

Criminal Case Law Update

Covering significant cases for trial judges, decided June 9, 2018 – Oct. 2, 2018

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Criminal Procedure Appellate Issues

State v. Ledbetter, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

In a case where the defendant pled guilty to DWI pursuant to a plea agreement and in which the court declined to exercise its discretion to grant the defendant's petition for writ of certiorari, the court noted that the defendant had no right to appeal from an order denying her motion to dismiss, entered prior to her guilty plea. It explained: "This issue is not listed as one of the grounds for appeal of right set forth in N.C. Gen. Stat. § 15A-1444. Defendant has no statutory right to plead guilty, while preserving a right to appeal the denial of her motion to dismiss."

State v. Wardrett, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

In this felon in possession of a firearm case, the defendant failed to submit an adequate record on appeal to support his challenge to the unanimity of the jury verdict. A juror entered the courtroom during the jury charge conference on a flight instruction. The defendant argued that because the juror possibly became privy to information outside of the presence of the other jurors, his right to a unanimous jury verdict was violated. The court declined to consider this issue because the defendant failed to provide a sufficient record to allow meaningful appellate review. The transcript is devoid of any information beyond the juror's entrance into the courtroom during the charge conference. It is silent as to whether the juror proceeded past the courtroom door. The trial court's statement, as indicated in the record, suggests that the juror immediately exited the courtroom, as did the fact that the charge conference continued. The defendant did not submit a supplemental narrative to provide context for the alleged error. Review of this matter would require speculation as to the length of time the juror was in the courtroom and information he or she might have overheard. There is a long-standing presumption in favor of regularity, with the burden on the appellant to show error. Here, the defendant did not produce any evidence overcoming that presumption.

Bond Forfeiture

State v. Crooms, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018)

The trial court erred by partially granting the surety's motion for relief from bond forfeiture. The defendant absconded during trial while subject to pretrial release conditions of electronic monitoring and a \$50,000 secured bond. After a final judgment of forfeiture was entered, the surety filed a petition for remission, arguing that there were extraordinary circumstances that would justify relief. The trial court found that extraordinary circumstances existed and ordered the County Board of Education to remit \$7,500 to the surety. The Board appealed, arguing that the surety's motion did not comply with G.S. 15A-544.8 and that the trial court erred in granting the motion. The court agreed. Under G.S. 15A-544.8, a court may grant relief from a final judgment of forfeiture only when extraordinary circumstances exist that the court, in its discretion, determine should entitle the person to relief or when notice was not properly given to the person seeking relief. The statute requires that a motion for relief state reasons and set forth evidence supporting each reason. Here, the surety's motion merely alleged that "there were extraordinary circumstances" warranting relief "said circumstances to be presented via affidavit and/or testimony at the hearing on this Motion." The surety failed to comply with the statutory requirement to set forth evidence. Because of the deficiencies in the motion, the trial court had no grounds on which to grant the motion and it should have been summarily denied.

State v. Isaacs, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The trial court did not err by allowing the Surety's motion to set aside a bond forfeiture. The motion to set aside asserted as a reason that the defendant had been served with an order for arrest for the failure to appear on the criminal charge as evidenced by a copy of an official court record. The court first concluded that in the bond forfeiture proceeding, the trial court did not err by taking judicial notice of the file as

evidence that the defendant was served with the order of arrest. A trial court may take judicial notice of earlier proceedings in the same case, including matters in the file not offered into evidence. Here, the trial court took judicial notice of a fact beyond a reasonable controversy. It is undisputed that the defendant was served with the order for arrest before the 150-day deadline for filing a notice to set aside a forfeiture expired and the trial court attached the order for arrest as an exhibit to the court's order.

The court went on to reject the Board's argument that the trial court committed reversible error by granting the Surety's motion to amend the motion to set aside the bond forfeiture and attach a copy of the order for arrest after expiration of the 150-day deadline for filing the notice. The Surety's original motion contained a copy of the initial warrant for arrest in the case, not the order for arrest issued after the failure to appear. A bond forfeiture proceeding, while ancillary to the underlying criminal proceeding, is a civil matter to which the Rules of Civil Procedure apply. Under those rules, leave to amend a pleading shall be freely given except when the objecting party can show material prejudice. In this case no undue prejudice was shown; in so holding the court noted that the Surety offered to pay the Board's attorney's fees incurred in connection with the hearing.

Counsel Issues

State v. Cozart, ___ N.C. App. ___, 817 S.E.2d 599 (June 19, 2018)

In this sexual assault case, the trial court did not err by failing to appoint substitute defense counsel. Absent a Sixth Amendment violation, the decision of whether appointed counsel should be replaced is a discretionary one for the trial court. Here, the defendant informed the trial court that his family was attempting to hire an attorney for him and that he was unhappy with the amount of contact and visitation trial counsel had with him before trial and with counsel's discussion of a plea agreement with him. The court determined that this record did not suggest an abuse of discretion in connection with the denial of the defendant's motion to discharge appointed counsel.

State v. Baskins, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 27, 2016)

In this drug trafficking case, the trial court erred by denying the defendant's motion for appropriate relief (MAR) which asserted ineffective assistance of appellate counsel. Drug were discovered after a vehicle stop. The defendant lost his motion to suppress and after being convicted appealed. On appeal appellate counsel did not challenge the trial court's findings of fact in connection with the suppression motion, and thus they were binding on appeal. After the Court of Appeals affirmed, the defendant filed a MAR alleging ineffective assistance of appellate counsel. Specifically he asserted that there was no evidence to support the finding of fact that the officer was aware of an inspection violation at the time of the stop. The defendant asserted that if appellate counsel had properly challenged this finding of fact, the court would have reversed the trial court's denial of the motion to suppress and vacated the convictions. The trial court denied the defendant's MAR, concluding that to rule favorably would require the court to reverse the order denying the motion to suppress and thus violate the rule that one Superior Court Judge cannot overrule another. The defendant filed a petition for writ of certiorari, which the Court of Appeals granted.

The court began by finding that the rule that one Superior Court Judge cannot overrule another "is generally inapplicable where a judge is tasked with deciding the merits of a defendant's motion for appropriate relief." The court noted that such action is authorized by the MAR statute. Thus, the trial court acted under a misapprehension of the law when it denied the defendant's MAR on grounds that it would impermissibly require the MAR court to overrule another Superior Court Judge.

The court went on to find that the defendant was denied effective assistance of appellate counsel. Appellate counsel's failure to challenge the trial court's findings of fact regarding the inspection violation was not a reasonable strategic decision but rather an oversight. In fact, appellate counsel's affidavit stated that counsel had "missed" the issue. Thus, the defendant satisfied the first prong of his ineffective assistance of counsel claim: deficient performance. The court went on to conclude that the defendant was prejudiced by counsel's deficient performance. Here, had appellate counsel challenged the trial court's

findings of fact, there is a reasonable probability that the Court of Appeals would have concluded that the trial court's finding that the stop was initiated because of an inspection violation was not supported by competent evidence and thus could not support the trial court's conclusion as to the stop's validity. Specifically, the DMV printout at issue contained no information concerning the vehicle's inspection status and the officers did not claim any other knowledge of the vehicle's inspection violation. In light of the actual DMV information presented, the officers could not have known that the vehicle's inspection was expired at the time of the stop. Given the reasonable probability that the inspection status would not have been found to support the validity of the stop, this court would have proceeded to examine the defendant's arguments pertaining to the two other grounds upon which the trial court based its denial of his motion to suppress, and it likely would have found for the defendant on both.

State v. Jones, ___ N.C. App. ___, 816 S.E.2d 921 (June 19, 2018)

In this assault case tried as a bench trial, the court rejected the defendant's argument that he received ineffective assistance of counsel (IAC) when his lawyer failed to assert and argue self-defense. The defendant filed a MAR with his direct appeal, asserting the IAC claim. Finding that it could resolve the issue on direct appeal, the court considered the IAC claim on the merits. The defendant argued that counsel did not give pretrial notice of his intention to present a defense of self-defense and that he failed to mention self-defense in his opening statement, failed to ask the court at the close of the evidence to consider self-defense, and failed to argue self-defense in closing argument. However evidence of self-defense was admitted at trial and the defendant did not argue or allege that he had additional evidence of self-defense that he could have presented at trial or that he was prevented from presenting any evidence supporting his defense. In light of the evidence presented, the issue of self-defense was obvious. Although opening and closing arguments by both the State and the defendant were very brief, this is not unusual in a bench trial. Additionally, counsel did refer to self-defense in his closing argument. The court reasoned:

Defendant argues that his counsel's failure to give notice of his defense of self-defense prior to trial somehow eliminated the trial court's ability or authority to consider this defense, but he cites no authority for this assertion. Bench trials differ from jury trials since there are no jury instructions and no verdict sheet to show exactly what the trial court considered, but we also presume that the trial court knows and follows the applicable law unless an appellant shows otherwise

The court continued, noting that if the case had involved a jury trial and counsel had failed to request a jury instruction on self-defense, that could likely be IAC, "since we could not presume the jury knows the law of self-defense." Similarly, if the case involved a jury trial and the State objected to evidence of self-defense and the trial court had sustained this objection because counsel failed to give proper notice of the defense, that might be IAC. But here, from the evidence and arguments at this bench trial, the defendant's claim of self-defense was "obvious, and [the] defendant has not shown any indication the trial judge failed to consider that defense." The court concluded: "Defendant has offered no evidence that the trial court did not consider self-defense during its evaluation, so he has not shown a 'reasonable probability' that the 'result of the proceeding would have been different' if his counsel had given notice prior to trial of his intent to present a defense of self-defense."

State v. McQueen, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

In this second-degree murder and armed robbery case, the court rejected the defendant's argument that trial counsel was ineffective by failing to ensure the jury knew that the State's key witness, Damon Bell, could have been but was not charged with first-degree murder in the case. The defendant's argument hinged on the notion that Bell's testimony was the result of a deal or immunity agreement with the State that the jury should have been informed about. The defendant argued that he suffered prejudice because the jury did not know that Bell was receiving something of value in exchange for his testimony which might bear on his credibility. However, counsel repeatedly attempted to elicit that information on cross-examination of both Bell and a Detective. Moreover, during the charge conference counsel requested that the trial court instruct the jury on the testimony of a witness with immunity or quasi-immunity. The

prosecutor adamantly maintained that there had been no discussions with Bell or his lawyer related to testifying in exchange for immunity, a reduction in sentencing, or any other concession that might undermine his credibility. The trial court denied the request for the instruction but went on to state that it would instruct the jury on the testimony of interested witnesses and accomplice testimony. The record reveals that no deal or immunity agreement with the State existed. On these facts the court rejected the ineffective assistance of counsel claim.

Double Jeopardy

Currier v. Virginia, 585 U.S. ___, 138 S. Ct. 2144 (June 22, 2018)

When a defendant agrees to have charges against him considered in two trials, he cannot later successfully argue that the second trial offends the Double Jeopardy Clause. Facing trial on charges of burglary, grand larceny, and unlawful possession of a firearm by a felon, defendant Michael Currier worried that because the prosecution could introduce evidence of his prior convictions to prove the felon-in-possession charge, that evidence might prejudice the jury's consideration of the other charges. Currier and the government agreed to a severance, with the burglary and larceny charges to be tried first, followed by a second trial on the felon-in-possession charge. But after the first trial ended in an acquittal, Currier argued that the second trial would violate double jeopardy. Alternatively he asked the trial court to forbid the government from relitigating in the second trial any issue resolved in his favor at the first. So, for example, he said the trial court should exclude from the new proceeding any evidence about the burglary and larceny. The trial court rejected his arguments and allowed the second trial to proceed. The jury convicted Currier on the felon-in-possession charge. After his unsuccessful appeal in the state courts, the Supreme Court granted review.

Currier argued that *Ashe v. Swenson*, 397 U. S. 436 (1970), required a ruling in his favor. The Court rejected this argument, noting, in part, that *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first trial. It found *Ashe* distinguishable, noting that in the case before it, the defendant consented to the second trial. Instead, the Court found guidance in *Jeffers v. United States*, 432 U.S. 137 (1977), in which the defendant sought separate trials on each count against him to reduce the possibility of prejudice. The court granted his request. After the jury convicted the defendant in the first trial of a lesser-included offense, he argued that the prosecution could not later try him for a greater offense. The *Jeffers* Court concluded that if a single trial on multiple charges would suffice to avoid a double jeopardy complaint, "there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . offenses tried separately and persuades the trial court to honor his election." (citation omitted). The Court continued:

What was true in *Jeffers*, we hold, can be no less true here. If a defendant's consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under *Ashe*. Nor does anything in *Jeffers* suggest that the outcome should be different if the first trial yielded an acquittal rather than a conviction when a defendant consents to severance. While we acknowledge that *Ashe*'s protections apply only to trials following acquittals, as a general rule, the Double Jeopardy Clause "protects against a second prosecution for the same offense after conviction" as well as "against a second prosecution for the same offense after acquittal." Because the Clause applies equally in both situations, consent to a second trial should in general have equal effect in both situations. (citation omitted)

The Court went on to explain that holding otherwise would create inconsistency not just with *Jeffers* but with other Court precedents as well. It concluded: "This Court's teachings are consistent and plain: the 'Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.'"

The Court continued in Part III of the Opinion, which garnered only four votes, rejecting Currier's argument that even if he voluntarily consented to holding the second trial, that consent did not

extend to the relitigation of any issues the first jury resolved in his favor. This argument turned on issue preclusion principles in civil cases that Currier invited the Court to import into the criminal law through the Double Jeopardy Clause. As noted, however, this aspect of the Court's opinion did not enjoy the support of a majority of the Court.

DWI Procedure; Pretrial Detention

State v. Ledbetter, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

On remand from the Supreme Court, ___ N.C. ___, 814 S.E.2d 39 (June 8, 2018), of this DWI case, the Court of Appeals declined to exercise its discretion to grant the defendant's petition for a writ of certiorari to review her claim that the trial court erred by denying her motion to dismiss. The defendant's motion to dismiss asserted that the State violated G.S. 20-38.4, G.S. 15A-534, and *State v. Knoll*, 322 N.C. 535 (1988), when the magistrate failed to provide her a written copy of form AOC-CR-271, advising of her right to have witnesses observe her demeanor in jail; and failed to enter sufficient findings of fact to show that the defendant was a danger to herself and others to justify imposing a secured bond pursuant to G.S. 15A-534. Dismissal of charges for violations of statutory rights is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted it must appear that the statutory violation caused irreparable prejudice to the preparation of the defendant's case.

On the first issue, the State conceded that the magistrate did not comply with G.S. 20-38.4 in that the magistrate did not inform the defendant in writing of the established procedure to have others appear at the jail to observe her condition and failed to require her to list all persons she wanted to contact and telephone numbers on the relevant form. However, the State argued that the defendant could not demonstrate irreparable prejudice to the preparation of her case because the magistrate orally informed the defendant of her right to have witnesses present to observe her condition. In denying the motion to dismiss, the trial court found that the magistrate told the defendant of her right to have individuals come to the detention center to observe her condition and that once she was placed in the detention center, the defendant was allowed to make phone calls to several identified people. These findings are supported by competent evidence.

With respect to the defendant's argument that the magistrate violated G.S. 15A-534, the magistrate testified that he considered the defendant's condition in deciding whether to impose a secured bond and initially entered his reasons on his computer for imposing a secured bond into the "FINDINGS" section of form AOC-CR-270. However, he accidentally deleted his reasons listed on form AOC-CR-270 and they were replaced with the text and finding of "BLOOD TEST." Competent evidence supports the trial court's findings that the magistrate considered the factors in G.S. 15A-534 in setting the defendant's bond, and found by clear, cogent, and convincing evidence that the defendant's physical or mental faculties were impaired and that she was a danger to herself, others or property if released.

The defendant failed to show that she was denied access to witnesses, her right to have witnesses observe her condition, or her right to collect evidence and did not demonstrate irreparable prejudice to the preparation of her case by the magistrate's statutory violations and failures to provide her with a copy of form AOC-CR-271 or to make additional factual findings to justify imposing a secured bond under G.S. 15A-534. The court noted that the defendant was informed of her right to have witnesses observe her and had the means and was provided the opportunity to contact potential witnesses. Additionally, the magistrate's detention order required the defendant to remain in custody for a twelve-hour period or until released into the custody of a sober, responsible adult. In fact, the defendant was released into the custody of a sober acquaintance after spending only two hours and fifty-three minutes in jail.

The court went on to reject the defendant's argument that she was per se prejudiced by the magistrate's statutory violations, pursuant to *State v. Hill*, 277 N.C. 547 (1971). Distinguishing *Hill* the court noted that no evidence in the record suggests the State took affirmative steps to deprive the defendant of any access to potential witnesses or an attorney, such as by preventing them from talking to the defendant or entering the jail to observe her. It continued: "Unlike the defendant in *Hill*, Defendant was told of her right to have observers present, was not limited to one phone call following her arrest, was

allowed and did make numerous calls to multiple individuals and was released to a sober adult within less than three hours. Additionally, the Supreme Court later acknowledged in *Knoll* that the per se prejudice rule stated in *Hill* is no longer applicable.”

Ultimately the court found that the defendant’s arguments failed to demonstrate “irreparable prejudice to the preparation of defendant’s case” and that that she did not raise any “good and sufficient cause” to support the court’s exercise of its discretion to grant her petition and issue the writ of certiorari.

Indictment & Pleading Issues Waiver of Fatal Variance

State v. Bice, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The defendant failed to properly preserve the argument that there was a fatal variance between a drug trafficking indictment and the evidence at trial, where the issue was raised for the first time on appeal. The defendant never alleged a fatal variance when he moved to dismiss the charge. Rather, his motion was based on insufficiency of the evidence.

Victim’s Name

State v. Forte, ___ N.C. App. ___, 817 S.E.2d 764 (July 3, 2018), *temp. stay allowed*, ___ N.C. ___, 815 S.E.2d 382 (July 18, 2018)

The court rejected the defendant’s argument that there was a fatal variance between the indictment for misdemeanor larceny and the evidence at trial. Specifically, the defendant argued that there was a fatal variance between the allegation that he stole a checkbook from Glenn Cox and the evidence at trial, which showed that the checkbook belonged to Cox Auto Salvage. The court noted that a larceny indictment must allege a person who has a property interest in the stolen item, and that the State must prove that person has ownership, meaning title to the property or some special property interest. As to the case at hand, it concluded:

While there is no evidence tending to show Glenn Cox was the actual owner of Cox Auto Salvage, there is ample evidence indicating Cox had a special property interest in the checkbook. Cox testified the checkbook was his, had his name written on it, and contained stubs of checks he had written. Cox always kept a company checkbook, and he realized the checkbook was missing when he needed to pay a customer. We conclude this evidence establishes Cox was in exclusive possession and control of the checkbook, and that he viewed it as being his checkbook. Therefore, Cox had a special property interest in the checkbook.

Habitual Felon

State v. Langley, ___ N.C. ___, 817 S.E.2d 191 (Aug. 17, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 166 (2017), the court reversed, holding that a habitual felon indictment was not fatally defective. The statute requires that a habitual felon indictment set forth “the date that prior felony offenses were committed;” “the name of the state or other sovereign against whom said felony offenses were committed;” “the dates that pleas of guilty were entered to or convictions returned in said felony offenses;” and “the identity of the court wherein said pleas or convictions took place.” Here, the indictment alleged that the three prior felony offenses were committed on 11 September 2006, 8 October 2009, and 24 August 2011; that the offenses that led to defendant’s felony convictions were committed against the State of North Carolina; that defendant was convicted of committing these offenses, the identity of which was specified in the body of the habitual felon indictment, on 15 February 2007, 21 September 2010, and 5 May 2014; and that each of these convictions occurred in the Superior Court, Pitt County. As a result, the habitual felon indictment contains all of the information required by G.S. 14-7.3

and provides defendant with adequate notice of the bases for the State's contention that defendant had attained habitual felon status. The court noted that the indictment alleged that the defendant had committed the offenses of armed robbery and had been convicted of the lesser included offenses of common-law robbery. Because an indictment for an offense includes all lesser offenses, when the defendant allegedly committed the offense of armed robbery 8 October 2009 and 24 August 2011, he also committed the lesser included offense of common law robbery. Thus, the Court of Appeals was incorrect to state that "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment."

State v. Forte, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018), *temp. stay allowed*, ___ N.C. ___, 815 S.E.2d 382 (July 18, 2018)

A habitual felon indictment was fatally defective. Citing precedent, the court noted that a habitual felon indictment must state two dates for each prior felony conviction: the date that the defendant committed the felony and the date that the defendant was convicted of the felony. These dates are essential elements. Here, the indictment failed to allege an offense date for one of the defendant's prior felony convictions.

Jurisdictional Issues

State v. Nobles, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

(1) The court rejected the defendant's argument that the trial court erred by denying his motions to dismiss the charges on grounds that the State of North Carolina lacked subject matter jurisdiction to prosecute him because he is an "Indian" and thus criminal jurisdiction lies exclusively in federal court under the Indian Major Crimes Act (IMCA). The defendant is a non-enrolled member of any federally recognized Native American tribe but a 1st descendent of an enrolled member of the Eastern Band of Cherokee Indians (EBCI). He was convicted of armed robbery, first-degree felony-murder, and possession of a firearm by a felon, and the trial court arrested judgment on the armed robbery conviction. The victim was a non-Indian and the offense occurred in the Qualla Boundary, land held in trust by the United States for the EBCI. The trial court found that the defendant was not an Indian and thus denied the defendant's motion to dismiss. On appeal, the court first concluded that when an "Indian" commits one of the enumerated "major crimes" in the "Indian Country" of the Qualla Boundary, the IMCA "would ordinarily oust North Carolina's criminal jurisdiction." Turning to whether the defendant qualifies as an "Indian" under the IMCA, the court noted that this was an issue of first impression. Applying the *Rogers* test, a person is an Indian if the person has some quantum of Indian blood and is a member of, or is affiliated with, a federally recognized tribe. Here, neither party disputed that the defendant met the quantum of blood prong of the test. After an extensive discussion contained in the opinion, the court went on to find that the second part of the test was not satisfied and thus that the trial court properly concluded that the defendant did not qualify as an Indian.

(2) The court rejected the defendant's argument that the trial court erred by denying his request to submit the question of his Indian status to the jury for a special verdict on subject matter jurisdiction. Unless sufficient evidence is adduced to create a jury question on jurisdiction, a jury instruction on that issue is not warranted. Discussing the evidence in the case, the court concluded that the defendant failed to adduce sufficient evidence to create a jury question on his Indian status.

Jury Selection Batson

State v. Hobbs, ___ N.C. App. ___, 817 S.E.2d 779 (July 17, 2018)

In this murder and robbery case that was tried capitally but for which a sentence of life in prison was imposed, the court rejected the defendant's *Batson* challenge. As to jurors Layden and Humphrey, the defense asserted that the State had used six out of eight peremptory challenges to excuse black jurors,

even though the responses from those jurors were similar to whites who were not excused. The defendant did not assert his first *Batson* challenge until after the State had exercised its eighth peremptory strike. Where a defendant has not made any previous *Batson* challenge, the trial court is not obligated to inquire into the reasons for striking those previously excused. At the time of the challenge, 11 black potential jurors were examined by the State, and the State passed five, one of whom was later dismissed by the trial court for cause. The defendant used two of five peremptory challenges to strike black jurors. At the time of the first challenge, the jury consisted of two white males, two black males, and two white females. If the defendant had not used his two strikes, the composition of the jury at the time of the first challenge would have been four black jurors (3 males and one female) and four white jurors. Continuing with its consideration of the other relevant factors, the court noted that the defendant is black, the murder victim was white, at least one of the robbery victims was black, and certain key witnesses were black. Additionally, the prosecutor did not make any racially motivated comments or ask racially motivated questions. Considering these factors, the trial court did not err in finding that the defendant failed to establish a prima facie case with respect to jurors Layden and Humphrey.

With respect to juror Landry, the court noted that the defendant raised his second *Batson* challenge after the State had exercised its ninth peremptory challenge. The trial court noted that the State had used seven out of nine peremptory challenges to excuse black prospective jurors and that the defendant had established a prima facie case. The State's proffered reasoning for striking Landry were: he believed drugs and alcohol can make people do things they did not want to do; he mentored individuals with substance abuse issues in his church; his uncle died in prison while serving two life sentences; he stated that he believed a life sentence was taking a life; he left several questions on the juror questionnaire unanswered; he gave some "perplexing" responses to questions; he allegedly walked out of court once singing "the sun will come out tomorrow"; he nodded affirmatively when another juror, who was excused for cause, mentioned her religious belief against the death penalty; he had been in a gang and had heard that the defendant was in a gang; he failed to appear in court on previous occasions; and he stated he would hold it against the State if it did not present all the evidence. The defendant failed to show any error in the trial court's conclusion that the State's reasons for dismissing the juror were race neutral. Although the defendant argued that there were similar concerns with several white jurors who were not excused, he did not specify the white jurors in question. Considering the record, the court found this argument to lack merit. Also, while some jurors had one factor in common with Landry, none presented the same range of issues.

With respect to juror McNeill, the defendant's third *Batson* challenge was asserted after the State had exercised its eleventh peremptory challenge. At the time of this challenge, the State had used eight out of eleven peremptory challenges to excuse black prospective jurors and had passed eight black prospective jurors to the defendant. Two of those jurors were seated on the panel, one was dismissed for cause, and five of the prospective black jurors were struck by the defendant's peremptory challenges. The State asserted that McNeill hesitated to reply when asked if he could vote to impose the death penalty, and then stated he preferred life in prison over the death penalty. Additionally he disclosed he had family members with substance abuse issues, a sister with apparent anxiety, and as a pastor, had often counseled individuals with substance abuse issues. The State presented valid, race neutral reasons for excusing this juror.

Rehabilitation

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In this non-capital first-degree murder case, the trial court did not abuse its discretion by preventing the defendant from rehabilitating a juror. During jury selection, the State questioned prospective juror Terrance Copling, who said he was familiar with the defendant's family, did not know the defendant personally, and could be impartial and fair to both sides. However, when pressed by the State, Copling admitted that his connection to the defendant's father would "probably cause issues." The State moved to dismiss Copling for cause. The trial court denied the defendant's request to rehabilitate and upon

questioning by the trial court Copling indicated that because of his connection to the defendant's family he could not be impartial. The trial court allowed the State's challenge for cause and excused Copling over the defendant's objection. The defendant also wanted to rehabilitate prospective juror Clapp, believing that the State's questions had confused her. The trial court rejected this request and excused Clapp for cause. The defendant was convicted and appealed. The court reasoned that in non-capital cases the trial court has discretion regarding whether to allow rehabilitation during voir dire. Here, although the trial court initially told the defendant that rehabilitation was not permissible in a non-capital case, the trial court later allowed for the possibility of rehabilitation and thus did not establish a blanket ruling against all rehabilitation. It further found that the trial court properly exercised its discretion by denying the defendant's request to rehabilitate jurors.

Jury Argument

State v. Wardrett, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

In this felon in possession of a firearm case, the court held that although some of the prosecutor's statements were improper, they were not so improper as to deprive the defendant of a fundamentally fair trial.

The court first determined that, in context, the prosecutor's use of the term "fool" was not improper. The prosecutor's remarks related to a gunfight and did not single out the defendant as a fool, but compared him to other fools who behave recklessly with firearms. Additionally there were no repeated ad hominem attacks on the defendant.

Although the prosecutor's expressions of personal belief were improper, they were not so grossly improper as to warrant reversal. Specifically, "[t]he prosecutor went too far when he asserted that the witnesses were 'telling the truth.'" These statements improperly vouched for the truthfulness of the witnesses.

Although the prosecutor's statements as to the defendant's guilt were improper, they did not deprive the defendant of a fair trial. The prosecutor proclaimed that the defendant was "absolutely guilty" and that there was "just no question about it."

The court rejected the defendant's argument that the prosecutor made arguments on matters outside of the record and unsupported by the evidence when he remarked that the defendant told another person to get rid of the gun. The prosecutor's assertion fairly summarized the evidence and argued a reasonable inference arising from it.

The court rejected the defendant's argument that the prosecutor impermissibly advocated that the jury's accountability to the community should compel a guilty verdict. A prosecutor can argue that the jury is the voice and conscience of the community and ask the jury to send a message to the community regarding justice. A prosecutor may not ask or embolden the jury to lend an ear to the community, such that the jury is speaking for the community or acting for the community's desires. Here, the prosecutor's remarks were proper because they involved commonly held beliefs and merely attempted to motivate the jury to come to an appropriate conclusion, rather than to achieve a result based on the community's demands. Additionally, the prosecutor did not urge that society wanted the defendant to be punished, but rather requested, based on the evidence, that the jury make an appropriate decision.

The court concluded with this note:

While we reject Defendant's arguments, we do not condone remarks by prosecutors that exceed statutory and ethical limitations. Derogatory comments, epithets, stating personal beliefs, or remarks regarding a witness's truthfulness reflect poorly on the propriety of prosecutors and on the criminal justice system as a whole. Prosecutors are given a wide berth of discretion to perform an important role for the State, and it is unfortunate that universal compliance with "seemingly simple requirements" are hindered by "some attorneys intentionally 'push[ing] the envelope' with their jury arguments." Jones, 355 N.C. at 127, 558 S.E.2d at 104. But, because Defendant has failed to overcome the high

burden to prove that these missteps violated his due process rights, he is not entitled to relief.

Jury Deliberations; Review of Evidence

State v. Orellana, ___ N.C. App. ___, 817 S.E.2d 480 (June 19, 2018)

In this indecent liberties with a child case, although the trial court erred by failing to conduct the jury to the courtroom as required by G.S. 15A-1233 in response to its request to review certain evidence, the error was not prejudicial and the defendant failed to show an error of constitutional magnitude. The statute requires that if the jury, after retiring for deliberations, requests to review evidence, the jurors must be conducted to the courtroom. Here, the jury sent two notes to the trial court, one requesting police reports, and another requesting transcripts of certain trial testimony. On both occasions, the bailiff brought the notes into the courtroom to the judge and delivered the judge's written responses to the jury. The judge's notes informed the jury that they could not review the police reports because they were not in evidence and that the trial court had decided, in its discretion, not to delay deliberations to have a transcript produced of the testimony in question. This was error because the trial court failed to comply with the statute. However this did not constitute a violation of the defendant's right to a unanimous verdict under the state constitution, where the trial court did not interact with or provide instructions to less than a full jury panel. Additionally a new trial is not warranted as there is no showing that the error prejudiced the defendant.

Jury Instructions; Theory Not Supported by Evidence

State v. Gentle, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

In this rape and sex offense case, the court rejected the defendant's argument that the trial court committed plain error by instructing the jury that it could find that the victim suffered serious personal injury in the form of mental injury; even if error occurred, it had no probable impact on the verdict. The defendant argued that the jury instruction was improper because the State presented no evidence of mental injury. The court noted that for several decades the appellate courts had held that it was per se error for the trial court to instruct the jury on a theory that was not supported by the evidence. However, in *State v. Boyd*, 366 N.C. 548 (2013) (per curiam), the Supreme Court shifted away from the per se rule. Now, a reviewing court must determine whether such an instruction constituted reversible error, without being required to assume that the jury relied on the inappropriate theory. Under North Carolina law, evidence of bodily or mental injuries can constitute serious personal injury for the purposes of forcible rape and forcible sex offense. Here, there was substantial evidence that the defendant inflicted bodily harm on the victim, who was seven months pregnant. The victim struggled to protect her stomach while the defendant forcibly dragged her down 33 concrete stairs and into nearby woods. She sustained extensive bruises and abrasions to most of the left side of her body, including her leg, abdomen, back, side, arm, and shoulder. Although some of the wounds were superficial, others were more significant abrasions. A nurse who testified at trial compared her injuries to "road rash" that a person might suffer after falling off a motorcycle traveling at 55 mph. The victim testified that her injuries were painful and she still bore extensive scars at trial. The court concluded that even assuming arguendo that there was no evidence to support the trial court's instruction on mental injury, the defendant failed to meet his burden of showing that the alleged error had any probable impact on the jury's verdict.

Motion to Suppress; Procedure

State v. Dixon, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The court rejected the defendant's argument that the findings and conclusions made by the trial court from the bench with respect to his motions to suppress are insufficient because the trial court expressly ordered the State to prepare written orders on the motions but the State failed to do so. North Carolina law

requires findings of fact only where there is a material conflict in the evidence, and allows the trial court to make those findings of fact either orally or in writing. Regardless of whether findings of fact are required, the trial court must make conclusions of law in the record. Considering each of the defendant's motions to suppress the court found that the "trial court's oral rulings on the motions are without error, because they state sufficient findings of fact resolving any material conflicts in the evidence and conclusions of law that apply the law to those factual findings."

Motion to Dismiss; Defendant as Perpetrator

State v. White, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

The trial court did not err by denying the defendant's motion to dismiss a charge of first-degree rape. Because the victim could not remember the incident, she was unable to testify that she had been raped or that the defendant was the perpetrator. The evidence showed that while out with friends one night, the victim met the defendant. Later that evening, two strangers, John and Jean, responded to a woman screaming for help. They found a man straddling the victim. After throwing the man off, John saw him pull up his pants over an erection. The man ran, chased by John and another person. Jean stayed with the victim, who was on the ground with her pants and underwear pulled to her ankles. An officer saw the chase and detained the defendant, whose pants were undone. John and Jean participated in a show up identification of the defendant shortly thereafter; both identified the defendant as the perpetrator. The victim was taken to the emergency room where a nurse found debris and a small black hair consistent with a pubic hair inside the victim's vagina. The nurse testified in part that debris cannot enter the vagina unless something had opened the vagina; thus the debris could not have entered merely because she was on the ground. The defendant unsuccessfully moved to dismiss, was convicted and appealed. On appeal the defendant argued that the State failed to produce sufficient evidence that penetration occurred and that he was the perpetrator. The court disagreed, succinctly concluding that a reasonable juror could have inferred that the victim was vaginally penetrated against her will and that the defendant was the perpetrator.

State v. Gray, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In this first-degree felony-murder and discharging a weapon into an occupied dwelling case, the trial court did not err by denying the defendant's motion to dismiss the charges on grounds that there was insufficient evidence establishing that the defendant was the perpetrator. Among other things, the State's evidence established a motive (hostility between the defendant and the victim) and opportunity to commit the crime (through physical evidence at the crime scene and witness testimony).

Pleas

State v. Murphy, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

Although the trial court erred by ordering the defendant to pay restitution for pecuniary losses arising from his alleged perpetration of charges in three indictments dismissed by the State pursuant to a plea agreement, the plea agreement need not be set aside. The defendant asserted that because he agreed to pay the invalid restitution as part of the plea deal, the appropriate remedy is to set aside the plea agreement. Although agreeing that the restitution order was improper, the court disagreed with the defendant that the plea agreement needed to be set aside. According to the transcript of plea, the plea arrangement provided that "[defendant] will plea to 7 counts of breaking and/or entering in lieu of the charges listed on the back of this transcript[.]" and defendant checked the following box in that same section: "The defendant stipulates to restitution to the party(ies) in the amounts set out on 'Restitution Worksheet, Notice And Order (Initial Sentencing)' (AOC-CR-611)." In a plea colloquy with the defendant the trial court specified: "And the plea bargain is that upon your plea of guilty to these seven charges the State will dismiss all other charges," to which the defendant responded, "Yes, sir." The court found that despite the defendant's stipulation to restitution as provided in the State's restitution worksheet, the defendant never

agreed to pay restitution as part of the plea agreement. Rather, as described in the transcript of plea and explained during the plea colloquy, the essential and fundamental terms of the plea agreement were that the defendant would plead to seven counts of felony breaking or entering, and the State would drop the remaining charges. It concluded: “As defendant never agreed to pay restitution as part of the plea agreement, the invalidly ordered restitution was not an ‘essential or fundamental’ term of the deal. Accordingly, we hold the proper remedy here is not to set aside defendant’s entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution.”

Selective Prosecution

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018)

In a case arising out of false information submitted by the defendant in connection with his work as a bail bondsman, and involving charges of, among other things, unlawful access of a government computer and obtaining property by false pretenses, the defendant did not make out a prima facie case for selective prosecution. To demonstrate selective prosecution, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; and second, after doing so, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. Here, the court rejected the defendant’s argument that certain testimony at trial established “the total lack of prosecutions of bail bondsmen . . . for intentionally filing false reports.”

Sentencing

Aggravating Factors/Sentence

State v. Edwards, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In a case involving convictions for attempted first-degree murder, statutory sex offense with a child by an adult, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and taking indecent liberties with a child, the trial court did not err by denying the defendant’s MAR challenging his aggravated sentence. The defendant’s MAR asserted that the State failed to allege the aggravating factors in the indictment and to narrowly define the aggravating factors in violation of *Apprendi*. The court began by rejecting the defendant’s argument that aggravating factors must be alleged in the indictment. Here, the State complied with G.S. 15A-1340.16, filing a written notice of aggravating factors months before trial that informed the defendant that the State sought to prove two identified statutory aggravating factors. After the jury convicted the defendant of the underlying offenses, the court allowed the State to proceed on the aggravating factors, and the jury found that each offense was especially heinous, atrocious, or cruel and that the victim was very young. The State complied with the statute and the procedure prescribed by the statute satisfies *Apprendi*.

The court went on to reject the defendant’s argument that the jury instruction for the heinous, atrocious, or cruel aggravating factor was unconstitutionally vague, citing controlling precedent.

Life without Possibility of Parole

State v. Sims, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

The trial court did not err by imposing a sentence of life imprisonment without parole on the juvenile defendant. In 2001 the defendant was tried capitally and convicted of first-degree murder, first-degree kidnapping and burning of personal property. The jury recommended a sentence of life imprisonment without parole, and the trial court entered judgment. The defendant’s direct appeal was unsuccessful. In 2013 the defendant filed an MAR requesting a new sentencing hearing in light of the United States Supreme Court’s decision in *Miller* which held that mandatory life without parole for juvenile offenders violates the eighth amendment. The trial court granted the defendant’s MAR and ordered a new

sentencing hearing. At the end of that hearing the trial court ordered that the defendant's sentence remain life without parole. The defendant appealed. On appeal the defendant argued that the trial court violated his eighth amendment constitutional protection against cruel and unusual punishment by imposing a sentence of life without parole and erred by imposing a sentence of life without parole because it failed to make findings on the presence or absence of *Miller* factors and the findings it did make do not support the conclusion that the sentence was warranted. The court disagreed finding that the trial court complied with the statutory requirements in determining that life imprisonment without parole was warranted. Additionally, the trial court properly made ultimate findings of fact on each of the *Miller* factors as set forth in section 15A-1340.19B(c) and did not abuse its discretion in weighing those factors and concluding that life imprisonment without parole was appropriate in the defendant's case.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In a case where the trial court found that the juvenile's likelihood of rehabilitation was uncertain and sentenced him to life in prison without parole, the court vacated and remanded for the defendant to be resentenced to life with the possibility of parole. The defendant was convicted of two counts of first-degree murder. He was 17 years old at the time of the crimes. The trial court sentenced the defendant to two consecutive terms of life in prison without the possibility of parole. Following the United States Supreme Court's *Miller* decision, the defendant sought and obtained a new sentencing hearing. After considering the evidence and arguments by counsel at the new hearing, the trial court entered an order that concluded, in part: "There is no certain prognosis of Defendant[']s possibility of rehabilitation. The speculation of Defendant's ability to be rehabilitated can only be given minimal weight as a mitigating factor." The trial court sentenced the defendant to two consecutive sentences of life without parole and the defendant appealed.

Citing state Supreme Court precedent, the court quickly rejected the defendant's argument that G.S. 15A-1340.19B (the post-*Miller* sentencing scheme for juveniles) is unconstitutional on its face. However, the court agreed with the defendant that the trial court's finding that the defendant's potential for rehabilitation was speculative rendered him ineligible for life without parole. The court noted that the case required it to address a question of first impression: whether the Supreme Court's holdings require trial courts to determine, as a threshold matter, whether a juvenile defendant is eligible for such punishment independent of other relevant factors, or whether it merely identifies additional factors that the trial court must consider as it weighs the totality of circumstances in making its sentencing decision. Considering the case law, the court stated:

[W]e hold that whether a defendant qualifies as an individual within the class of offenders who are irreparably corrupt is a threshold determination that is necessary before a life sentence without parole may be imposed by the trial court. This holding is not inconsistent with the North Carolina Supreme Court's rejection of a specific factfinding requirement. Rather, we hold that, when a trial court does make a finding about a juvenile offender's possibility of rehabilitation that is inconsistent with the limited class of offenders defined by the United States Supreme Court, a sentence of life in prison without the possibility of parole is unconstitutional as applied to that offender.

Turning to the case at hand, the court concluded that "the trial court erred by imposing a sentence of life in prison without the possibility of parole after making a finding contrary to the defined class of irreparably corrupt offenders described in our precedent." The trial court made an explicit finding that "there is no certain prognosis" for the defendant's potential for rehabilitation. This finding directly conflicts with the limitation of life in prison without parole to juveniles who are "irreparably corrupt" and "permanently incorrigible." It concluded: "Because the trial court made an explicit finding contrary to a determination that Defendant is one of those rarest of juvenile offenders for whom rehabilitation is impossible and a worthless endeavor, we hold the trial court erred by imposing a life sentence without the possibility of parole."

Restitution

State v. Murphy, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

The trial court improperly ordered the defendant to pay restitution for pecuniary losses arising from his alleged perpetration of charges in three indictments dismissed by the State pursuant to a plea agreement. The defendant appealed judgments entered upon his guilty pleas to seven counts of felony breaking and entering into seven different residences on different dates, and a civil judgment ordering he pay \$23,113.00 in restitution to fourteen alleged victims identified in the State's restitution worksheet. In return for the defendant's pleas and his stipulation to restitution as provided in the State's restitution worksheet, the State dismissed thirteen indictments against him, three of which contained the only charges linked to losses suffered by four of the fourteen alleged victims to whom the trial court ordered he pay restitution. The court concluded that "[b]ecause a trial court is only statutorily authorized to order restitution for losses attributable to a defendant's perpetration of crimes for which he or she is convicted, . . . the trial court invalidly ordered defendant to pay restitution for pecuniary losses arising from his alleged perpetration of the charges in the three indictments the State dismissed pursuant to the plea agreement." The court vacated the restitution order and remanded for resentencing on the issue of restitution.

State v. Buchanan, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

In this assault case, no evidence was adduced at trial or sentencing to support the trial court's restitution award of \$1,962.80.

Fees

State v. Baker, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

The court granted the defendant's petition for certiorari with respect to review of the civil judgment and held that the trial court erred by entering the civil judgment against the defendant for attorney's fees without first affording the defendant an opportunity to be heard. Before entering a civil judgment under G.S. 7A-455(b) the defendant must be given notice and an opportunity to be heard. Here, after the defendant was convicted of criminal contempt, the trial court asked defense counsel how much time she spent on the case. After counsel responded that she spent about 9½ hours, the court set a civil judgment in the amount of \$570. Because the defendant was present in the courtroom when attorney's fees were imposed, the defendant received notice. However he was not given an opportunity to be heard. The court vacated the judgment and remanded to the trial court for further proceedings.

Probation Violations

State v. Krider, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018) (per curiam)

On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E.2d 828 (2018), the court affirmed per curiam, holding that the State failed to carry its burden of presenting sufficient evidence to support the trial court's decision to revoke the defendant's probation based upon a finding that the defendant willfully absconded probation. It went on, however, to "disavow the portion of the opinion analyzing the pertinence of the fact that defendant's probationary term expired prior to the date of the probation violation hearing and holding 'that the trial court lacked jurisdiction to revoke defendant's probation after his case expired.'" In the opinion below, the Court of Appeals held that because the State presented insufficient evidence to support a finding of willful absconding, the trial court lacked jurisdiction to revoke the defendant's probation after the term of probation ended. When the defendant's probation officer visited his reported address, an unidentified woman advised the officer that the defendant did not live there. The State presented no evidence regarding the identity of this person or her relationship to the defendant. The officer never attempted to contact the defendant again. However when the defendant contacted the officer following his absconding arrest, the officer met the defendant at

the residence in question. The Court of Appeals held that the evidence was insufficient to establish absconding. It went on to hold that the trial court's decision was not only an abuse of discretion but also was an error that deprived the court of jurisdiction to revoke the defendant's probation after his probationary term expired.

Sex Offenders & SBM Constitutionality

State v. White, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

Citing prior case law, the court held that because the trial court failed to conduct a hearing to determine whether it would be constitutional to subject the defendant to SBM upon his release from a prison sentence for rape, the trial court's order enrolling the defendant in SBM for life must be vacated and the matter remanded for a hearing. The court rejected the defendant's argument that the appropriate remedy was to reverse without remanding for a hearing, noting that in this case no hearing whatsoever had been held on the matter.

State v. Gordon, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018)

The court vacated the trial court's order requiring lifetime SBM, concluding that the State cannot establish, at this time, that the defendant's submission to SBM will constitute a reasonable fourth amendment search when the defendant is eventually released from prison. After the defendant pleaded guilty to statutory rape and other charges, the trial court sentenced the defendant and ordered him to enroll in lifetime SBM upon his release from prison. At the SBM hearing, a probation and parole officer in the sex offender unit explained, among other things, how the SBM device currently in use operates. The defendant's Static-99 score was moderate/low and the officer agreed that based on that score it was not likely that the defendant would commit another sex crime. On appeal the defendant argued that the trial court erred by ordering lifetime SBM because the State failed to meet its burden of proving that imposing SBM was reasonable under the fourth amendment. The court agreed. Because enrollment in the SBM program constitutes a fourth amendment search, the reasonableness of the search must be assessed to determine its constitutionality. The court viewed the SBM order as a general warrant. It explained:

The satellite-based monitoring program grants . . . expansive authority to State officials. State officials have the ability to access the details of a monitored defendant's private life whenever they see fit. A defendant's trip to a therapist, a church, or a family barbecue are revealed in the same manner as an unauthorized trip to an elementary school. At no point are officials required to proffer a suspicion or exigency upon which their searches are based or to submit to judicial oversight. Rather, the extent of the State's ability to rummage through a defendant's private life are left largely to the searching official's discretion, constrained only by his or her will.

The court noted that it "will not exhibit a more generous faith in our government's benign use of general warrants than did the Founders," and concluded that "Given the unlimited and unfettered discretion afforded to State officials with the satellite-based monitoring system, the State's burden of establishing that the use of satellite-based monitoring will comply with the Fourth Amendment's demand that all searches be 'reasonable' is especially weighty."

Here, the State failed to meet its burden of showing that SBM of the defendant will be reasonable. Specifically, the State did not establish the circumstances necessary for the court to determine the reasonableness of a search 15 to 20 years before its execution. The general balancing approach ordinarily involves examination of the circumstances existing at the time of the search, including the nature of the privacy interest upon which the search intrudes; the character of the intrusion itself and the information it discloses; as well as the nature and immediacy of the government concerns at issue and the efficacy of the means for meeting it. In prior decisions the court was able to determine the reasonableness of SBM orders because the defendants had already become subject to the monitoring at the time of the court's decisions.

Thus, the court could examine the totality of the circumstances to determine the reasonableness of the search. Here, there is a lack of knowledge concerning the future circumstances relevant to the analysis. For example, the court explained, we do not yet know the extent of the invasion that the search will entail when the SBM eventually is implemented on the defendant. The State focuses on the limited impact of the monitoring device itself, but provides no indication that the monitoring device currently in use will be similar to that which may be used 15 to 20 years in the future. Additionally, the State has been unable to adequately establish the government's need to conduct the search. Among other things, the State's evidence "falls short of demonstrating what Defendant's threat of recidivating will be after having been incarcerated for roughly [15] years." The only individualized measure of the defendant's risk of reoffending was the Static-99, which the State's witness characterized as indicating that the defendant was not likely to recidivate. The court concluded:

Without reference to the relevant circumstances that must be considered, the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion in searching—or "obtaining"—Defendant's location information upon his release from prison. Authorizing the State to conduct a search of this magnitude fifteen to twenty years in the future based solely upon scant references to present circumstances would defeat the Fourth Amendment's requirement of circumstantial reasonableness altogether. (citation omitted).

The court vacated the trial court's order and remanded with instructions for the trial court to dismiss the State's application for SBM monitoring without prejudice to the State's ability to reapply.

State v. Griffin, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 210 (Aug. 24, 2018)

Following *State v. Grady*, ___ N.C. App. ___, ___ S.E.2d ___ (May 15, 2018), the court held, over a dissent, that absent any evidence that SBM is effective to protect the public from sex offenders, the trial court erred by imposing SBM for 30 years. The defendant proffered an Alford plea to first-degree sex offense with a child. The defendant was sentenced and released from prison. Eleven years later, he was subjected to a "bring-back" hearing to determine whether he would be required to participate in SBM. At that hearing, the trial court ordered the defendant to enroll in SBM for 30 years. The defendant appealed, arguing that the trial court violated his fourth amendment rights by ordering him to submit to SBM for 30 years. The court agreed. *Grady* held that absent evidence that SBM is effective in serving the State's compelling interest in protecting the public from sex offenders, the State fails to meet its burden to prove that SBM is reasonable as required by the fourth amendment. Here, as in *Grady*, the State presented no evidence regarding the efficacy of the SBM program. Having found that the State failed to prove that SBM is a reasonable search compliant with the fourth amendment because it presented no evidence that the program is effective to serve the State's interest in protecting the public against sex offenders, the court declined to reach the issue of whether the trial court's order or the State's evidence regarding the defendant's individual threat of reoffending meets minimum constitutional standards.

Appeal

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

The defendant failed to preserve for appellate review his claim that the trial court erred by requiring him to enroll in satellite-based monitoring (SBM). The defendant asserted that the State failed to meet its burden of proving that imposing SBM is reasonable under the fourth amendment. Because the defendant raised no fourth amendment objection at the SBM hearing and the issue was not implicitly addressed or ruled upon by the trial court, it was not preserved for appellate review. In its discretion, the court declined to grant review under Rule 2, reasoning that the law was well-established at the time of the hearing and the State was not on notice of the need to address *Grady* issues due to the defendant's failure to raise the constitutional issue.

State v. Gentle, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

Over a dissent, the court declined the defendant's request to grant his petition for writ of certiorari to review the trial court's order requiring him to enroll in lifetime SBM. The defendant argued that the trial court erred by ordering him to submit to SBM without first making a reasonableness determination as required by *Grady*. The defendant conceded that he failed to make his constitutional argument at trial and that his appeal from the SBM order was untimely. The dissenting judge would have issued a writ of certiorari and invoked Rule 2 of the Rules of Appellate Procedure to address the merits of the argument.

State v. Cozart, ___ N.C. App. ___, 817 S.E.2d 599 (June 19, 2018)

Because SBM hearings are civil proceedings, the defendant's oral notice of appeal from an order requiring him to enroll in lifetime SBM was insufficient to give the court jurisdiction to hear his appeal. The court declined to grant the defendant's request for writ of certiorari to review the issue, or to suspend the Rules of Appellate Procedure to reach the merits.

Evidence

Best Evidence Rule

State v. Waycaster, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

The court held, over a dissent, that the trial court did not err when it allowed an ACIS printout to be admitted as proof of a prior conviction to establish the defendant's habitual felon status. On appeal the defendant argued that admission of the printout violated the best evidence rule. The court held that printouts from the ACIS database are admissible to prove a prior felony under G.S. 14-7.4 and are not barred by the best evidence rule.

Rule 401 (Relevancy) DVPOs

State v. Hobson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

In this stalking case, the trial court did not abuse its discretion by admitting into evidence Domestic Violence Protective Orders (DVPOs) obtained by the victim against the defendant. The defendant asserted that the findings of fact in the DVPOs unfairly prejudiced him and confused the jury. The court found that the DVPOs were relevant to show the defendant's course of conduct as well as his motive to commit the current offense. It noted that after reviewing the DVPOs, the trial court redacted those portions it found to be unfairly prejudicial to defendant, and only the redacted versions were admitted into evidence and published to the jury. The court rejected the defendant's argument that the jury was highly likely to regard the findings contained in the DVPOs as true and binding simply because they had been handwritten by a district court judge, noting that the trial court redacted the DVPOs and properly instructed the jury regarding the State's burden of proof as well as the jury's duty to find the facts.

Miscellaneous Cases on Relevancy

State v. Alonzo, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (Sept. 7, 2018)

In this child sexual assault case, the trial court did not err by finding that the defendant's proffered testimony was not relevant. The defendant was charged with committing sexual acts on his daughter Sandy while home from the military on compassionate leave. At trial, the defendant attempted to testify that the reason for his compassionate leave was the rape of his other daughter by a neighbor. The defendant argued that his testimony constituted substantive evidence showing that he did not sexually assault the victim during his compassionate leave and would have allowed him to impeach his ex-wife, Ms. Alonzo, who testified that she witnessed the abuse. Specifically, he asserted that his testimony informing the jury of the sexual assault of his other daughter proves that he "would have been sufficiently

deterred” from molesting Sandy during that same time period as “Ms. Alonzo [was] watching him like a hawk.” He further asserted that the testimony would “discredit[] Ms. Alonzo’s testimony” that she saw him sexually assault Sandy, making her explanation for not contacting the police after witnessing his acts “less convincing.” The trial court excluded the testimony under Rules 401 and 403.

The court made swift work of the defendant’s Rule 401 argument, concluding that his proposed testimony does not have a logical tendency to prove that Defendant would not have sexually molested Sandy. The court went on to conclude that even if the testimony was relevant, the trial court did not abuse its discretion in excluding it under Rule 403. The court explained: “The testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value.”

The court also rejected the defendant’s argument that his testimony could have been used to impeach Ms. Alonzo. Specifically, he argued that because Ms. Alonzo reported the sexual assault of their other daughter by a neighbor, she therefore would have reported any assault she witnessed him commit. Defendant further alleged that because Ms. Alonzo did not file any reports, the jury could have therefore determined there was no sexual assault. The court rejected this argument, concluding: “Ms. Alonzo turning in a neighbor for sexual assault is entirely different, psychologically and emotionally, than turning in her husband. Without an established correlation between turning in neighbors and husbands for sexual assault, Defendant’s proposed testimony does not ‘have a logical tendency to prove’ that Ms. Alonzo was incorrect or untruthful in her testimony.” Moreover, the trial court did not abuse its discretion in excluding this testimony under Rule 403. The court explained: “As previously stated, testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value.”

State v. Dixon, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

In this case involving convictions of felony murder, discharging a firearm into an occupied vehicle, and possession of marijuana with intent to sell, the trial court did not err by admitting certain photographs at trial. Two of the photographs (“Gun Photos”) were of firearms; the photos were found on the defendant’s cell phone. A third photograph (“Mustang Photo”) also was recovered from the defendant’s phone; it showed the defendant and another man leaning against the hood of a Silver Mustang with a black racing stripe on the street where the victim was shot. Both men were displaying the hand sign for the number “4” with their left hands, while the man on the right displayed a closed right hand with his middle finger extended.

The defendant argued that the photos should have been excluded under Evidence Rule 404 because possession of a firearm and flashing gang signs show bad character and bad acts. The court found itself unable to conclude that possession of a firearm is indicative of bad acts or character given that gun ownership is protected by the Second Amendment and that the defendant’s own brief fails to identify any basis for such a conclusion. The court failed to see how the hand signals in the Mustang Photo indicate gang affiliation. Nothing in the record suggests that either gesture indicates gang affiliation, and the trial court instructed the prosecutor not to ask any questions about signs or gang affiliation based on the picture. Thus, neither photograph falls within the scope of Rule 404.

The court rejected the defendant’s argument that the photographs were inadmissible under Rules 401 and 402. The court rejected the defendant’s argument that no evidence connected the gun at issue to the weapon used in the crime. There was an evidentiary connection between the photos, the crime, and the accused; specifically, the photos were obtained from the defendant’s phone, showed that he had access to firearms and to the vehicle in question, and depict him at almost the precise location where the shooting occurred. One of the gun photos shows the defendant in possession of a firearm resembling the one used in the shooting. The evidence was relevant and the trial court did not err by admitting the photographs.

The trial court did not abuse its discretion in conducting the Rule 403 balancing test with respect to the photographs. The defendant’s brief assumes that the photographs are irrelevant but because the court concluded to the contrary it rejected this argument as well.

Rule 403

State v. Hobson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

Although the trial court erred by admitting into evidence in this stalking case approximately 28 photographs of firearms, ammunition, and surveillance equipment found throughout the defendant's home during the execution of a search warrant, the error did not amount to prejudicial error. Photographs of the defendant's firearms, ammunition, and surveillance equipment--all of which the defendant legally possessed at the time the search warrant was executed--were wholly irrelevant to the issue of whether the defendant committed the offense of stalking. The court thus agreed with the defendant that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, and that the trial court should have exercised its discretion to exclude this evidence. The court went on to conclude that in light of the overwhelming additional evidence presented at trial, the defendant failed to show that the admission of the photographs amounted to prejudicial error.

State v. Steele, ___ N.C. App. ___, 817 S.E.2d 487 (July 3, 2018)

In this drug trafficking case, the court rejected the defendant's argument that the trial court abused its discretion under Rule 403 by admitting statements made by a confidential informant about the defendant's distribution of drugs to a law enforcement officer for the limited purpose of explaining the course of the investigation. The statements were relevant and explain the steps taken by officers during the investigation. Further, the limiting instruction demonstrated that the trial court thoughtfully considered the nature of the testimony and how it could potentially be used by the jury.

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In this first-degree murder case, the trial court did not abuse its discretion under Rule 403 by admitting the victim's skeletal remains, specifically her skull, ribs, and femur. The court considered each set of bones, starting with the skull. It noted that admission of a homicide victim's skull was an issue of first impression. Generally, however, evidence used to identify a victim is relevant and admissible at trial. Here, the State argued, in part, that it needed witness Curtis, who found the skull, to identify it so that other witnesses could identify other pertinent bones. Curtis positively identified the skull as the one he found in the woods, based on the front teeth. Here, the skull is relevant to the State's case, illustrated Curtis's testimony, and was properly admitted under Rule 403.

As to the rib bones, the court noted that evidence showing the nature and number of the victim's injuries is probative. Here, the State used the rib bones to illustrate the victim's injuries, which the medical examiner concluded caused death. They thus were more probative than prejudicial and were properly admitted under Rule 403.

Considering the femur, the court noted that biological items used in DNA testing generally are admissible. Here, the State used the femur to establish the identity of the victim through DNA testing and it was properly admitted under Rule 403.

Rules 106 (Rule of Completeness) & 611 (Mode and Order of Interrogation)

State v. Edwards, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In this case involving convictions for attempted first-degree murder, statutory sex offense with a child by an adult, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and taking indecent liberties with a child, although the trial court erred by preventing the defendant from cross-examining the State's witnesses concerning the defendant's admission and attempt to help investigators rescue the victim during his post-arrest interrogation, the error was harmless. The case involved the defendant's abduction of a six-year-old girl and related conduct including binding the child to a tree with a chain around her neck. The defendant asserted that the trial court's limitation on cross-examination violated his constitutional rights to due process, a fair trial and right to silence. The State elicited testimony from law enforcement officers about the defendant's pre-arrest statements. It did not however

elicit any testimony regarding the post-arrest interrogation of him, and sought to prevent the defendant from introducing any evidence from the State's witnesses regarding the post-arrest interrogation during cross-examination. According to the State, the pre-arrest interview of the defendant was separate from the post-arrest interrogation that occurred the next day. The trial court agreed with the State and prevented the defendant from questioning the State's witnesses, including Detective Sorg, regarding the defendant's post-arrest interrogation. After the State rested, the issue of the defense presenting evidence regarding the post-arrest interrogation arose again, specifically with respect to calling Sorg as a defense witness. According to the State, the testimony would include self-serving statements by the defendant from a completely different interview that constituted hearsay. The State asserted that if the defense wanted to present evidence about what the defendant said during those interviews, he had to take the stand. The trial court agreed and ruled that the defense could not question Sorg on anything related to the post-arrest interrogation. The defendant took the stand and testified about that interrogation.

The court rejected the defendant's argument that the cross-examination should have been allowed under Rule 106, to prevent the jury from being misled or deceived by the evidence presented regarding the pre-arrest interview. The purpose of Rule 106's completeness rule is to ensure that misleading impressions created by taking matters out of context are corrected. Here, there was no nexus between the interview and the post-arrest interrogation that would require evidence of the post-arrest interrogation to explain or add context to the earlier interview. Thus the trial court did not err by concluding that the two events were discrete. Moreover, Rule 106 is limited to writings and recorded statements. Here, the defense did not seek to introduce any such materials; rather, the defense simply wanted to question the State's witnesses about that interrogation during cross-examination.

Considering Rule 611, which addresses the proper scope of cross-examination, the court found that the trial court abused its discretion by disallowing the evidence. Rule 611 provides that a witness may be cross-examined on any relevant matter, and here the evidence that the defendant sought to elicit from the State's witnesses was relevant. However, the court went on to conclude that the trial court's error was harmless given the overwhelming evidence of guilt.

State v. Vann, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

In this assault case, the trial court did not abuse its discretion by allowing portions of the defendant's telephone call, made from jail, to his grandmother into evidence but refusing to allow the defendant to offer other portions from the same call into evidence. The defendant argued that the trial court's ruling violated the rule of completeness. The admitted portions of the telephone conversation show that the defendant had certain knowledge of the crime that only the perpetrator would know. The defendant sought to introduce an additional portion of the conversation in which the defendant's grandmother said, "you didn't do it," and the defendant responded, "I know." The court concluded that the defendant's exculpatory statement to his grandmother was neither explanatory of nor relevant to the admitted statements.

Confrontation Clause

State v. Steele, ___ N.C. App. ___, 817 S.E.2d 487 (July 3, 2018)

In this drug trafficking case, the defendant's Confrontation Clause rights were not violated when the trial court admitted statements made by a non-testifying confidential informant. The statements were not admitted for the truth of the matter asserted but rather to explain subsequent steps taken by officers in the investigation, and the trial court gave a limiting instruction to that effect.

State v. Perez, ___ N.C. App. ___, 817 S.E.2d 612 (July 3, 2018)

In this drug case, the court rejected the defendant's argument that the trial court violated his Confrontation Clause rights when it permitted him to stipulate to the admission of forensic laboratory reports without first addressing him personally and ensuring that he understood the stipulation would waive those rights. At trial the prosecutor informed the trial court that the defendant intended to stipulate

to the admission of forensic laboratory reports confirming that the substance seized was cocaine. Both defense counsel and the defendant signed the stipulations and the trial court admitted the stipulated evidence. On appeal, the defendant argued that the trial court erred by permitting him to stipulate to the admission of the reports without engaging in a colloquy to ensure he understood the consequences of that decision. The court rejected this argument. It began by acknowledging that the stipulation acted as a waiver of the defendant's Confrontation Clause rights. The court held however that "the waiver of Confrontation Clause rights does not require the sort of extensive colloquy needed to waive the right to counsel or enter a guilty plea." The court rejected the defendant's argument that *State v. English*, 171 N.C. App. 277 (2005), requires such a colloquy. Here, both the defendant and counsel signed the stipulations, and there may have been strategic reasons to do so. The court found it notable that the defendant did not argue that his lawyer failed to discuss those strategic issues with him, or that defense counsel failed to explain that stipulating to admission of the lab reports would waive his Confrontation Clause rights. Instead, he argued that the trial court should have discussed these issues with him in open court. The court declined the defendant's request to impose on trial courts an obligation to personally address a defendant whose attorney seeks to waive any of his constitutional rights via stipulation with the State. If the defendant did not understand the implications of stipulating, his recourse is to pursue an MAR asserting ineffective assistance of counsel.

Right to Present a Defense

State v. Bowman, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 587 (Aug. 27, 2018)

In this murder, armed robbery, and possession of a firearm by a felon case, the court held, over a dissent, that the trial court committed reversible constitutional error in restricting the defendant's cross-examination of the State's principal witness. The defendant, Lakenda Malachi, and the victim were associates in a drug business. The charges in question arose out of an incident in which the defendant arrived at Malachi's house and confronted the victim about money allegedly owed to him. The victim ended up dead. The case was tried in Forsyth County. On appeal, the defendant argued that the trial court erred by limiting the scope of his cross-examination of Malachi, preventing him from adequately questioning her regarding pending drug charges in Guilford County for which she could receive a favorable plea offer contingent on her testimony against the defendant. The court agreed. Here, trial counsel argued that an email exchange between prosecutors established a possible reduction of drug trafficking charges against Malachi in Guilford County in exchange for her testimony against the defendant in Forsyth County. After a voir dire, the trial court ruled that it would allow defense counsel limited cross-examination of Malachi regarding her pending charges. However, before the jury, the trial court sustained the State's objection to defense counsel's cross-examination of Malachi, precluding defense counsel from establishing a possible bias in Malachi's testimony. Because the defendant presented evidence of communication between the districts, the trial court's limitation of Malachi's cross-examination was error. The court went on to conclude that the State cannot prove that the error was harmless beyond a reasonable doubt, noting in part that Malachi was the state's principal eyewitness. There were no other witnesses to the shooting and the other evidence provided by the State was tenuous. The court ordered a new trial. The dissenting judge concluded that any error was harmless beyond a reasonable doubt.

Rule 404(b) (Other Acts Evidence)

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

(1) In this non-capital first-degree murder case where the defendant was convicted of murdering a former girlfriend Sellars, the trial court did not err by admitting 404(b) testimony from the defendant's former girlfriend Crisp and former wife Lewis about assaults that the defendant committed on them. The evidence was admitted to show motive, intent, modus operandi, and identity. The requirement of

similarity was satisfied. Among other things, the trial court's findings of fact identified "location similarities between the incidents." The defendant's assaults of Crisp and Lewis occurred in isolated areas, and Sellars' remains were found on one of the roads in an isolated area where the defendant assaulted Crisp. With respect to remoteness, the defendant's assaults on Crisp occurred from 1990-1993; the assaults on Lewis occurred from 1996-1999; and Sellars' death occurred in 2012, 13 years after the last assault. Subtracting 4 years that the defendant spent in prison, leaves a 9 year gap. The court concluded that assaults on multiple victims over time with relatively short gaps in between show a pattern of behavior, and that the evidence satisfied the temporal proximity requirement of the Rule 404(b) analysis. The court went on to find that the trial court did not abuse its discretion by finding that the 404 evidence satisfied Rule 403.

(2) The trial court did not err by instructing the jury that it could use of evidence of the defendant's prior assaults on the victim to show identity. Multiple witnesses testified regarding the defendant's abuse of the victim prior to her murder and the defendant's prior assaults on her arose in the context of a relationship in which the defendant used violence to control her behavior. This evidence was properly admitted to show identity.

State v. Hobson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018)

In this case where the defendant was convicted of stalking victim Lorrie, with whom the defendant had a dating relationship, the trial court did not commit plain error by introducing 404(b) evidence from Holly, the defendant's ex-girlfriend. The defendant argued that the trial court erred in failing to exclude Holly's testimony that the defendant had assaulted her in the past, that she was afraid of the defendant, and that the defendant told Holly "he would never be arrested again" and "he would not be taken alive." The court disagreed, finding that Holly's testimony established that Lorrie was in reasonable fear of the defendant. Holly testified to texting Lorrie about the assault and warning Lorrie to be careful, and that Holly herself was afraid of the defendant. This testimony demonstrates both that Lorrie had a legitimate basis for her fear of the defendant and that her fear was reasonable as required by the stalking statute. Similarly, the court noted, the defendant's statements to Holly that "he would never be arrested again" and "he would not be taken alive" were made in reference to the assault and further illustrate a course of conduct that would cause a reasonable person to fear for her safety.

Fifth Amendment (Self-Incrimination) Issues

State v. Perry, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 395 (Aug. 22, 2018)

(1) The trial court did not err by allowing the prosecutor to cross-examine defendant Perry regarding his post-arrest, pre-Miranda silence. Defendants Perry and Powell appealed from judgments entered upon jury verdicts finding them guilty of offenses in connection with a shooting. The defendants were tried together. At trial Perry testified regarding his alibi defense. On appeal the defendants argued that the trial court committed reversible error by allowing the prosecutor to cross-examine Perry regarding his silence to the police after his arrest regarding his alibi. Although a defendant's post-arrest, post-Miranda warning silence may not be used by the State for any purpose, a defendant's post-arrest, pre-Miranda silence may be used by the State to impeach a defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial. Our Supreme Court has instructed that a defendant's silence about an alibi at the time of arrest can constitute an inconsistent statement, and that this silence can be used to impeach a defendant's alibi offered at trial if it would have been natural for a defendant to mention the alibi at the time of his encounter with the police. Applying these rules to the case at hand, the court concluded:

[T]here was evidence which showed as follows: The offenses were perpetrated no more than 72 hours before Defendant Perry was arrested and informed of the charges against him. Defendant Perry knew the victims named in the warrant: he knew one of the victims because she was his ex-girlfriend, and he knew the other victim from hanging out in the

same neighborhood. Despite Defendant Perry's familiarity with these two victims and the location where the shooting occurred, he made no statements that he had an alibi to account for his whereabouts during the commission of the crime. When the officer charged Defendant Perry with three counts of attempted murder and three counts of injury to real or personal property, Defendant Perry failed to mention his alibi when it would have been natural to deny that he would not have attempted to kill his ex-girlfriend, her current partner, and his ex-girlfriend's son.

Based on this evidence, we conclude that Defendant Perry's silence is inconsistent with his later alibi testimony presented for the first time during trial. Therefore, the trial court did not err when it allowed the State to impeach Defendant Perry on cross-examination about his failure to say anything about his alibi when the warrants were read to him and before he had received Miranda warnings.

(2) Although it was error to admit evidence of Perry's post-Miranda warnings silence about an alibi, the error did not constitute plain error for either defendant. Because the defendant failed to object to the testimony at trial, the plain error standard applied. Here no plain error occurred because there was ample evidence establishing the defendants' guilt.

Hearsay Non-Hearsay

State v. Baker, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

The court rejected the defendant's argument that the trial court considered inadmissible hearsay in finding him in criminal contempt, reasoning that the evidence was admitted not for the truth of the matter asserted but rather for corroboration. At the show cause hearing the trial court found that the defendant was seen by a testifying State's witness to have made a hand gesture indicating a gun to his head and shaking his head. This interaction interrupted the State's direct examination of the witness. At the hearing, the State introduced two transcripts into evidence. The first was a one-page excerpt of the witness's trial testimony. The second reflected an additional interview with the witness taken after the witness's trial testimony was completed. Over the defendant's hearsay objection, the trial court admitted the transcripts. The State further called three witnesses to testify to the events in question, one of whom was the ADA who testified that he saw the defendant make the gesture. The trial court found the defendant to be in willful contempt of court and entered a civil judgment for attorney's fees and costs. The defendant gave oral notice of appeal. He later filed a petition for a writ of certiorari seeking a belated appeal of the civil judgment. On appeal the defendant argued that he was found in criminal contempt based on inadmissible hearsay. The court rejected this argument, noting that the first transcript was used to illustrate the context in which the incident arose and to corroborate other testimony that the witness seemed agitated and distracted on the stand. The second transcript was used to corroborate the ADA's testimony. The court concluded: "Because [the transcripts] were used to corroborate the testimony of the State's witnesses, and were not offered into evidence to prove that Defendant was speaking and making a gun gesture, the trial court did not err when admitting them into evidence."

Hearsay Exceptions

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018)

In this first-degree murder case, the trial did not err by admitting, under Rule 803(3), a handwritten document made by the victim that contained a list of things that the victim was going to tell the defendant. The trial court properly determined that the document showed the victim's state of mind.

State v. Waycaster, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

In a case where the defendant was convicted of interfering with an electronic monitoring device, the court rejected the defendant's argument that the trial court committed plain error by admitting hearsay evidence

regarding the ankle monitor in question. The defendant was subjected to electronic monitoring as a condition of probation. The defendant's electronic monitoring equipment was installed by BI Total Monitoring and included an ankle monitor, a beacon that uses a GPS system to track the monitor, and a charger. The ankle monitor and beacon have serial numbers specific to the probationer. BI Total Monitoring's computer software, BI Total Access, keeps logs of which serial numbers are assigned to each probationer. When an ankle monitor is not in the beacon's range, it transmits a GPS signal that enables the probation officer to log into a computer program and see where the probationer is located. When a probationer removes the ankle monitor, BI Total Monitoring notifies the probation office. On-call probation officer Ashe received an alert that the defendant's ankle monitor strap had been tampered with. Ashe used the GPS to locate the monitor miles from the defendant's residence, in a ditch off of the road. He took the monitor to his office, where he verified that it was assigned and installed on the defendant. On appeal the defendant argued that the trial court committed plain error when it allowed Ashe to provide testimony based on GPS tracking evidence and simultaneously prepared reports to establish that the ankle monitor that he found was the same monitor that had been installed on the defendant. The defendant argued that this testimony constituted inadmissible hearsay. The court disagreed, finding that the evidence in question fell within the Rule 803(6) exception for business records.

Opinions

Drug ID

State v. Osborne, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The evidence is insufficient to sustain the defendant's conviction for possession of heroin because the controlled substance at issue was not sufficiently identified as heroin. Officers found the defendant unconscious in a hotel room. After being revived, the defendant admitted to using heroin. Officers searched the hotel room and found syringes, spoons with burn marks and residue, and a rock-like substance. The State did not have the substance tested using a scientifically valid chemical analysis. Rather, at trial the State relied on the defendant's statement to officers that she used heroin, as well as officers' descriptions of the rock-like substance and the results of field tests on the substance, including one performed in open court. On appeal the State conceded, or at least did not dispute, that the field tests are not scientifically valid chemical analysis sufficient to support a conviction. Instead, the State relied on *State v. Ortiz-Zape*, 367 N.C. 1 (2013), and related cases. In *Ortiz-Zape*, the court held that an officer's testimony concerning the defendant's out-of-court identification of the substance as cocaine, combined with the officers own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss. Here however the defendant did not identify the seized substance as heroin. Rather, after being revived she told officers that she had ingested heroin. Although the State's evidence strongly suggests that the substance was heroin, it is not sufficient to establish that fact. The court concluded that a holding otherwise "likely would eliminate the need for scientifically valid chemical analysis in many—perhaps most—drug cases" and undermine the Supreme Court's decision in *State v. Ward*, 364 N.C. 133 (2010).

Eyewitness Identification

State v. Vann, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The trial court did not abuse its discretion by partially sustaining the State's objection to expert testimony by a defense witness regarding the factors affecting the reliability of eyewitness identification. UNC-Charlotte Prof. Dr. Van Wallendael was qualified and accepted by the court as an expert witness in the field of memory perception and eyewitness identification. The defendant sought to have her testify concerning whether any factors were present that could have affected the witnesses' identification of the defendant as the shooter. At a voir dire, the expert witness identified four factors in the case which could have affected the witnesses' identifications: the time factor; the disguise factor; the stress factor; and the weapon focus effect. According to the time factor, the likelihood of an accurate identification increases

the longer in time a witness has to view the perpetrator's face. Under the disguise factor, anything covering the face of the perpetrator decreases the chances of an accurate identification later by the eyewitness. The stress factor states that stress, especially from violent crimes, can significantly reduce an eyewitness's ability to remember accurately. Studies on the weapon focus factor show that people confronted with a weapon tend to concentrate their attention on the weapon itself, and not the individual holding the weapon, which decreases the likelihood of an accurate identification of the assailant or shooter later. The trial court sustained the State's objection to opinion testimony concerning the time and disguise factors, noting that they are commonsense conclusions that would be of little if any benefit to the jury. It did however allow testimony on the stress factor and the weapon focus effect. The defendant failed to show any abuse of discretion by the trial court in partially sustaining the State's objection. The trial court properly found that the time and disguise concepts were commonsense conclusions that would be of little benefit to the jury.

On Credibility

State v. Orellana, ___ N.C. App. ___, 817 S.E.2d 480 (June 19, 2018)

(1) In this indecent liberties with a child case, the court rejected the defendant's argument that the trial court committed plain error by allowing the victim's mother to vouch for the victim's credibility. An individual informed the victim's mother that the victim said that the defendant had touched her inappropriately. The victim was still asleep at the time this exchange took place. The victim's mother testified as follows:

I knew that my daughter would tell me the truth because that's what I had instilled in her. So I was debating on whether to wake her up. I didn't want to traumatize her. I didn't want to scare her. I knew that when she would come to me at that moment when I asked her that she would tell me the truth.

In sum, the court noted, the victim's mother testified that she believed that her daughter was truthful in her accusations. Assuming arguendo admission of this testimony was improper, the defendant failed to show that the jury probably would have reached a different result absent the error.

(2) The court rejected the defendant's argument that a detective's testimony improperly vouched for the victim's credibility. Here, the detective testified about his observation of the victim's demeanor during his interview with her. The detective testified as follows:

Her responses seemed to be thoughtful. She paused several times while telling the story, just trying to recollect, and with each account she looked at the ground or looked downward several times, seemed to be genuinely affected by what had occurred.

The court rejected the notion that this testimony was the functional equivalent of vouching for the victim's credibility, finding instead that it "contains precisely the type of 'instantaneous conclusions' that our Supreme Court considers to be admissible 'shorthand statements of fact.'"

(3) The court rejected the defendant's argument that a nurse's opinion testimony improperly vouched for the victim's credibility. In the relevant portion of her testimony, the nurse stated that erythema that she observed on the victim's privates was consistent with touching, but also could be consistent with "a multitude of things," such as improper hygiene. The court was unable to see how this testimony improperly vouched for the victim's credibility.

Judicial Notice

State v. Isaacs, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

In a bond forfeiture proceeding, the trial court did not err by taking judicial notice of the file as evidence that the defendant was served with the order of arrest. A trial court may take judicial notice of earlier proceedings in the same case, including matters in the file not offered into evidence. Here, the trial court took judicial notice of a fact beyond reasonable controversy. It is undisputed that the defendant was

served with the order for arrest before the deadline for filing a notice to set aside the bond forfeiture expired and the trial court attached the order for arrest as an exhibit to its order.

Arrest, Search, and Investigation Stops

State v. Baskins, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Aug. 27, 2016)

(1) In a case in which the court determined that the defendant received ineffective assistance of appellate counsel, it considered whether the officers' mistake of fact regarding a basis for a traffic stop was reasonable and concluded that it was not. Having found that appellate counsel's performance was deficient, the court moved on to the prejudice prong of the ineffective assistance of counsel claim. The analysis required it to evaluate how it would have ruled on direct appeal with respect to the defendant's claim that the officers' mistake of fact regarding his vehicle registration invalidated the traffic stop. Here, the officers argued that the stop was justified because the vehicle had an expired registration. Although the vehicle's registration was in fact valid at the time, the trial court had found that the officers' mistake was reasonable and did not invalidate the stop. The DMV record indicated that the registration was valid and the officers stopped the vehicle "for a registration violation despite having intentionally neglected to read the very sentence in which the relevant expiration date appeared." Under the circumstances the court found that there is a reasonable probability that it would have determined that the facts do not constitute the sort of objectively reasonable mistake of fact tolerable under the fourth amendment.

(2) The prejudice analysis also required the court to evaluate how it would have ruled on direct appeal with respect to the defendant's claim that there was no reasonable suspicion for the stop. Here, the conclusion that the officers had reasonable suspicion to stop the vehicle was based solely on the following facts: officers saw the defendant and a woman exit a China Bus carrying small bags at the "same bus stop that a lot of heroin is being transported from New York to the Greensboro area" and while waiting for his ride at an adjacent gas station, the defendant briefly looked towards an officer's unmarked vehicle and "shooed" that vehicle away, at which point the defendant's ride pulled into the parking lot. These facts do not support a finding of reasonable suspicion, particularly where the defendant was entirely unknown to the officers.

Interrogation and Confession Miranda

State v. Nobles, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

The trial court did not err by denying the defendant's motion to suppress incriminating statements made to police during a custodial interview. The defendant asserted that the statements were made after he invoked his right to counsel. Before the custodial interview, the defendant was advised of his Miranda rights, initialed and signed the Miranda rights form, waived his Miranda rights, and spoke with law enforcement. The defendant asked at one point "Can I consult with a lawyer, I mean, or anything?" Finding that the trial court did not err by concluding that this question was not an unambiguous assertion of the right to counsel, the court noted:

Merely one-tenth of a second elapsed between the time that defendant asked, "[c]an I consult with a lawyer, I mean, or anything?" and then stated, "I mean I – I – I did it. I'm not laughing man, I want to cry because its f[*]cked up to be put on the spot like this." The officers then immediately reminded defendant of his Miranda rights, that they had just read him those rights, that defendant "ha[d] the right to have [his attorney] here," and that the officers "[could] never make that choice for [him] one way or another." After police attempted to clarify whether defendant's question was an affirmative assertion of his Miranda rights, defendant declined to unambiguously assert that right, continued communications, and never again asked about counsel for the rest of the interview.

The court concluded that although the defendant explicitly asked if he could consult with a lawyer, considering the totality of the circumstances his statement was ambiguous or equivocal, such that the officers were not required to cease questioning. He did not pause between the time he asked for counsel and gave his initial confession, the officers immediately reminded him of his Miranda rights to clarify if he was indeed asserting his right to counsel, and the defendant declined the offered opportunity to unambiguously assert that right but instead continued communicating with the officers. The court went on to hold that even if his question could be objectively construed as an unambiguous invocation of his Miranda rights it was immediately waived when he initiated further communication.

Juveniles

State v. Saldierna, ___ N.C. ___, 817 S.E.2d 174 (Aug. 17, 2018)

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 33 (2017), the court reversed, holding that the trial court's order denying the defendant's motion to suppress contained sufficient findings of fact to support its conclusion that the defendant knowingly and voluntarily waived his juvenile rights pursuant to G.S. 7B-2101 before making certain incriminating statements. After the trial court denied the defendant's suppression motion, the defendant entered a negotiated plea reserving his right to seek review of the denial of suppression motion. After sentencing, the defendant appealed. The Court of Appeals held that the trial court erred by denying the suppression motion because the defendant's statement, "Can I call my mom," required the officer to clarify whether the defendant was invoking his right to have a parent present during the interview. The Supreme Court granted the State's petition seeking discretionary review of that decision, reversed that decision, and remanded to the Court of Appeals for consideration of the defendant's other challenges to the suppression order. In reversing the Court of Appeals in *Saldierna I*, the Supreme Court concluded that the statement "Can I call my mom" did not constitute a clear and unambiguous invocation of his right to have his parent or guardian present. On remand in (*Saldierna II*) the Court of Appeals found that the trial court's findings of fact did not support its conclusion of law that the State carried its burden of showing that the defendant knowingly, willingly, and understandingly waived his juvenile rights. The Supreme Court granted the State's petition for discretionary review of the Court of Appeals' remand decision in *Saldierna II*. The court noted that the totality of the circumstances analysis requires inquiry into all of the circumstances surrounding the interrogation, including evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether the juvenile has the capacity to understand the warnings given, the nature of his or her rights, and the consequences of waiving those rights. In applying this test to the custodial interrogation of juveniles, the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation. However, a defendant's juvenile status does not compel a determination that the juvenile did not knowingly and intelligently waive his or her rights. Instead, the juvenile's age is a factor to consider in the analysis. Turning to the record before it, the court found that the trial court's findings of fact have adequate evidentiary support and that those findings support the trial court's conclusion that the defendant knowingly and voluntarily waived his juvenile rights. In reaching a contrary conclusion, the Court of Appeals failed to focus on the sufficiency of the evidence to support the findings of fact that the trial court actually made and to give proper deference to those findings. Thus, the Court of Appeals erred in determining that the record did not support the trial court's findings to the effect that the defendant understood his juvenile rights. Although the record contains evidence that would have supported a different determination, it was, at most, in conflict. Evidentiary conflicts are a matter for the trial court, which has the opportunity to see and hear the witnesses. The court further found that the trial court's findings support its conclusion of law that the defendant knowingly, willingly, and understandingly waived his juvenile rights.

Search Warrants Probable Cause Sufficient

State v. Winchester, ___ N.C. App. ___, ___ S.E.2d ___ (July 17, 2018)

In this drug trafficking case, a warrant to search the defendant's person and vehicle was supported by probable cause. After a three-month investigation prompted by a confidential informant's tip that the defendant was dealing heroin, Detective Cole obtained a warrant to search the defendant's residence for evidence of drug dealing. The warrant also authorized the search of a specified Range Rover and of the defendant. On appeal the defendant argued that the searches of his person and vehicle were not supported by probable cause. He conceded that there was probable cause to search the house. The court rejected the defendant's argument noting that a confidential informant known to law enforcement stated that the defendant was using the Range Rover to transport heroin and other drugs to and from the residence and was selling drugs from the vehicle. The ensuing investigation included authorized GPS tracking of the Range Rover and visual surveillance of the defendant and the vehicle. It revealed that the defendant appeared to reside at the residence and that he frequented locations known for drug sales. Additionally at one point the defendant was stopped in the vehicle which displayed a fictitious or altered tag and when the defendant's driving privileges had been suspended or revoked. Officers performed "trash pulls" at the residence which found paraphernalia that tested positive for heroin and cocaine, as well as bills and other papers indicating that the defendant lived there. The most recent trash pull occurred within one week of the search. These facts support the trial court's conclusion that there was probable cause to issue the warrant to search the defendant and the Range Rover. The confidential informant's statements were corroborated by a month's-long investigation, the drug evidence recovered from the multiple trash pulls was not stale, and the allegations sufficiently linked the defendant and the Range Rover to the residence and the known drug evidence.

Knock and Announce

State v. Winchester, ___ N.C. App. ___, ___ S.E.2d ___ (July 17, 2018)

The court rejected the defendant's argument that the search of the premises was unreasonable. The defendant argued that because the officers deliberately waited until he vacated the premises before breaking open the door without knocking and announcing their presence, they violated the statutory knock and announce requirement. Here, before executing the warrant a detective loudly announced three times that officers would be entering the residence to execute the search warrant. After waiting a reasonable time and hearing no response officers made a forced entry into the residence. These facts establish that no statutory violation occurred.

Detaining Persons On or Off the Premises

State v. Winchester, ___ N.C. App. ___, ___ S.E.2d ___ (July 17, 2018)

Officers did not unreasonably seize the defendant in connection with execution of the search warrant. The defendant asserted that his seizure was unreasonable because it occurred two miles away from the residence in question. The court noted in part that the warrant authorized a search of both the premises and the defendant.

Searches

Consent Searches

State v. Bartlett, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

The trial court properly denied the defendant's motion to suppress heroin discovered following a search of the defendant during a traffic stop. A tactical narcotics officer noticed a Lincoln sedan weaving in and out of heavy traffic at high speeds, nearly causing multiple collisions. The vehicle pulled into a Sonic

Drive-In parking lot next to an unoccupied Honda. The defendant, a passenger in the Lincoln, exited the vehicle, approached the Honda, and placed his hand inside the passenger window of that vehicle. The driver of the Honda appeared and spoke with the defendant briefly. The defendant then returned to the Lincoln and the vehicle drove away. No one in the Lincoln had ordered any food. Based on his experience, the officer concluded that the defendant had participated in a drug transaction. Other officers then saw the Lincoln go to a gas station. A second officer radioed that the vehicle continued to be driven in a careless and reckless manner, at approximately 15 miles per hour over the speed limit. After the vehicle left the gas station, the first officer stopped it for reckless driving and speeding. Four other officers participated in the stop; all five officers were in uniform. The first officer approached the passenger side of the vehicle, while two others approached the driver's side. The officer approaching the passenger side saw the defendant reach toward the floorboard. Because he did not know whether the defendant had a weapon or was trying to conceal contraband, the officer asked the defendant to show his hands. The defendant raised his hands, which were daubed in a light pink substance that the defendant stated was fabric softener. The officer ordered the defendant out of the vehicle and asked whether he was attempting to conceal something. The defendant denied doing so. The officer testified that when he asked for the defendant's consent to search his person the defendant gave consent saying, "go ahead." The defendant testified that he never consented to a search. When the officer proceeded to pat down the defendant he noticed a larger than normal bulge near the groin area that was not consistent with "male parts." The officer then detained the defendant in handcuffs, believing that he had contraband on his person. The officer asked the defendant if he had anything inside of his underwear and the defendant said that he did. The officer asked the defendant if he would retrieve the item and the defendant said he would. The officer removed the handcuffs, the defendant reached into his pants and produced a plastic bag containing heroin. He was then placed under arrest.

The court first found that the defendant consented to the search, rejecting the defendant's argument that his consent was not voluntary given the coercive environment fostered by the police. The defendant argued that his race is highly relevant to the determination of whether he voluntarily consented to the search because people of color will view a "request" to search by the police as an inherently coercive command, and he cited various studies in support of this claim. The court agreed that the defendant's race may be a relevant factor in considering whether consent was voluntary. However, aside from the studies presented by the defendant, the record is devoid of any indication that the defendant's consent in this case was involuntary. To the contrary, the circumstances show that the defendant's consent was freely and intelligently made. Although multiple officers were present, only the first officer interacted with the defendant. When the officer approached the vehicle he asked the defendant whether he had anything illegal and the defendant said that he did not. The officer then asked if he could search the defendant's person, to which the defendant responded "go ahead." No other conversation occurred. There is no evidence that the defendant was unaware of his ability to refuse the request or that he feared retribution had he done so. There is no indication that the officer made threats, used harsh language, or raised his voice. There is no evidence of any physical contact with the defendant. Additionally, the officers' firearms remain holstered throughout the encounter.

The court next rejected the defendant's argument that the scope of his consent to search his person did not include a frisk of his private parts, and lacking probable cause or exigent circumstances to justify such a search, the pat down of his groin area was unconstitutional. The court concluded that because the defendant's consent encompassed the sort of limited frisk that was performed, neither probable cause nor exigency was required to justify the search. The pat down of the defendant's groin area was within the bounds of what a reasonable person would have expected the search to include. The officer limited his pat down to the outer layer of the defendant's clothing. He did not reach into the defendant's pants to search his undergarments or directly touch his groin area. Nothing about the search involved the exposure of the defendant's privates to the officer or to the public. And there is no evidence that the groin pat down was conducted in an unreasonably offensive manner. Thus, the court concluded that a reasonable person in the defendant's position would have understood his consent to include the sort of limited outer pat down that was performed here.

Finally, the court rejected the defendant's argument that the officer's continued detention of him after searching his groin area was not justified by the plain feel doctrine. During the pat down the officer felt a bulge that he determined was not consistent with male body parts and was obviously contraband. When coupled with the totality of the circumstances already observed by the officer, this discovery amounted to reasonable suspicion justifying further detention of the defendant to question him about the contents of his clothing.

Homes & Vehicles

State v. Smith, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018) (per curiam)

In a per curiam opinion in this felon in possession of a firearm case, the court reversed the Court of Appeals for reasons stated in the dissenting opinion below, thus holding that the shotgun was in plain view. In the opinion below, ___ N.C. App. ___, 804 S.E.2d 235 (2017), the Court of Appeals held that the trial court erred by denying the defendant's motion to suppress. Three officers entered the defendant's apartment to execute arrest warrants issued for misdemeanors. While two officers made the in-home arrest, the third conducted a protective sweep of the defendant's apartment, leading to the discovery and seizure of the stolen shotgun. The shotgun was leaning against the wall in the entry of the defendant's bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. The officer walked past the shotgun when checking the defendant's bedroom to confirm that no other occupants were present. After completing the sweep, the officer secured the shotgun "to have it in . . . control and also check to see if it was stolen." The officer located the serial number on the shotgun and called it into the police department, which reported that the gun was stolen. The officer then seized the weapon. The defendant moved to suppress the shotgun, arguing that the officer lacked authority to conduct a protective sweep and that the seizure could not be justified under the plain view doctrine. The trial court denied the defendant's motion to suppress. The Court of Appeals began by finding that the protective sweep was proper, and there was no dissent on this issue. It held that the officer was authorized to conduct a protective sweep, without reasonable suspicion, because the rooms in the apartment—including the bedroom where the shotgun was found--were areas immediately adjoining the place of arrest from which an attack could be immediately launched. The court rejected the defendant's argument that the bedroom area was not immediately adjoining the place of arrest. The defendant was in the living room when the officers placed him in handcuffs. The third officer immediately conducted the protective sweep of the remaining rooms for the sole purpose of determining whether any occupants were present who could launch an attack on the officers. Every room in the apartment was connected by a short hallway and the apartment was small enough that a person hiding in any area outside of the living room could have rushed into that room without warning. Based on the size and layout of the apartment, the trial court properly concluded that all of the rooms, including the bedroom where the shotgun was found, were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched. (2) The Court of Appeals went on to hold however, over a dissent, that the plain view doctrine could not justify seizure of the shotgun. The defendant argued that the seizure could not be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. He also argued that the officer conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number. The court concluded that observing the shotgun in plain view did not provide the officer with authority to seize the weapon permanently where the State's evidence failed to establish that, based on the objective facts known to him at the time, the officer had probable cause to believe that the weapon was contraband or evidence of a crime. The officers were executing arrest warrants for misdemeanor offenses and were not aware that the defendant was a convicted felon. Before the seizure, the officer asked the other officers in the apartment if the defendant was a convicted felon, which they could not confirm. The court went on to find that the incriminating character of the shotgun became apparent only upon some further action by the officers, here, exposing its serial number and calling that number into the police department. Such action constitutes a search, separate and apart from the lawful objective of the entry. The search cannot be justified under the plain

view doctrine because the shotgun's incriminating nature was not immediately apparent. There was no evidence to indicate that the officer had probable cause to believe that the shotgun was stolen. It was only after the unlawful search that he had reason to believe it was evidence of a crime. The dissenting judge concluded that regardless of whether the officer knew that defendant was a felon or knew that the shotgun was stolen, it was immediately apparent that the shotgun was contraband. One of the regular conditions of the defendant's probation was that he possess no firearms. Thus, the dissenting judge concluded, under the regular terms and conditions of probation, the shotgun was contraband. The dissenting judge continued: "Given that the officers were serving a warrant for a probation violation, it was immediately apparent that the shotgun was contraband."

State v. Degraphenreed, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018)

In this case in which the defendant was convicted of drug trafficking and related charges, the court held that although the trial court erred by finding that a vehicle was within the curtilage of the defendant's residence, it properly found that officers had probable cause to search the vehicle. Officers conducted a drug investigation of the defendant, including surveillance of his residence. During the investigation, a confidential police informant arranged and engaged in a controlled purchase of heroin from the defendant's residence. A couple of months later the same confidential informant conducted another controlled purchase of heroin at the defendant's residence. Officers saw the confidential informant purchase the drugs from the defendant at the trunk of a black 1985 Mercury Grand Marquis parked on the other side of the road from the defendant's residence. Officers saw the vehicle regularly parked in this location during their investigation. As a result of the investigation, Officer Kimel got a search warrant for the defendant's residence; the warrant did not mention the Grand Marquis. When the officers arrived to execute the search warrant, Kimel saw the vehicle parked across the street. The back and sides of the residence were surrounded by a 7- or 8-foot-high chain link fence; a short wooden fence was in the front of the residence. Kimel asked another officer have his K-9 sniff the vehicle. The dog gave a positive alert for drugs. Kimel obtained the keys to the vehicle from the defendant's pocket and searched the car. In the trunk, officers found the defendant's wallet, guns, ammunition, a digital scale, and drugs. After the defendant unsuccessfully moved to suppress evidence obtained from the search of the vehicle, the defendant pled guilty to multiple drug charges, reserving the right to appeal the denial of his suppression motion. On appeal the defendant argued that the officers searched the vehicle without either a search warrant or probable cause.

The court began by holding that the trial court erred by concluding that the vehicle was within the curtilage of the residence while parked on the side of a public street opposite the home and outside the home's fenced-in area. The State had conceded this issue at oral argument.

The court went on to find however that the officers had probable cause to search the vehicle based on: the controlled purchases by the informant, during which times the Grand Marquis was always present; the officers' observation of a drug transaction taking place at the trunk of the Grand Marquis; the Grand Marquis parked on a public street near the defendant's residence during the officers' investigation; the defendant's possession of the keys to the Grand Marquis; and the K-9's positive alert outside of the vehicle for the potential presence of narcotics. It concluded: "Based upon the automobile being located on a public road exception to the Fourth Amendment warrant requirement, probable cause justified the officers in conducting the warrantless search of the Grand Marquis."

In so holding, the court declined to consider the defendant's argument, raised for the first time on appeal, that the reliability of the K-9 was not sufficiently established under *Florida v. Harris*, 568 U.S. 237 (2013), noting that a party may not assert on appeal a theory that was not raised at the trial court. It further noted that the K-9 sniff was not a search and the dog's positive alert provided support for the trial court's determination that officers had probable cause to conduct a warrantless search of the vehicle. The court did however note that officers had probable cause to search the vehicle even without the sniff.

Computerized Devices

Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (June 22, 2018)

The Government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements. Police officers arrested four men suspected of robbing Radio Shack and TMobile stores in Detroit. One of the men confessed to a series of robberies in Michigan and Ohio, identified 15 accomplices, and gave law enforcement some of their cell phone numbers. Based on this information, prosecutors applied for court orders under the Stored Communications Act (SCA) to obtain cell phone records for defendant Timothy Carpenter. The SCA permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day. Carpenter was charged with six counts of robbery and six counts of carrying a firearm during a federal crime of violence. He moved to suppress the cell-site data provided by the wireless carriers, arguing that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. At trial FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. Carpenter was convicted on all but one count. After an unsuccessful appeal to the Sixth Circuit, the Supreme Court agreed to take the case.

The Court began by noting that for many years Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." But, in *Katz v. United States*, 389 U.S. 347, 351 (1967), the Court established that "the Fourth Amendment protects people, not places," and expanded its conception of the Amendment to protect certain expectations of privacy as well. It explained: "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause." (quotations omitted). The Court noted that the digital data at issue in this case does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases. The first set of cases addresses a person's expectation of privacy in his physical location and movements, including *United States v. Knotts*, 460 U. S. 276 (1983) (monitoring a beeper signal in a container in an automobile on public highways did not violate the Fourth Amendment), and *United States v. Jones*, 565 U.S. 400 (2012) (the government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a search within the meaning of the Fourth Amendment). In the second set of cases, including *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller*, 425 U.S. 435 (1976), the Court applied the "third-party doctrine" and has drawn a line between what a person keeps to himself and what he shares with others, holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Against this review, the Court presented the issue as follows:

The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS monitoring

we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.

At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements

It held:

We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

The Court characterized its decision as "a narrow one," noting:

We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

Having found that the acquisition of Carpenter's CSLI was a search, the Court went on to conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. It noted that the showing required in the SCA "falls well short of the probable cause required for a warrant." Thus, an order issued under the SCA "is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." The Court continued, noting that while the Government will generally need a warrant to access CSLI, case-specific exceptions may support a warrantless search of an individual's cellsite records, such as exigent circumstances.

Criminal Offenses

Conspiracy

State v. Stimpson, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018) (per curiam)

In a per curiam opinion, the court affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 603 (2017). The defendant was charged with five indictments alleging five separate offenses of conspiracy to commit robbery arising from five separate incidents. The Court of Appeals held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss four of the charges. On appeal, the defendant argued that there was only one agreement and thus only one conspiracy charge was proper. The majority disagreed, concluding, in part, that the random nature and happenstance of the robberies did not indicate a one-time, pre-planned conspiracy. It noted that the victims and crimes committed arose at random and by pure opportunity.

Assaults

State v. Perry, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 395 (Aug. 22, 2018)

A defendant may not be convicted of assault with a deadly weapon under G.S. 14-32 and assault on a child under G.S. 14-33 based on the same incident. G.S. 14-33 states that a defendant shall be guilty of assault on a child unless another statute provides harsher punishment for the same conduct. Here, because the defendant was convicted and sentenced for assault with a deadly weapon for his assault on the same victim and since this conviction carries a harsher punishment than assault on a child, the conviction and sentence for assault on a child must be vacated.

Sexual Assaults & Related Offenses

State v. Gentle, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss a crime against nature charge. The defendant asserted that the State failed to offer substantial evidence that the offense was committed in a public place. The court noted that although *Lawrence v. Texas* limited the circumstances in which a defendant can be prosecuted for crime against nature, the State may prosecute conduct in which a minor is involved, involving nonconsensual or coercive sexual acts, occurring in a public place, or involving prostitution or solicitation. Here, the trial court instructed the jury on the public place theory. The defendant argued that the State failed to prove that the offense occurred in a public place because it occurred well outside of public view in a dark and wooded area. There is no requirement that the prohibited conduct occur in public view. Also, the victim's description of the dark, wooded area does not foreclose its status as a public place. She consistently testified that the offense occurred at the bottom of the stairs in a parking lot and other evidence supported that testimony. Thus there was sufficient evidence that the defendant unlawfully engaged in sexual acts in a public place.

State v. Wilson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

The evidence was sufficient to sustain the defendant's convictions for sex offense by a substitute parent. The case involved allegations of digital penetration. On appeal the defendant argued that the evidence was insufficient to establish that he penetrated the victim's genitals. The only evidence offered by the State that could establish penetration came from an officer who testified to the defendant's confession that he put his hands "in [the victim's] genital area", causing her to become sexually aroused. The officer recounted that the defendant talked about the victim being "wet." The court concluded that a rational juror, hearing this description of the defendant being "in" the victim's genital area and feeling that she was "wet" and sexually stimulated could reasonably infer that he at least penetrated her labia. Although the evidence does not conclusively establish penetration, a juror could reasonably infer that it occurred.

State v. Hoyle, ___ N.C. App. ___, ___ S.E.2d ___ (July 17, 2018), *temp. stay allowed*, ___ N.C. ___, 816 S.E.2d 516 (Aug. 3, 2018)

(1) Over a dissent the court held that the trial court committed prejudicial error with respect to its jury instructions on felony indecent exposure. This offense involves indecent exposure in the presence of a child. The defendant requested that the trial court add to the pattern instruction that "[t]he person need not actually see what is being exposed . . . *but that the person could have seen had they looked.*" The trial court declined to instruct the jury on the italicized language. That language however is a correct statement of law. Thus, it was error for the trial court not to give the instruction. Given the facts of this case (the defendant exposed himself to the child's mother while in his car while the child played on a nearby tree), it is likely that without the additional instruction defining presence, the jury considered only the child's proximity to the alleged exposure in determining whether it was in the presence of the child. Absent the requested instruction, there was no reason for the jury to consider whether the child could have seen the

alleged exposure had he looked. Thus, the defendant was prejudiced by the omission of the requested instruction.

(2) The trial court properly denied the defendant's motion to dismiss a charge of felony indecent exposure. This offense requires, in part, that the exposure occur in the presence of a person less than 16 years old. The defendant asserted that there was insufficient evidence of this element. The facts show that the defendant exposed himself while sitting in his vehicle. The child's mother had approached the window while the child was playing in a nearby tree. The court concluded that in order for an exposure to be "in the presence of" a child the child must be present during the exposure and have been able to see the exposure had the child looked. Here, the evidence was sufficient to withstand the motion to dismiss and allow the jury to decide whether the exposure was in the presence of the child.

Abuse

State v. Osborne, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The evidence was sufficient to support the defendant's convictions for misdemeanor child abuse. The charges asserted that the defendant used heroin in the presence of a child. The court rejected the defendant's argument that the State was required to prove, through chemical analysis, that a substance seized at the premises was in fact heroin. Here, the evidence showed that officers discovered the defendant unconscious from an apparent drug overdose; the defendant admitted to officers that she used heroin before becoming unconscious; and drug paraphernalia consistent with heroin use was found in the hotel room occupied by the defendant and her children. This evidence was sufficient to send the charges to the jury.

State v. Alonzo, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 21, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (Sept. 7, 2018)

Although the trial court erred with respect to its jury instructions for felony child abuse by sexual act under G.S. 14-318.4(a2) the error did not rise to the level of plain error. The trial court instructed the jury in accordance with the Pattern Jury Instruction, N.C.P.I.--Crim. 239.55B. That instruction defines a sexual act as "an immoral, improper or indecent act by [Defendant] upon [Sandy] for the purpose of arousing, gratifying sexual desire." On appeal the defendant argued that definition is not in accord with the court's precedent. The court agreed, noting that it held in *State v. Lark*, 198 N.C. App. 82 (2009), that the term "sexual act" is defined by G.S. 14-27.20(4) (formerly G.S. 14-27.1(4)) to include "cunnilingus, fellatio, anilingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." Although a later decision by the court declined to apply that definition to the charge at issue, the court found itself bound by its earlier decision that did so. It noted:

This . . . indicates the necessity of updating the Pattern Jury Instructions to be in accordance with our precedent. The Pattern Jury Instruction's definition of sexual act must conform with this Court's definition in *Lark*. (citation omitted)

The court went on to hold that the error did not rise to the level of plain error, finding that the defendant failed to demonstrate that the jury would have reached a different verdict had correct jury instructions been given, with the proper definition of the term sexual act. [Author's note: I will bring this decision to the attention of the Criminal Pattern Jury Committee]

Larceny

State v. Forte, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018), *temp. stay allowed*, ___ N.C. ___, 815 S.E.2d 382 (July 18, 2018)

The State conceded and the Court of Appeals held that the trial court erred by entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction. The court thus vacated seven of the convictions.

Obtaining Property by False Pretenses

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018)

The evidence was insufficient to support the defendant's conviction of obtaining property by false pretenses. The case arose out of false information submitted by the defendant in connection with his work as a bail bondsman. The indictment alleged that the thing of value obtained was a Professional Bail Bondsman's License. At the time of the alleged acts, the defendant already had a bail bondsman license. The State argued, however, that the defendant's false representations allowed him to retain his license, which--according to the State--constituted obtaining property. The court disagreed, concluding that retaining is not the same as obtaining. Among other things, it noted that the Department of Insurance has different processes and requirements for obtaining a bail bondsman license and renewing such a license.

Embezzlement

State v. Grandy, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The evidence was sufficient to sustain the defendant's convictions for embezzlement under G.S. 14-90. The defendant, a director of accounting for a Foundation, transferred over \$400,000 from the Foundation's account into her personal account. The defendant asserted that she was not entrusted with the funds in the course of her employment. To access the funds, her employer's bank required the defendant to use both her own security device, which they referred to as a "key fob," along with her supervisor's key fob. Because the bank issued the key fobs to each employee individually, the defendant asserted that she was not entrusted with the funds. Here however the defendant's employer entrusted her with both key fobs, even if the bank intended otherwise. She had lawful possession or control of both her own key fob and her supervisor's key fob when she obtained the funds. Although the bank intended for two employees to participate in each transaction as a security measure, the Foundation did not require its employees to use the key fobs as the bank intended. Instead, it entrusted the entire process to the defendant.

Computer Fraud

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018)

The evidence was sufficient to convict the defendant of unlawfully accessing a government computer in violation of G.S. 14-454.1. The case arose out of false information submitted by the defendant in connection with his work as a bail bondsman. On appeal the defendant first argued that the evidence did not establish that his actions were willful or without authorization. Here, although the defendant had authorization to use the computer system, the State presented evidence that he exceeded that authorization by inputting fraudulent information and that his actions were willful.

The court went on to reject the defendant's argument that there was insufficient evidence that he accessed a government computer. The defendant's unique username and password were used to access the system and upload his monthly reports. Additionally his email was used to submit his reports. Thus, even if the court were to accept the defendant's argument that he only transmitted information that was then uploaded by government personnel, the statute covers not only accessing but also causing a government computer to be accessed.

Finally, the court rejected the defendant’s argument that the statute was not intended to cover mere submission of information and that it required the defendant to have some actual interaction with the government computer. The court noted that the plain language of the statute includes accessing or causing a government computer to be accessed, “directly or indirectly.”

Insurance Fraud

State v. Ferrer, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

Because the State presented no evidence that the defendant made fraudulent representations in support of an insurance claim to The Hartford Insurance Company as alleged by the indictment, the trial court erred by denying the defendant’s motion to dismiss this charge. The evidence at trial showed only that the defendant made a statement in connection with a separate insurance claim to Nationwide Insurance. No statement from the defendant to Hartford was in evidence.

Disorderly Conduct & RDO

In re T.T.E., ___ N.C. App. ___, ___ S.E.2d ___ (July 17, 2018), *temp. stay allowed*, ___ N.C. ___, 816 S.E.2d 515 (Aug. 2, 2018)

There was insufficient evidence to support an adjudication of delinquency for disorderly conduct and resisting a public officer. A school resource officer testified that he saw the juvenile throw a chair in the cafeteria. No one was hit with the chair, and no one was nearby who could have been hit by it. After throwing the chair, the juvenile ran out of the cafeteria. The officer followed and without calling out to the juvenile, grabbed him from behind. The juvenile initially cursed when the officer caught him and then told the officer that he was playing with his brother. (1) Over a dissent, the court held that the evidence was insufficient to adjudicate the juvenile delinquent based on disorderly conduct under G.S. 14-288.4(a)(1). Under the statute the State must present evidence that the juvenile engaged in “fighting,” “other violent conduct,” or “conduct creating the threat of imminent fighting or other violence.” The court found that it failed to do that, explaining:

The evidence was not sufficient to show that the juvenile fought, engaged in violent conduct, or created an imminent risk of fighting or other violence. Although there were other students in the cafeteria – a very large room – when the juvenile threw a chair, no other person was nearby, nor did the chair hit a table or another chair or anything else. Juvenile then ran out of the cafeteria. This is not “violent conduct or . . . conduct creating the threat of imminent fighting or other violence.” No one was hurt or threatened during the event and juvenile did not escalate the situation by yelling, throwing other things, raising fists, or other such conduct that along with the throwing of the chair could be construed to indicate escalating violent behavior. Throwing a single chair with no other person nearby and without attempting to hit another person and without hitting even any other item in the cafeteria is not disorderly conduct . . . (citations omitted)

(2) There was insufficient evidence of resisting an officer. The officer testified that he never told the juvenile to stop before he grabbed him. In fact he testified that he “kind of, snuck up on him” and then grabbed him. On these facts the juvenile did not know or have reasonable grounds to believe that the victim was a public officer until after the officer stopped him. There is also no evidence that the juvenile resisted, delayed, or obstructed the officer in discharging or attempting to discharge a duty once he realized that an officer had grabbed him. He did not hit, fight, or physically engage with the officer. While the State focused on the fact that the juvenile yelled “no” and cursed when the officer grabbed him, his language does not rise to the level of resisting an officer, particularly as the statements appear to have been made when he was grabbed and before he knew who was grabbing him. Additionally, saying “no” and cursing does not show that the juvenile acted willfully and unlawfully, without justification or excuse. Most people would have a similar reaction grabbed from behind by an unknown person.

Felon in Possession

State v. Mercer, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 209 (Aug. 21, 2018)

In this possession of a firearm by a felon case, the trial court erred by denying the defendant's request for a jury instruction on the defense of justification. The charges arose from an altercation during which the defendant, a convicted felon possessed a gun. The defendant lived near the home of Dazoveen Mingo. The day before the incident in question, the defendant's cousin Wardell accused Dazoveen of stealing his phone and the two nearly fought. The following day, Wardell again accused Dazoveen of stealing his phone and a fight occurred, which was broken up by the defendant's mother. Thereafter Dazoveen and a group of family members walked to the defendant's home, where Wardell was visiting, with the intention of fighting. An altercation occurred resulting in the charges at issue. The participants and witnesses provided different versions of the event at trial. According to the defendant, he knew he was a convicted felon and was not allowed to possess a firearm, but did so when confronted with a group of people with guns. During the charge conference the defendant requested a jury instruction on justification, which the trial court denied. During deliberations the jury sent the trial court a note asking whether or not a defendant can be justified in possessing a firearm even if he is a felon. The trial court responded by rereading and recharging its instruction on reasonable doubt. The defendant was found guilty and appealed, arguing that the trial court erred by refusing his request for an instruction on justification. The court agreed. Under the test established in *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000), to establish justification for this offense, a defendant must show four elements: that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. Here each element of the test was satisfied. Having concluded that the defendant was entitled to a jury instruction on justification, the court went on to find that he was prejudiced by this error.

Falsifying Bail Bond Report

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018)

The State presented sufficient evidence the defendant violated G.S. 58-71-165. The case arose out of false information submitted by the defendant in connection with his work as a bail bondsman. On appeal the defendant argued that information was missing from his reports due to clerical errors committed by his staff. The court disagreed, concluding that the State presented substantial evidence to withstand a motion to dismiss this charge. Specifically, false reports, that the defendant signed the attestation clause certifying that he submitted true information, and that the reports were filed via the government system. Whether the omissions were fraud or clerical errors was for the jury to decide.

Drug Offenses

Maintaining a Dwelling, Etc.

State v. Rogers, ___ N.C. ___, 817 S.E.2d 150 (Aug. 17, 2018)

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 91 (2017), the court reversed, holding that the evidence was sufficient to support a conviction of maintaining a vehicle for the purpose of keeping controlled substances in violation of G.S. 90-108(a)(7). The issues before the court were whether the defendant kept or maintained the vehicle and, if so, whether there was substantial evidence that the vehicle was used for the keeping of controlled substances. Considering the first question, the court found that the word "keep" with respect to "keeping or maintaining" "refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use." Here, officers conducted surveillance for about an hour and a half before

searching the vehicle and the defendant's hotel room. During that surveillance, they saw the defendant arrive at the hotel in the vehicle, stay in his room for a period of time, and then leave the vehicle. The defendant was the only person seen using the car. Additionally, a service receipt bearing the defendant's name was found inside the vehicle and was dated about 2½ months before the defendant's arrest. From these facts a reasonable jury could conclude that the defendant had possessed the car for at least 2½ months. This was sufficient evidence that the defendant kept the vehicle.

The court then turned to the second issue: whether there was sufficient evidence that the defendant used the vehicle for the keeping of illegal drugs. The court determined that in this context the word "keeps" refers to storing objects in the vehicle. The court found that here, there was substantial evidence that the defendant was using the vehicle to store crack cocaine, not merely to transport it, noting, among other things, the fact that the drugs were found in a hidden compartment and evidence suggesting that the defendant was involved in selling drugs. The court emphasized however that the statute does not create a separate crime simply because controlled substances are temporarily in a vehicle. It clarified:

In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the "keeping" element of subsection 90-108(a)(7). Rather, courts must determine whether the defendant was using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry "on the *use*, not the contents, of the vehicle." (citation omitted)

The court went on to disavow its statement in *State v. Mitchell*, 336 N.C. 22 (1994), that keeping of drugs means "not just possession, but possession that occurs over a duration of time." The court concluded that the statute does not require that the drugs be kept for a duration of time. Rather, "the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place 'for the keeping . . . of' drugs is whether the defendant was using that vehicle, building, or other place for the storing of drugs." The court continued:

So, for instance, when the evidence indicates that a defendant has possessed a car for at least a short period of time, but that he had just begun storing drugs inside his car at the time of his arrest, that defendant has still violated subsection 90-108(a)(7)—even if, arguably, he has not stored the drugs for any appreciable "duration of time." The critical question is *whether* a defendant's car is used to store drugs, not *how long* the defendant's car has been used to store drugs for. As a result, we reject any notion that subsection 90-108(a)(7) requires that a car kept or maintained by a defendant be used to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7). But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7). The evidence and all reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," that the drugs are also being stored there. To the extent that *Mitchell's* "duration of time" requirement conflicts with the text of subsection 90-108(a)(7), therefore, this aspect of *Mitchell* is disavowed. (citation omitted)

State v. Alvarez, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

The court held, over a dissent, that the evidence was sufficient to support the defendant's conviction of maintaining a vehicle for keeping or selling controlled substances. The defendant argued that the State presented insufficient evidence that he kept or maintained the vehicle over a duration of time. The court disagreed. The determination of whether a vehicle is used for keeping or selling drugs depends on the totality of the circumstances and a variety of factors are relevant, including occupancy of the property, possession over time, the presence of large amounts of cash or paraphernalia, and the defendant's admission to selling controlled substances. Here, the totality of the circumstances supports a reasonable inference that the defendant knowingly kept or maintained the vehicle for the purposes of keeping or selling cocaine. Although the vehicle was registered in his wife's name, the defendant described it as his

truck. He admitted that it was his work vehicle, that no one else used it, and that he built the wooden drawers and compartments located in the back of the vehicle. When searching the vehicle, officers discovered a hidden compartment in the truck bed floor containing 1 kg of cocaine. The cocaine was packaged to evade canine detection. The defendant does not challenge the sufficiency of the evidence supporting his related trafficking convictions arising from the same incident. Additionally, evidence shows that the defendant knowingly participated in a drug transaction in a Walmart parking lot immediately before his arrest and that this was not an isolated incident. Specifically, evidence indicated that if the transaction worked out, further drug sales could occur in the future. The court concluded: [T]he evidence showed, generally, that defendant exercised regular and continuous control over the truck; that he constructed and knew about the false-bottomed compartment in which one kilogram of cocaine— an amount consistent with trafficking, not personal use— was discovered . . . ; that he was aware that cocaine was hidden in his truck and willingly participated in the transaction in the Walmart parking lot; and that he held himself out as responsible for the ongoing distribution of drugs like those discovered in the truck.

Possession

State v. Steele, ___ N.C. App. ___, 817 S.E.2d 487 (July 3, 2018)

The evidence was sufficient to support the defendant’s conviction of trafficking in cocaine by possession. At issue was whether the defendant constructively possessed the cocaine, found in the drawer of a bedroom dresser. Among other things, the defendant lived with Cunningham at the home. The two shared the bedroom, which also contained drug paraphernalia and illegal contraband, and was padlocked from the outside to prevent entry. The defendant and Cunningham had the only keys to the padlock. Officers found more than \$400 of cash on the nightstand and a box near the nightstand contained latex gloves, a pair of goggles, and 2 boxes of plastic baggies, which the jury could infer were used to manufacture, package, or otherwise distribute crack cocaine. A reasonable juror could infer from Cunningham’s statements that she did not put the cocaine in the dresser. Moreover she stated that the cocaine did not belong to her. The jury could reasonably infer that the defendant, the only other individual with access to the bedroom, was the person who had control and dominion over the cocaine. Additionally, the defendant’s knowledge of the weight of cocaine found in the bedroom, as demonstrated by his conversation with another person, is another incriminating circumstance from which the jury could find constructive possession of cocaine.

Ultimate User Exception

State v. Bice, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

The trial court did not err by failing to instruct the jury on an exemption to a drug trafficking charge. The defendant argued that he was exempt from prosecution as an “ultimate user” pursuant to G.S. 90-101(c). The statute defines an ultimate user as a person who lawfully possesses a controlled substance for his own use, or for the use of a member of his household. The defendant was found in possession of 54 dosage units of oxycodone weighing 6.89 grams. The defendant argued that the trial court erred by not instructing the jury sua sponte on the ultimate user exception. The court found however that the record lacked substantial evidence by which a jury instruction on this exemption would have been required. The evidence showed that the defendant did not lawfully possess his father’s oxycodone pills solely for his father’s prescribed use, as required to fall within the ultimate user exemption. Rather, the record reflects overwhelming evidence that the defendant possessed his father’s oxycodone for his own purpose of unlawfully selling the pills. Although the defendant presented evidence that the oxycodone was prescribed to his father, that the defendant drove his father to and from appointments related to his care, and that the defendant lived with and cared for his father, “no reasonable person could conclude that Defendant was in lawful possession of his father’s oxycodone at the time of his arrest.” Among other things the defendant gave a written confession admitting that he was selling the pills to make money.

Because the defendant failed to present substantial evidence that he possessed the pills solely for his father's use, he was not entitled to the instruction.

Defenses

Self-Defense

State v. Ayers, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 12, 2018)

Although the trial court properly gave a self-defense instruction in this shooting into an occupied vehicle and injury to personal property case, it erred by failing to give a no duty to retreat instruction. Viewed in the light most favorable to the defendant, the evidence showed that the defendant was driving at night in wet conditions with a potential for ice, along a meandering two-lane highway with few street lights. The victim Parker came up behind the defendant and persistently tailgated the defendant's vehicle with bright lights, while other traffic was traveling in front of the defendant. Although Parker had an opportunity to pass the defendant, he pulled up alongside the defendant. When the defendant slowed down, Parker also slowed and "paced" him, rather than passing, and veered closer towards the defendant's vehicle. Parker moved his vehicle into the defendant's lane and was driving so close to the defendant's vehicle, that the defendant could have reached out from his driver's side window and touched Parker's tire. The passenger-side tires of the defendant's vehicle were forced off the road onto the muddy shoulder. Fearing that he would lose control of his vehicle and suffer injury, the defendant shot at Parker's tire to disable his vehicle. The trial court gave a self-defense instruction without language about duty or lack of duty to retreat. The defendant was found guilty and appealed.

The court first held that the trial court properly instructed on self-defense, even though there was no intent to kill in this case. It noted that although the state Supreme Court has held that self-defense is not available where the defendant claims that the victim's death was an accident, those cases were distinguishable and not controlling where, here, it is undisputed that the defendant intended to "strike the blow"—to shoot Parker's tire. The court explained that the defendant was not required to show that he intended to kill Parker; he only needed to show the intent to strike the blow by shooting at Parker's vehicle.

Next, the court concluded that the trial court committed prejudicial error by denying the defendant's request for an instruction on no duty to retreat. The court reasoned: "Defendant was present in a location he lawfully had a right to be: driving inside his vehicle upon a public highway. Defendant was under no legal obligation to stop, pull off the road, veer from his lane of travel, or to engage his brakes and risk endangering himself."

State v. Buchanan, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 7, 2018)

In this assault case, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the charges due to the insufficiency of the evidence. The defendant asserted that the State's own evidence showed that the defendant acted in self-defense after he was violently assaulted. The defendant argued that because the State's evidence tended only to exculpate the defendant, his motion to dismiss should have been granted. The court found that the evidence did not tend only to exculpate the defendant. Rather, there was substantial evidence to contradict the defendant's claim of self-defense.

State v. Kuhns, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

In this voluntary manslaughter case, the trial court committed prejudicial error by denying the defendant's request for a jury instruction on defense of habitation. The trial court denied the defendant's requested instruction, finding no evidence that the victim was "trying to break in." According to the trial court, the defendant's evidence demonstrated that he was attempting to prevent injury to himself, not trying to prevent someone coming into his curtilage or home. The trial court's ruling was erroneous. As explained in the "Note Well" in the jury instruction, the use of force is justified when the defendant is acting to prevent a forcible entry into the defendant's home or to terminate an intruder's unlawful entry into the

home, a term that includes the curtilage. Here, the victim was standing within the curtilage of the defendant's property when the defendant fired the fatal shot. The court rejected the State's argument that the defendant was not entitled to the instruction because the victim never came onto the defendant's porch and never tried to open the door to the defendant's trailer, finding that it "defies the plain language of the statute." Despite numerous requests to leave and multiple orders from law enforcement, the victim continued to return to the curtilage of the defendant's property while repeatedly threatening bodily harm. Thus, the trial court erred by denying the defendant's request for the jury instruction, and this error required reversal.

Statute of Limitations

State v. Curtis, ___ N.C. ___, 817 S.E.2d 187 (Aug. 17, 2018)

On discretionary review of a unanimous, unpublished decision below, the court reversed, ruling on the "Turner issue" presented in this case and holding that the misdemeanor DWI prosecution was not barred by the two-year statute of limitations in G.S. 15-1. On 1 August 2012, the defendant was cited for DWI. A magistrate's order was issued on 9 August 2012. On 21 April 2015, the defendant objected to trial on the citation and moved for a statement of charges and to dismiss. The defendant argued that because she was filing a pretrial objection to trial on a citation, the State typically would be required to file a statement of charges. However, she further argued that because G.S. 15-1 establishes a two-year statute of limitations for misdemeanors, the charges must be dismissed. In a Preliminary Indication, the District Court found a statute of limitations bar and dismissed the charges. The State appealed to Superior Court, arguing that the magistrate's order tolled the statute of limitations. The Superior Court affirmed the District Court's Preliminary Indication and the State appealed to the Court of Appeals. That court found the procedural and legal issues identical to those in *State v. Turner*, ___ N.C. App. ___, 793 S.E.2d 287 (2016), adopted the reasoning of that decision, and held that the District Court did not err by granting the motion to dismiss. The State again sought review, arguing that any criminal pleading that establishes jurisdiction in the district court tolls the two-year statute of limitations. The Supreme Court agreed. The Supreme Court found the citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the District Court to try the defendant for the charged misdemeanor. The court went on to hold that the citation tolled the statute of limitations. The court found itself unable to "conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations."

Post-Conviction

Motions for Appropriate Relief

State v. Hyman, ___ N.C. ___, 817 S.E.2d 157 (Aug. 17, 2018)

(1) On review of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 308 (2017), in this murder case, the court affirmed the holding of the Court of Appeals that the defendant's ineffective assistance of counsel (IAC) claim was not procedurally barred under G.S. 15A-1419(a)(3) (a claim asserted in a MAR must be denied if, upon a previous appeal, the defendant was in a position to adequately raise the ground or issue underlying the present motion but did not do so). To be subject to the G.S. 15A-1419(a)(3) procedural default bar, the direct appeal record must contain sufficient information to permit the reviewing court to make all the factual and legal determinations necessary to allow a proper resolution of the claim. Here, the defendant was not in a position to adequately raise the IAC claim on direct appeal. A *Strickland* IAC claim requires a defendant to show both deficient performance and prejudice. The nature of the defendant's claim would have required him to establish that his attorney was in a position to provide favorable testimony on his behalf, that her failure to withdraw from representing the defendant in order to testify on his behalf constituted deficient performance, and if she had acted as he asserts she should have, there is a reasonable probability that he would not have been found guilty of

murder. Here, the defendant would have been unable to make a viable showing based on the evidentiary record developed at trial.

(2) Reversing the Court of Appeals, the court found that the record contains adequate evidentiary support for the trial court's findings that the factual basis for the defendant's IAC claim did not exist. The defendant's IAC claim alleged that his lawyer should have withdrawn from representing him at trial and testified on his behalf with respect to a conversation that she had with a witness. The trial court found as a fact that the defendant presented no credible evidence during the MAR hearing that the alleged conversation between defense counsel and the witness ever took place. After reviewing the evidence presented before the trial court, the court found that the record contains sufficient evidence to support the trial court's finding of fact that the alleged conversation never occurred.

DNA Testing

State v. Sayre, ___ N.C. ___, ___ S.E.2d ___ (Sept. 21, 2018) (per curiam)

On appeal from the unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 699 (2017), the court affirmed per curiam. In the opinion below, the Court of Appeals affirmed the trial court's order denying the defendant's pro se motion to locate and preserve evidence and motion for post-conviction DNA testing. The defendant pleaded guilty to multiple counts of indecent liberties, 2 counts of second-degree sexual offense and 2 counts of felony child abuse. He did not appeal. Nearly 2 years later he filed a pro se motion to locate and preserve evidence and motion for post-conviction DNA testing. The motion listed 12 pieces of physical evidence that the defendant alleged needed to be tested and preserved because they would prove that he was not the perpetrator. The trial court denied the defendant's motion concluding that he had not made a showing that DNA testing may be material to his claim of wrongful conviction. As a result, the trial court declined to either appoint counsel or conduct an evidentiary hearing on the motion. The defendant appealed. The Court of Appeals concluded that the defendant's burden of showing materiality under the post-conviction DNA statute requires more than a conclusory statement that the ability to conduct the testing is material to the defense. Rather, the defendant must provide specific reasons why the requested test would be significantly more accurate or probative of the identity of the perpetrator or accomplice or that there is a reasonable probability of contradicting previous test results. Here, the defendant's bare assertion that the DNA testing would prove he is not the perpetrator is not sufficiently specific to establish that the requested DNA testing would be material to his defense. Accordingly, the trial court did not err by summarily denying his request for post-conviction DNA testing and court-appointed counsel to prosecute the motion.

State v. Tilghman, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018)

(1) The trial court did not err by denying the defendant's motion for post-conviction DNA testing without appointing counsel. The statute requires appointment of counsel only on a showing that the DNA testing may be material to the defendant's claim of wrongful conviction. The burden of establishing materiality is on the defendant. To meet this burden, the defendant must do more than make a conclusory statement that the ability to conduct the requested testing is material to the defense. Where—as here--the case involves a guilty plea, the defendant has a heightened burden to show materiality. Here, the defendant's justifications for DNA testing are merely conclusory statements. In a footnote, the court noted that the trial court did not address materiality and that "a specific finding or conclusion of materiality" by the trial court "would be helpful to our appellate review."

(2) The court rejected the defendant's argument that the trial court erred by summarily denying his motion for a complete inventory of evidence under G.S. 15A-268. That statute provides that upon written request by the defendant the custodial agency shall prepare an inventory of biological evidence relevant to the case that is in the custodial agency's custody. However, a request for location and preservation of evidence, as occurred here, is not a request for an inventory of evidence. Thus, the trial court did not err by denying the defendant's motion for post-conviction DNA testing prior to obtaining an inventory of biological evidence which the defendant never requested. Even if the defendant had requested an

inventory of biological evidence from the trial court, it would have been improper for the trial court to grant such a request where there was no evidence that the defendant had requested the inventory from the custodial agency.

(3) The court rejected the defendant's argument that the trial court erred by summarily denying his motion for an inventory of evidence under G.S. 15A-269. That statute provides that upon receipt of a motion for post-conviction DNA testing the custodial agency shall inventory the evidence and provide an inventory list to, among others, the defendant. Under the statute, a defendant need not make a request for an inventory of physical evidence. Instead, the custodial agency's obligation to do the inventory is triggered upon receipt of a motion for post-conviction DNA testing. Here, the record lacks proof that either the defendant or the trial court served the custodial agency with the motion for inventory. Assuming *arguendo* that the trial court had the burden to do so, any error that occurred is harmless because the defendant failed to meet his burden of showing materiality.

Judicial Administration Contempt

State v. Baker, ___ N.C. App. ___, ___ S.E.2d ___ (July 3, 2018)

The trial court's findings of fact support its conclusion that the defendant's conduct was willful. The trial court found, in part, that the defendant's willful behavior committed during court was intended to interrupt the proceedings and resulted in the witness ceasing testimony and challenging the defendant's action on the stand in front of the jury. The court held that this finding of fact supported the trial court's conclusion that the defendant willfully interrupted the proceedings.