Criminal Case Update

Covering significant cases decided June 7, 2017 – Oct. 3, 2017

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Contents

Criminal Procedure

Bond Forfeiture

State v. Chestnut, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The trial court erred by granting a motion to set aside a bond forfeiture. When the defendant failed to appear in district court, the trial court issued a bond forfeiture notice. The bail agent filed a motion to set aside the forfeiture. However, on the preprinted form used for such motions the bail agent did not check any of the seven exclusive reasons under the statute, G.S. 15A-544.5, for setting aside a bond forfeiture. In addition to the motion, the bail agent submitted a letter stating that it had "been putting forth efforts to locate [the defendant]" but had been unsuccessful in doing so despite spending "$150 checking leads as to where and how" to locate the defendant. The Board of Education objected to the motion. The trial court allowed the surety's motion to set aside. On appeal, the court held that the trial court erred in allowing the motion to set aside because the surety failed to demonstrate a legally sufficient reason to set aside under the statute. No box was checked on the relevant form and the reasons asserted in the letter attached to the motion did not fall within any of the seven exclusive statutory reasons for setting aside a forfeiture.

State v. Hinnant, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). Over a dissent, the court held that the trial court erred by allowing a motion to set aside a bond forfeiture filed by the bail agent on behalf of the surety. Because the record establishes that at the time the surety posted the bond, it had actual notice that the defendant previously had failed to appear in the same matter the trial court was prohibited by statute from setting aside the bond forfeiture. When the defendant failed to appear in district court an order for arrest was issued, indicating that this was the defendant's second or subsequent failure to appear on the charges. The defendant was served with the order for arrest and released on a secured bond posted by the bail agent in the amount of $16,000. The release order also explicitly indicated that this was the defendant's second or subsequent failure to appear in the case. When the defendant again failed to appear, the trial court ordered the bond forfeited. A motion to set aside asserted that the defendant had been surrendered by a surety on the bail bond. At the hearing on the motion, the bail agent presented a letter from the sheriff's office stating that the defendant had been surrendered. The trial court allowed the motion to set aside. The Board of Education appealed, arguing that the trial court was statutorily barred from setting aside the bond forfeiture and that no competent evidence

supported the trial court's decision to set aside. The Court of Appeals agreed, noting in part that while the statute allows a forfeiture to be set aside where the defendant has been surrendered by a surety, it explicitly prohibits setting aside a bond forfeiture "*for any reason in any case* in which the surety or the bail agent had actual notice before executing a bail bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed." G.S. 15A-544.5(f). Here, both the order for arrest and the release order expressly indicated the defendant's second or subsequent failure to appear on the charges. Thus, the bail agent had actual notice and the trial court lacked authority to set aside the forfeiture for any reason.

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The trial court lacked statutory authority to reduce the bond forfeiture amount. After the defendant failed to appear, the clerk of court issued a bond forfeiture notice in the amount of $2,000. A bail agent filed a motion to set aside the bond forfeiture. However, the motion de did not indicate the reason for setting aside the forfeiture. A document attached to the motion indicated that the defendant was incarcerated. The Board of Education objected to the motion to set aside. Following a hearing, the trial court denied the surety's motion to set aside, finding that it had not established one of the statutory reasons for setting aside the forfeiture. Despite denying the motion, the trial court verbally reduced the amount of the bond forfeiture from $2,000 to $300. The Board of Education appealed, arguing that the trial court lacked authority to reduce the amount of the bond forfeiture after denying the motion to set aside. On appeal, the surety did not argue that the motion to set aside should have been allowed; rather, it asserted that the trial court had discretion to reduce the bond forfeiture amount. The court concluded that the trial court did not have authority under G.S. 15A-544.5 to reduce the amount owed by the surety. The court reasoned that under G.S. 15A-544.5, the trial court may only grant relief from the forfeiture for the reasons listed in the statute, and the only relief it may grant is the setting aside of the forfeiture. Here, having denied the motion to set aside, the trial court had no authority to grant partial relief by reducing the amount owed on the bond.

State v. Cobb, ___ N.C. App. ___, 803 S.E.2d 176 (July 5, 2017). Over a dissent, the court held that where a motion to set aside the forfeiture of an appearance bond did not contain the required documentation to support a ground in G.S. 15A-544.5, the trial court lacked statutory authority to set aside the forfeiture. When the defendant failed to appear on a $30,000 bond, the trial judge ordered that the bond be forfeited. A bail agent for the surety moved to set aside the forfeiture, asserting that the defendant had been surrendered. Specifically, the motion stated that the "defendant has been surrendered by a surety on the bail bond as provided by G.S. 15A-540, as evidenced by the attached 'Surrender of Defendant By Surety' (AOC-CR-214)" (ground (b)(3) under G.S. 15A-544.5). However, no AOC form was attached to the motion. Instead, an ACIS printout was attached. The printout pertained to a traffic offense but included no reference to the case in which the bond was forfeited; nor did the printout indicate that the defendant had been surrendered. The information in the ACIS printout does not meet the requirement of a sheriff's receipt contemplated by the statute.

Counsel Issues

Fees, for Counsel & Appointment

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The court agreed with the defendant that a civil judgment imposing fees against him must be vacated because neither the defense counsel's total attorney fee amount nor the appointment fee were discussed in open court with the defendant. The court noted that on remand the State may apply for judgment in accordance with G.S. 7A-455, provided that the defendant is given notice and an opportunity to be heard regarding the total amount of hours and fees claimed for court-appointed counsel. Similarly, although the $60 appointment fee was vacated, that was without prejudice to the State again seeking an appointment fee on remand.

Ineffective Assistance of Counsel

Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958 (June 23, 2017). By wrongly advising the defendant that a guilty plea to a drug charge would not result in deportation, counsel rendered ineffective assistance of counsel (IAC) in connection with the defendant's plea. After he was charged with possessing ecstasy with intent to distribute, the defendant feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him that the Government would not deport him if he pleaded guilty. As a result the defendant, who had no real defense to the charge, accepted a plea that carried a lesser prison sentence than he would have faced at trial. The defendant's attorney was wrong: The conviction meant that the defendant was subject to mandatory deportation. Before the Court, the Government conceded that the defendant received objectively unreasonable representation when counsel assured him that he would not be deported if he pleaded guilty. The question before the Court was whether the defendant could show prejudice as a result. The Court noted that when an IAC claim involves a claim of attorney error during the course of a legal proceeding—for example, that counsel failed to raise an objection at trial or to present an argument on appeal—a defendant raising such a claim can demonstrate prejudice by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This case, however was different. The Court explained:

> But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."
>
> We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." As we held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (citations omitted).

The Court rejected the dissent's argument that the defendant must also show that he would have been better off going to trial. It conceded "[t]hat is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession." The Court found that the error at issue was different. Here, the defendant "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected [the defendant's] understanding of the consequences of pleading guilty." And here, the defendant argues that he never would have accepted a guilty plea had he known that he would be deported as a result; the defendant insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. Considering this claim, the Court rejected the Government's request for a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Instead it held: "In the unusual circumstances of this case, we conclude that [the defendant] has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation."

State v. Todd, ___ N.C. ___, 799 S.E.2d 834 (June 9, 2017). The Court of Appeals erred by holding that the defendant received ineffective assistance of counsel when appellate counsel failed to challenge the sufficiency of the evidence supporting the defendant's armed robbery conviction. Before the Supreme Court, the State argued that appellate counsel made a strategic decision not to challenge the sufficiency of the evidence. However, because the lower courts did not determine whether there was a strategic reason for counsel to refrain from addressing the sufficiency of the evidence, the record was insufficient to determine the merits of the ineffective assistance claim. The court reversed and remanded so that the trial court could fully address whether counsel made a strategic decision not to raise the sufficiency of the evidence argument, if such a decision was reasonable and whether the defendant suffered prejudice.

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The court rejected the defendant's argument that trial counsel was deficient by failing to give notice to the State of the defendant's intention to offer an alibi witness. The defendant had argued that trial counsel's failure was a violation of the discovery rules and resulted in the trial court declining to give an alibi jury instruction. The court found however that the trial court's decision declining to give an alibi instruction was not due to ineffective assistance but rather to the trial court's error. A defendant only is required to give notice of an alibi witness after being ordered to do so by the trial court. Here, no such order was entered. Therefore, counsel was not deficient in failing to disclose the defendant's intent to offer an alibi witness. The court went on to conclude that even if it were to find that counsel's performance was deficient, the defendant failed to show prejudice. Although the trial court declined to give an instruction on alibi, the alibi evidence--the defendant's own testimony that he was elsewhere with his girlfriend at the time of the offense--was heard and considered by the jury.

State v. Perry, ___ N.C. App. ____, 802 S.E.2d 566 (June 20, 2017). Counsel was not ineffective by failing to allege a Fourth Amendment violation in a motion to suppress a warrantless blood draw. Here, no prejudice occurred under the *Strickland* test because there was sufficient evidence

for a conviction based driving while under the influence of an impairing substance prong of DWI such that BAC evidence for the .08 prong was not required.

Discovery Issues

Turner v. United States, 582 U.S. ___, 137 S. Ct. 1885 (June 22, 2017). Evidence withheld by the Government was not material under *Brady.* In 1985, a group of defendants were tried together in the Superior Court for the District of Columbia for the kidnaping, armed robbery, and murder of Catherine Fuller. Long after their convictions became final, it emerged that the Government possessed certain evidence that it failed to disclose to the defense. The only question before the Court was whether the withheld evidence was "material" under *Brady*. The Court held it was not, finding that the withheld evidence as "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." [Author's note: For a more detailed discussion of the withheld evidence and the Court's reasoning, see my colleague's blog post here].

State v. Broyhill, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this murder case, the trial court did not err by excluding the testimony of a defense psychiatrist on the basis that the witness's proffered testimony constituted expert opinion testimony that had not been disclosed pursuant to a reciprocal discovery order. The witness, Dr. Badri Hamra, was a psychiatrist with the North Carolina Department of Public Safety who treated the defendant fifteen months after his arrest. On appeal, the defendant argued that Hamra was proffered as a fact witness regarding the issue of premeditation and deliberation. Defendant further argued that as a fact witness, she was outside of the scope of the reciprocal discovery order, which applied only to expert witnesses. The court agreed with the trial court that Hamra intended to offer expert opinion testimony. Hamra testified that the defendant had a psychiatric condition for which the doctor had prescribed medication. He clarified that his decision to prescribe medication was based not merely on his review of the defendant's medical history but on his own evaluation of the defendant. Finally he confirmed he would only have prescribed medication for a legitimate medical reason, dismissing the notion that he would write a prescription simply because the defendant asked him to do so. His testimony was tantamount to a diagnosis, which constitutes expert testimony.

State v. Bacon, ___ N.C. App. ___, 803 S.E.2d 402 (July 18, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 460 (Aug. 4, 2017). In this felony larceny case, the trial court did not abuse its discretion by excluding the defendant's witness as a sanction for the defendant's violation of discovery rules, specifically, the defendant's failure to timely file notice that he intended to call the witness as an alibi witness under G.S. 15A-905(c)(1). A voir dire of the witness revealed that his testimony was vague and certain inconsistencies in it made it unreliable and thus of minimal value. The court concluded: "Considering the materiality of [the witness's] proposed testimony, which we find minimal, and the totality of the circumstances surrounding Defendant's failure to comply with his discovery obligations, we cannot find that the trial court abused its discretion in excluding this testimony." The court went on to hold that even if it was error to exclude this testimony, the defendant failed to show prejudice.

Experts, Provision of & Funding for

McWilliams v. Dunn, 582 U.S. ___, 137 S. Ct. 1790 (June 19, 2017). The Court held, in this federal habeas case, that the Alabama courts' refusal to provide a capital murder defendant with expert mental health assistance was contrary to, or involved an unreasonable application of, clearly established federal law. After the jury recommended that the defendant receive the death penalty, the trial court scheduled a judicial sentencing hearing for about six weeks later. It also granted a defense motion for neurological and neuropsychological exams on the defendant for use in connection with the sentencing hearing. Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined the defendant. He filed his report two days before the judicial sentencing hearing. The report concluded, in part, that the defendant presented "some diagnostic dilemmas." On the one hand, the defendant was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems," including "cortical dysfunction attributable to right cerebral hemisphere dysfunction." The report added that the defendant's "obvious neuropsychological deficit" could be related to his "low frustration tolerance and impulsivity," and suggested a diagnosis of "organic personality syndrome." Right before the hearing, defense counsel received updated records indicating that the defendant was taking an assortment of psychotropic medications. Over a defense objection that assistance from a mental health expert was needed to interpret the report and information, the hearing proceeded. The trial court sentenced the defendant to death. It later issued a written sentencing order, finding that the defendant "was not and is not psychotic," and that "the preponderance of the evidence from these tests and reports show [the defendant] to be feigning, faking, and manipulative." It further found that even if his mental health issues "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." The case came before the U.S. Supreme Court on habeas. The Court began by noting that *Ake v. Oklahoma*, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Here, no one denied that the conditions that trigger application of *Ake* are present: the defendant is and was an indigent defendant, his mental condition was relevant to the punishment he might suffer, and that mental condition--his sanity at the time of the offense--was seriously in question. As a result *Ake*, required the State to provide the defendant with access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. The question before the Court was: whether the Alabama courts' determination that the defendant got all the assistance that *Ake* requires was contrary to, or involved an unreasonable application of, clearly established federal law. The defendant urged the Court to answer this question "yes," asserting that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. The Court however found that it need not decide whether this claim is correct. It explained:

> *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." As a practical matter, the simplest way for a State to meet this

> standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake*'s most basic requirements.

Here, although the defendant was examined by Dr. Goff, neither Goff nor any other expert helped the defense evaluate Goff's report or the defendant's extensive medical records and translate these data into a legal strategy; neither Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that the defendant's purported malingering was not necessarily inconsistent with mental illness; and neither Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself. The Court concluded: "Since Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming [the defendant's] conviction and sentence was contrary to, or involved an unreasonable application of, clearly established Federal law."

Habitual Felon

State v. Cannon, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017). The State conceded, and the court held, that the trial court should not have sentenced the defendant as a habitual felon where the issue was not submitted to the jury and no formal guilty plea was made. Here, the defendant only stipulated to habitual felon status.

Indictment & Pleading Issues
Citation

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). Over a dissent, the court held that a citation properly charged the defendant with operating a motor vehicle with an open container of alcohol. The defendant challenged the citation on grounds that it failed to allege that he was operating a motor vehicle while on a public street or highway. The court noted that official commentary to G.S. 15A Article 49 indicates that a citation need only identify the crime charged and that the pleading requirements for a citation are less than is required for other criminal process. It further noted that pursuant to G.S. 15A-922(c), "[t]o the extent there was a deficiency in the citation," the defendant could have objected to trial on the citation. The court went on to hold that the citation properly identified the crime and thus complied with G.S. 15A-302, giving the district court jurisdiction. It stated: "Identifying a crime charged does not require a hyper-technical assertion of each element of an offense, nor does it require the specificity of a "statement of the crime" necessary to issue a warrant or criminal summons." The court acknowledged that G.S. 20-138.7(g) requires a citation charging the offence in question to include additional information, including that the defendant drove a motor vehicle. However, because the citation satisfied the requirements of G.S. 15A-302, thereby establishing the district court's jurisdiction, the defendant's concern regarding the sufficiency of the charging language required an objection to trial on the citation at the district court level under G.S. 15A-922, which he failed to do. Thus, the defendant "was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in Section 20-138.7(g)." The court continued, holding that even if the defendant was not required to object

below, "the failure to comply with N.C. Gen. Stat. § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect." It reasoned that the North Carolina Constitution does not require a citation charging a misdemeanor to allege each element of the charged offense.

Theory of Liability

State v. Glidewell, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this habitual misdemeanor larceny case, the court rejected the defendant's argument that the trial court created a fatal variance when it instructed the jury on a theory of acting in concert not alleged in the indictment. Citing prior case law, the court held that the theory of acting in concert need not be alleged in the indictment.

Robbery, Larceny & Related Offenses

State v. Murrell, ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). Affirming an unpublished opinion of the Court of Appeals, the court held that a robbery indictment was fatally defective. The indictment alleged, in relevant part, that the defendant committed the bank robbery "by way of reasonably appearing to the [named] victim . . . that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note." The Court of Appeals had held that the indictment was defective because it failed to name any dangerous weapon that the defendant allegedly employed. The Supreme Court noted that an essential element of armed robbery is that the defendant possessed, used, or threatened use of a firearm or other dangerous weapon. Here, the indictment does not adequately allege this element. The court instructed: an armed robbery indictment "must allege the presence of a firearm or dangerous weapon used to threaten or endanger the life of a person."

State v. Glidewell, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this habitual misdemeanor larceny case, the court rejected the defendant's argument that a fatal variance existed between the indictment, the jury instructions, and the verdict sheets because each held him accountable for stealing a different number of items. Neither the jury instructions nor the verdict sheet were required to specify the number of items stolen.

State v. Bacon, ___ N.C. App. ___, 803 S.E.2d 402 (July 18, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 460 (Aug. 4, 2017). Although there was a fatal variance between the allegation in a felony larceny indictment as to the owner of the stolen property and the proof of ownership presented at trial, the variance did not warrant dismissal. The indictments alleged that all of the stolen items, a television, gaming system, video games, laptop, camera, and earrings were the personal property of April Faison. The evidence at trial indicated that Faison did not own all of those items. Specifically, her daughter owned the laptop and the camera; the gaming system belonged to a friend. Although the defendant conceded that some of the items listed in the indictment correctly named Faison as property owner, he argued that a fatal variance with respect to the other items required dismissal. The State's evidence would have been sufficient if it had established that Faison, while not the property owner, had some special interest in the items owned by others, for example, as a bailee. However, the State's evidence did not establish that. The court also rejected the argument that Faison had a special custody interest in her child's

property because, here, her daughter was an adult who did not live in the home. Thus, while the evidence was sufficient to demonstrate that Faison was the owner of some of the property, there was a fatal variance with respect to ownership of other items. The court however went on to reject the argument that a larceny indictment that properly alleges the owner of certain stolen property, but improperly alleges the owner of additional property, must be dismissed in its entirety. Here, the problematic language was surplusage.

Drug Offenses

State v. Culbertson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). As conceded by the State, indictments charging the defendant with possession with intent to sell and deliver marijuana and heroin within 1000 feet of a park under G.S. 90-95(e)(10) were fatally defective where they failed to allege that he was over the age of 21 at the time of the offenses.

Habitual Felon

State v. Langley, ___ N.C. App. ____, 803 S.E.2d 166 (June 20, 2017), *temporary stay allowed*, ___ N.C. ___, 800 S.E.2d 667 (July 6, 2017). A habitual indictment was fatally defective with respect to its allegations as to two of the three prior felonies. With respect to these convictions, the indictment alleged offense dates for armed robbery and then gave conviction dates for common law robbery. The indictment was defective because it did not allege an offense date for the crimes for which the defendant was convicted (common law robbery).

Joinder

State v. Voltz, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). The trial court did not err by joining for trial offenses that occurred on different dates. The first set of offenses occurred on May 15, 2015 and involved assaults and sexual assaults on B.A. The second set of charges arose from a breaking or entering that occurred approximately eight months later, when the defendant entered a neighbor's home looking for B.A. The defendant argued that certain testimony offered by the neighbor was inadmissible character evidence as to the first set of charges but was essential testimony as to the second set of charges, to establish guilt of another. The court however found that the evidence would not have been admissible for that purpose; to be admissible, guilt of another evidence must do more than create mere conjecture of another's guilt. Here, the evidence was mere speculation that another person committed the crime. Furthermore the testimony was not inconsistent with the defendant's guilt.

Judge's Expression of Opinion

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). Citing *State v. Welch*, 65 N.C. App. 390 (1983), the court rejected the defendant's argument that the trial court impermissibly expressed an opinion on the evidence by denying the defendant's motion to dismiss in the presence of the jury, in violation of G.S. 15A-1222.

Jurisdictional Issues

State v. Seam, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). In this *Miller* Eighth Amendment/LWOP case, the superior court lacked jurisdiction to enter judgment. The trial court resentenced the defendant in response to a decision by the North Carolina Supreme Court, but before the mandate had issued from that Court. The court vacated the judgment and remanded for resentencing.

Jury Selection

State v. Broyhill, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The court rejected the defendant's argument that the trial court erred during jury selection by unduly restricting the defendant's inquiry into whether prospective jurors could fairly evaluate credibility if faced with evidence that a person had lied in the past. The trial court properly sustained objections to the defendant's improper stakeout questions and questions tending to indoctrinate the jurors. Additionally, the trial court did not close the door on the defendant's inquiry into whether the prospective jurors could fairly assess credibility. Rather, the defendant was permitted to ask similar questions in line with the pattern jury instructions, which were an adequate proxy to gauge a prospective juror's ability to fairly assess credibility at trial.

Jury Argument

State v. Huey, ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). Reversing a unanimous decision of the Court of Appeals in this murder case, the court held that while certain statements made by the prosecutor in his closing argument were improper, the arguments did not amount to prejudicial error. The ADA opened closing arguments by saying "Innocent men don't lie." During his argument, the prosecutor used some variation of the verb "to lie" at least thirteen times. The prosecutor also made negative comments regarding defense counsel and regarding a defense expert witness. Regarding the defense expert, the prosecutor argued that the expert made more than $300,000 per year working for defendants, that he was not impartial and that "he's just a $6,000 excuse man." Defense counsel did not object and the trial court did not intervene ex mero motu. The Court of Appeals held that the trial court erred by failing to intervene ex mero motu, concluding that the defendant's entire defense was predicated on his credibility and on the credibility of his expert witness. The court reversed. It began by holding that there was "no doubt" that the prosecutor's statements directed at the defendant's credibility were improper. However it went on to hold that the statements were not so grossly improper as to result in prejudice, noting that the evidence supports the inference that the defendant's testimony lacked credibility. For example, the defendant gave six different versions of the shooting, five to the police and one to the jury. The court concluded: "While we do not approve of the prosecutor's repetitive and dominant insinuations that defendant was a liar, we do believe sufficient evidence supported the premise that defendant's contradictory statements were untruthful." The court also found that the prosecutor's assertion that the defense expert was "just a $6,000 excuse man" also was improper in that it implied the witness was not trustworthy because he was paid for his testimony. While a lawyer may point out potential bias resulting from payment, it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay. The court also noted that the prosecutor's use of the word

"excuse" amounts to name-calling, "which is certainly improper." Finally, the court agreed that the prosecutor improperly argued that defense counsel should not be believed because he was paid to represent the defendant. Although ultimately concluding that it was not reversible error for the trial court to fail to intervene ex mero motu, the court added:

> Nonetheless, we are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. . . . Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene ex mero motu when improper arguments are made.

State v. Younts, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this DWI case, the trial court did not err by failing to intervene ex mero motu when the prosecutor speculated in closing argument about what the defendant's breathalyzer test would have been an hour before she was actually tested. The court found that the argument at issue was not so grossly improper as to require the trial court to intervene ex mero motu.

Jury Misconduct

State v. Langley, ___ N.C. App. ____, 803 S.E.2d 166 (June 20, 2017), *temporary stay allowed*, ___ N.C. ___, 800 S.E.2d 667 (July 6, 2017). Although juror misconduct occurred, the defendant's challenge failed because the error was invited. After it was reported to the judge that a juror did an internet search of a term used in jury instructions, the judge called the jurors into court and instructed them to disregard any other information and to follow the judge's instructions. When the defendant moved for mistrial, the trial court offered to continue the inquiry, offering to interview each juror. The defendant did not respond to the trial judge's offer. The court held: "Defendant is not in a position to repudiate the action and argue that it is grounds for a new trial since he did not accept the trial court's offer to continue the inquiry when the judge offered to do so. Therefore, if any error took place, Defendant invited it."

Jury Instructions

Self-Defense Instructions

State v. Holloman, ___ N.C. ___, 799 S.E.2d 824 (June 9, 2017). Reversing the Court of Appeals, the Supreme Court held that the trial court's self-defense instructions were not erroneous. The court began by considering whether "North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party." Although historically North Carolina law did not allow an aggressor using deadly force to regain the right to exercise self-defense when the person to whom his or her aggression was directed responds by using deadly force in defense, changes in statutory law allow aggressor to regain that right under certain circumstances. But, G.S. 14-51.4(2)(a), allowing an aggressor to regain the right to utilize defensive force under certain

circumstances, does not apply where the aggressor initially uses deadly force against the person provoked. Thus, the trial court did not err by instructing that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor. The court continued, noting that it also must determine whether the trial court erred by failing to instruct the jury, in accordance with the defendant's request, that he might have regained the right to use defensive force based on the victim's reaction to any provocative conduct in which the defendant might have engaged. The court concluded that a defendant "could have only been entitled to the delivery of such an instruction to the extent that his provocative conduct involved non-deadly, rather than deadly, force." Here, there was a complete absence of any evidence tending to show that the defendant used non-deadly force.

State v. Fitts, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017). In this felony-murder case where the underlying felony was discharging a firearm into an occupied vehicle, the trial court did not err by declining to instruct on self-defense. The court rejected the defendant's argument that a reasonable jury could have found that the shooting constituted perfect self-defense. Viewing the facts in the light most favorable to the defendant, the first three elements of self-defense were present: the defendant testified that he believed two individuals were about to shoot him or another person; a reasonable person would have so concluded; and until he fired, the defendant had not attacked or threatened the victim in any way. However, the defendant's own testimony indicated that he did not shoot to kill. "Such an intent is required for a trial court to instruct a jury on perfect self-defense."

State v. Cook, ___ N.C. App. ____, 802 S.E.2d 575 (June 20, 2017). In this assault on a law enforcement officer case, the court held, over a dissent, that the trial court did not err by denying the defendant's request for a self-defense instruction. While executing a warrant for the defendant's arrest at his home an officer announced at a bedroom door that he was a police officer and that he was going to kick in the door. The officer's foot went through the door on the first kick. The defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer. The charges at issue resulted. The defendant testified that he was asleep when the officer arrived at his bedroom door; that when his girlfriend woke him, he heard loud banging and saw a foot come through the door "a split second" after waking up; that he did not hear the police announce their presence but did hear family members "wailing" downstairs; that he was "scared for [his] life . . . thought someone was breaking in the house . . . hurting his family downstairs and coming to hurt [him] next;" and that he when fired his weapon he had "no specific intention" and was "just scared." Rejecting the defendant's appeal, the court explained: "our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is *not* entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun." Under this law, a person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction. This is true even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker.

State v. Clonts, ___ N.C. App. ____, 802 S.E.2d 531 (June 20, 2017), *temporary stay allowed*, ___ N.C. ___, 800 S.E.2d 668 (July 7, 2017). The trial court did not err by failing to instruct the jury on imperfect self-defense and imperfect defense of others where the defendant did not request that the trial court give any instruction on imperfect self-defense or imperfect defense of others. In fact, when the State indicated that it believed that these defenses were not legally available to the defendant, defense counsel agreed with the State. The defendant cannot show prejudice from invited error.

Conflicting Instructions

State v. Voltz, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) The court rejected the defendant's argument that the trial court erred by providing the jury with written jury instructions on the charge of felonious breaking or entering which conflicted and materially differed from the court's earlier oral instructions. As a general rule, when there are conflicting instructions on a material point, a new trial is required. Here, the trial court's initial oral instructions stated, in part, that the jury must find that, at the time of the breaking or entering, the defendant intended to commit the felony of assault. Subsequently, the trial court noted to counsel that he wanted to add the definition of "the felony of assault" in written instructions to be given to the jury. Both sides agreed to the trial court's proposed language. The revised language stated that the felony of assault would be assault with a deadly weapon with intent to kill, inflicting serious bodily injury or an attempt to commit that crime. The court rejected the defendant's argument that the oral and written instructions conflicted. Here, recognizing that the oral instructions may have been insufficient, the trial court provided the additional language simply to further define "the felony of assault." The trial court may clarify its jury instructions. (2) Even assuming that the trial court erred in its jury instructions, the error did not rise to the level of plain error.

Automatism

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this homicide case, the trial court did not commit plain error in its jury instructions on the defense of automatism. The defendant argued that the jury instruction misleadingly implied that he had to prove the defense beyond a reasonable doubt. The trial court's instructions, which were almost entirely a verbatim recitation of the Pattern Jury Instructions, explained the proper burden of proof for the defense as well as the principle that if the jury found that the defendant had met his burden of proving the defense he would be not guilty of any crime. The instructions explicitly stated that the defendant's burden was "to establish this defense to the satisfaction of the jury," unlike the State, which must prove all the other elements beyond a reasonable doubt.

Impaired Driving

State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (June 9, 2017). In this DWI case, the trial court did not err by denying the defendant's request for a special jury instruction explaining that results of a chemical breath test are not conclusive evidence of impairment. Following the pattern jury instructions for DWI, the trial court explained to the jury that impairment could be proved by an alcohol concentration of .08 or more and that a chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." The trial court also inform the

jury that they were the sole judges of the credibility of each witness and the weight to be given to each witness's testimony. This statement signaled to the jury that it was free to analyze the weight and effect of the breathalyzer evidence, along with all the evidence presented at trial. Therefore, the standard jury instruction on credibility was sufficient and the trial court adequately conveyed the substance of the defendant's request instructions to the jury.

Theory Not Supported by Evidence

State v. Robinson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). No plain error occurred in this drug case where the trial court instructed the jury that it could convict the defendant if it found that he was in actual or constructive possession of the contraband. Although there was no evidence that the defendant actually possessed the contraband, no plain error occurred where there was substantial evidence that the defendant constructively possessed the items and where the defense at trial was that the defendant's sister-in-law planted the drugs and that his brother-in-law was storing weapons in his house.

Mistrial

State v. Lynch, ___ N.C. App. ___, 803 S.E.2d 190 (July 5, 2017). In this drug trafficking case, the trial court did not abuse its discretion by declining to declare a mistrial because of a prospective juror's comment. In the presence of the rest of the jury pool, the prospective juror stated that he had seen the defendant "around" and "I believe she did it." The defendant moved for a mistrial. The trial judge denied the motion but indicated that it would instruct the jury to cure any potential for prejudice. The trial judge immediately dismissed the prospective juror and gave a lengthy curative instruction to the jury pool. The court rejected the defendant's argument that the comment required a mistrial as a matter of law. The court held that in light of the trial court's curative instruction, the trial court acted well within its discretion in denying the defendant's motion for a mistrial.

Motion to Dismiss

State v. Messer, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery asserting that the State failed to establish the corpus delicti of the crime. Specifically, the defendant argued that the State relied solely on his uncorroborated confession, which, under the corpus delicti rule, was insufficient to establish guilt. Rejecting the defendant's argument, the court also rejected the notion that the corpus delicti rule requires non-confessional evidence of every element of a crime. Citing prior case law, it concluded that the State need only show corroborative evidence tending to establish the reliability of the confession. Here, the State presented evidence that aligned with the defendant's confession, including, among other things, the medical examiner's determination as to cause of death; the recovery of a firearm at the scene; and DNA evidence.

Motion to Continue

State v. Moore, ___ N.C. App. ___, 803 S.E.2d 196 (July 18, 2017). (1) The trial court did not abuse its discretion by denying the defendant's motion to continue. The court rejected the

defendant's argument that the trial court's denial of his motion to continue constituted an improper overruling or reversal of an earlier order or ruling by another judge. Specifically, the defendant asserted that a statement by the judge who presided over a pretrial hearing constituted a ruling or decision which could not be modified by another judge. The court rejected this argument, finding that the preliminary and informal remark made by the pretrial judge did not constitute an order or ruling continuing the case. (2) With respect to the defendant's argument that the denial of his motion to continue denied him his constitutional right to effective assistance of counsel, the court declined to presume prejudice in this case. And it found that the defendant had not articulated any argument related to the circumstances of the case to explain why defense counsel did not have a sufficient time to prepare for trial.

Motion to Suppress

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). Because the trial court summarily denied the defendant's motion to suppress, a full hearing with sworn testimony was not required under G.S. 15A-977 (motion to suppress procedure). The defendant's own affidavit clearly laid out facts establishing that the officer had reasonable suspicion to detain the defendant. The information presented in the affidavit was sufficient to allow the trial court to determine that the defendant's allegation did not merit a full suppression hearing because the affidavit did not as a matter of law support the ground alleged for suppression.

Pleas

State v. Dail, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Because the trial court failed to consider evidence of the defendant's eligibility for conditional discharge pursuant to G.S. 90-96, the court vacated the judgment and remanded for resentencing. The defendant pleaded guilty to driving while impaired and possession of LSD. According to the plea agreement, the defendant stipulated to his prior record level for each offense, and that he would be placed on probation. In exchange, the State agreed to dismiss additional drug possession charges against the defendant. Pursuant to the plea agreement, the defendant received suspended sentences. On appeal, the defendant argued that the trial court erred by granting a suspended sentence rather than a conditional discharge. The trial court had denied this request, concluding that the defendant was asking for something beyond the scope of his plea agreement. The Court of Appeals agreed with the defendant, noting that defense counsel asked for such a discharge during the plea hearing and that the conditional discharge statute was mandatory for eligible defendants. The court rejected the State's argument that the defendant failed to present evidence that he was qualified for conditional discharge, concluding instead that the burden is on the State to establish that the defendant is not eligible for conditional discharge by proving the defendant's prior record. Here, the trial court did not afford either party the opportunity to establish whether or not the defendant was eligible for conditional discharge. The court therefore vacated the judgment and remanded for a new sentencing hearing, directing the trial court to follow the procedure for the consideration of eligibility for conditional discharge.

State v. Culbertson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Having found that the defendant's convictions for drug offenses that were part of a plea agreement had to be vacated on grounds of fatal defects in the indictments, the court held that the entire plea agreement and the

judgments entered on it must be set aside and the matter remanded to the trial court. The court expressly noted that nothing in its opinion binds either party to the vacated pleas or sentences or restricts the State from re-indicting the defendant.

State v. Anderson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017). Where a negotiated plea agreement involving several charges included a plea to a crime later held to be unconstitutional, the entire agreement must be set aside. After the jury convicted the defendant of being a sex offender on the premises of a daycare, the defendant pled guilty based on a negotiated plea arrangement to being a sex offender unlawfully within 300 feet of a daycare, failing to report a new address as a sex offender, and three counts of attaining habitual felon status. While his direct appeal was pending, the statute prohibiting a sex offender from being within 300 feet of a daycare was held to be unconstitutional. The court thus held that the defendant's conviction for that offense must be vacated. Having determined that the defendant's guilty plea to violating the unconstitutional statute must be vacated the essential and fundamental terms of the plea agreement became unfulfillable and that the entire plea agreement must be set aside.

State v. Arrington, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 734 (Aug. 18, 2017). Over a dissent, the court held that where the trial court erred by accepting the defendant's stipulation to his prior record level as part of a plea agreement, the plea agreement must be set aside.

Sentencing

Eighth Amendment Issues

Virginia v. LeBlanc, 582 U.S. ___, 137 S. Ct. 1726 (June 12, 2017). In a per curiam decision, the Court held that the Virginia Supreme Court's ruling, holding that Virginia's "geriatric release" provision satisfies *Graham v. Florida* was not an objectively unreasonable application of *Graham*. In 1999, the defendant, who was 16 years old at the time, raped a 62-year-old woman. In 2003, a state court sentenced him to life in prison. At the time, Virginia had abolished traditional parole. However it had a geriatric release parole program which allowed older inmates to receive conditional release under some circumstances. Specifically, the statute provided: "Any person serving a sentence imposed upon a conviction for a felony offense . . . (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release." Seven years after the defendant was sentenced, the Court decided *Graham,* holding that the Eighth Amendment prohibits juvenile offenders convicted of non-homicide offenses from being sentenced to life without parole. *Graham* held that while a "State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The *Graham* Court left it to the States, "in the first instance, to explore the means and mechanisms for compliance" with the *Graham* rule. The defendant then sought to vacate his sentence in light of *Graham.* The Virginia courts rejected this motion, holding that Virginia's geriatric release statute satisfied *Graham*'s requirement of parole for juvenile offenders. The defendant then brought a federal habeas action. The federal district court held that "there is no possibility that fairminded jurists could disagree that the state court's decision conflicts wit[h]

the dictates of *Graham*." The Fourth Circuit affirmed. The Supreme Court reversed, noting in part:

> The Court of Appeals for the Fourth Circuit erred by failing to accord the state court's decision the deference owed under AEDPA. Graham did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied Graham's requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole.

Gang Offense Issues

State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (June 20, 2017). The trial court erred by finding that the defendant had "gang affiliation" and ordering gang restrictions in the judgment. G.S. 14-50.25 provides that when a defendant is found guilty of a criminal offense relevant to the statute "the presiding judge shall determine whether the offense involved criminal street gang activity." If the judge makes this determination, then he "shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity." Here, the judge made a judicial, not clerical error, where there was no evidence to support such a finding. The court declined to reach the defendant's argument that the statute was unconstitutional under the *Apprendi* line of cases (holding that any fact other than a prior conviction that elevates a sentence must be submitted to the jury).

Life Without Possibility of Parole

State v. May, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) Because the trial court failed to make statutorily required findings of fact addressing statutory mitigating factors prior to sentencing the juvenile defendant to life imprisonment without the possibility of parole, a new sentencing hearing was required. The defendant was convicted of first-degree murder and attempted robbery with a dangerous weapon. The trial court sentenced the defendant to life imprisonment without the possibility of parole on the murder charge. Immediately after judgment was entered, the defendant gave oral notice of appeal. Almost one month later, the trial court entered an order making findings of fact based on G.S. 15A-1340.19B to support its determination that the defendant should be sentenced to life imprisonment without the possibility of parole, as opposed to a lesser sentence of life imprisonment with the possibility of parole. The court agreed with the defendant that the trial court erred by sentencing him to life imprisonment without the possibility of parole, where it failed to make findings of fact and conclusions of law in support of the sentence. (2) Because the trial court had no jurisdiction to enter findings of fact after the defendant gave notice of appeal, the court vacated the order entered upon these findings. Once the defendant gave notice of appeal, the trial court's jurisdiction was divested. Note: one judge concurred, but wrote separately to note concern about how the trial courts are addressing discretionary determinations of whether juvenile should be sentenced to life imprisonment without the possibility of parole.

Prior Record Level

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court erred in calculating the defendant's prior record level points. Specifically, it made an arithmetic error, finding that the points totaled 18 when in fact they totaled 17. This error lead the trial court to sentence the defendant as a prior record level VI offender instead of as a record level V offender. The State conceded the mathematical error but argued the error was harmless. The court agreed, noting that it has repeatedly held that an erroneous prior record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct level, as it was here.

State v. Bryant, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). (1) In calculating prior record level, the trial court did not err by concluding that the defendant's South Carolina conviction for criminal sexual conduct in the third degree was substantially similar to the North Carolina Class C felonies of second-degree forcible rape and second-degree forcible sex offense. The court rejected the defendant's argument that the South Carolina conviction could be a violation of either second-degree forcible rape or second-degree forcible sexual offense, but not both because North Carolina's rape statute only applies to vaginal intercourse and the sexual offense statute specifically excludes vaginal intercourse. This argument was "a distinction without a difference." (2) Over a dissent, the court held that the trial court erred by concluding that the defendant's South Carolina conviction for criminal sexual conduct in the first degree was substantially similar to the North Carolina Class BI felonies of statutory rape of a child by an adult and statutory sex offense with the child by an adult. These offenses are not substantially similar due to their disparate age requirements. Specifically, although both North Carolina statutes require that the offender be at least 18 years old, a person of any age may violate the South Carolina statute. Also, the North Carolina statutes apply to victims under the age of 13, while South Carolina's protects victims who are less than 11 years old. Thus, the North Carolina and South Carolina statutes apply to different offenders and different victims and are not substantially similar.

State v. Arrington, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 734 (Aug. 18, 2017). Over a dissent, the court held that the defendant's stipulation to his prior record level was invalid. The defendant purported to stipulate in his prior record level worksheet and during his plea colloquy both to the existence of several prior convictions and to his designation as a Level V offender. One of the convictions contributing to his total points was a 1994 second-degree murder conviction, which the defendant stipulated was a Class BI felony. On appeal, the defendant argued that the calculation of his prior record level was incorrect because the 1994 conviction should have counted as a Class B2 felony, for which only six points should have been assessed. At the time of the 1994 conviction, the murder statute placed all second-degree murder convictions in the same felony class. However, between 1994 and the date of the offenses in question, the statute was amended dividing the offense into two classes: B1 and B2, based on the type of malice involved. Thus, the amended version of the statute—creating two classes of second-degree murder—controlled classification of the 1994 conviction for prior record level purposes. The defendant's stipulation went beyond the factual admission that the 1994 conviction existed and constituted a stipulation as to whether that conviction should be treated as a Class B1 or B2 felony. Because the

defendant's stipulation involved a question of law, it should not have been accepted by the trial court. The court went on to emphasize that the case "constitutes a narrow exception the general rule regarding a defendant's ability to stipulate to matters in connection with his prior record level." It explained:

> A stipulation as to the classification of a prior conviction is permissible so long as it does not attempt to resolve a question of law. In the great majority of cases in which a defendant makes such a stipulation, the stipulation will be valid because it does not concern an issue requiring legal analysis.
>
> The present case falls within a small minority of cases in which the stipulation did concern a question of law. Here, because Defendant's purported stipulation that his prior conviction was a B1 felony went beyond a factual admission that the 1994 Conviction existed and instead constituted a stipulation as to the legal issue of how that conviction should be treated under the current version of N.C. Gen. Stat. § 14- 17, the stipulation should not have been accepted by the trial court . . . .

Probation

State v. Posey, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). Over a dissent, the court dismissed as moot the defendant's appeal from a judgment revoking his probation and activating his suspended sentence. After finding that the defendant was not at home during a mandatory curfew on two occasions, that these absences constituted willful violations of probation, and that the violations constituted absconding, the trial court revoked the defendant's probation and activated his suspended sentence. The defendant appealed. The case was before the appellate court on writ of certiorari. The State conceded that the trial court lacked jurisdiction to revoke the defendant's probation under the Justice Reinvestment Act because the underlying offenses occurred prior to December 1, 2011. The State argued however that the appeal was moot because the defendant had served his time. The defendant countered, arguing that he may suffer collateral consequences as a result of the trial court's alleged error if he is subsequently convicted of a new crime. Specifically, he noted that under North Carolina law, an aggravating sentencing factor may be found when the defendant previously has been found in willful violation of probation. The court rejected this argument, noting that the defendant made no assertion that the trial court erred in finding him in willful violation of probation, the factor that triggers application of the aggravating factor. Rather, the defendant only argued that the trial court erred in revoking his probation based on application of the Justice Reinvestment Act, which did not take effect until after he violated his probation. However, the fact that the defendant's probation was revoked does not in itself trigger application of the aggravating factor. The only part of the trial court's judgment which could have any future detrimental effect is the finding that the defendant was in willful violation of probation, a finding he did not challenge. Here, the trial court acted within its authority in entering its finding of willfulness. Specifically, the court stated: "the conditions of Defendant's probation included a mandatory curfew; Defendant was cited for violating this curfew; the trial court had the jurisdiction to hold its hearing to consider Defendant's violation; and the trial court found that Defendant violated his curfew and that the violation was willful. Therefore, since Defendant will not suffer future collateral consequences stemming from the trial court's error *in revoking his probation*, we conclude that Defendant's appeal is moot."

State v. Trent, ___ N.C. App. ___, 803 S.E.2d 224 (Aug. 1, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 725 (Aug. 11, 2017). (1) The trial court did not err by revoking the defendant's probation based on its finding that he willfully absconded from supervision. Reviewing the facts of the case, the court rejected the defendant's argument that there was insufficient evidence that he willfully absconded from supervision. (2) the court rejected the defendant's argument that the trial court abused its discretion by making its oral findings of fact without explicitly stating the legal standard of proof. Noting that it has held that a trial court's failure to state the standard of proof underlying its findings may constitute reversible error when certain protected interests are involved, it has never so held in the context of a probation hearing. The court noted that "Although the trial court failed to employ the best practice and explicitly state the legal standard of proof," the totality of the trial court's statements indicate that it was reasonably satisfied in light of all the evidence presented that a willful violation had occurred. Reviewing the facts of the case, the court also rejected the defendant's argument that there was insufficient evidence that he willfully absconded from supervision.

State v. Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The trial court lacked jurisdiction to revoke the defendant's probation based on the violations alleged. Here, the defendant did not waive his right to notice of his alleged probation violations and the State failed to allege a revocation-eligible violation. Thus, the trial court lacked jurisdiction to revoke.

Sex Offenders

State v. Bishop, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). (1) The defendant failed to preserve the claim that the trial court erred by ordering him to enroll in SBM without conducting a *Grady* hearing to determine whether the monitoring was reasonable under the Fourth Amendment. After a jury convicted the defendant of taking indecent liberties with his daughter, the trial court ordered him to enroll in SBM for 30 years. The defendant did not challenge the trial court's imposition of SBM on constitutional grounds at the hearing. Immediately after the sentence and SBM was imposed, the defendant entered a plea to two additional counts of indecent liberties with a child, evidence of which was uncovered during investigation with respect to his daughter. The trial court sentenced the defendant, found he qualified as recidivist, and ordered him to enroll in SBM for life. The defendant did not challenge this new SBM order on constitutional grounds. Nor did he timely appeal either of the SBM orders. He later filed a petition for writ of certiorari, asking the Court of Appeals to review the SBM orders. The court concluded that the defendant's claim suffered from two separate preservation issues. First the defendant did not make the *Grady* constitutional argument before the trial court. Second, he did not timely appeal the SBM orders. The court went on to decline to consider the merits of his claim. (2) The court declined to issue a writ of certiorari to consider the defendant's argument that the trial court erred in finding that he was a recidivist and thus qualified for lifetime SBM. The defendant failed to timely appeal on this ground. The court declined to issue the writ because the defendant had not shown that his argument has merit or that error was probably committed below. Here, the defendant argued that his convictions for indecent liberties against his daughter could not count as a "prior conviction" because they occurred on the same day as his guilty plea to the additional counts of indecent liberties against different victims. The court noted that the defendant was not simultaneously convicted of the offenses that rendered him a recidivist. After he was convicted and sentenced for offenses against his daughter, he plead

guilty to separate offenses that occurred more than a decade earlier. At the time he pled guilty to those offenses, he had already been convicted and sentenced for the offenses against his daughter. Thus, he had a prior conviction for a reportable offense at the time the trial court sentenced him on the new convictions. The court concluded: "That his prior conviction occurred earlier the same day rather than the day before, or many years before, is irrelevant . . . ."

State v. Greene, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The court reversed the trial court's order denying the defendant's motion to dismiss the State's application for lifetime SBM. In the trial court, the defendant filed a motion to dismiss the State's application for SBM. At the SBM hearing, the State presented evidence establishing that the defendant had a prior conviction of misdemeanor sexual battery in addition to his new conviction of two counts of taking indecent liberties with a child. The State offered no evidence other than the defendant's criminal record. The defendant countered, challenging the constitutionality of imposition of lifetime SBM under *Grady*, arguing that the State had not met its burden of establishing the reasonableness of the SBM. The trial court rejected the defendant's argument. On appeal, the defendant argued that the trial court erred by ordering lifetime SBM where the State's evidence was insufficient to establish that imposition of SBM constituted a reasonable Fourth Amendment search. The State conceded this point but argued that it should have a chance to supplement its evidence upon the remand from the Court of Appeals. The court disagreed and reversed without a remand.

In Re Bethea, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The court affirmed the trial court's denial of the petitioner's petition to be removed from the sex offender registry. The trial court found that the requested relief did not comply with federal law. On appeal, the court rejected the petitioner's argument that the trial court violated his substantive due process rights by denying his petition for termination of sex offender registration after finding that he "is not a current or potential threat to public safety." Specifically, the petitioner argued after the trial court found that he was not a current or potential threat to public safety, it was arbitrary for the trial court to deny his petition and to require him to continue to register because of federal standards incorporated into state law. The court also rejected the petitioner's argument that the retroactive application of federal sex offender registration standards violates ex post facto protections. Citing its prior cases on point, the court rejected this argument.

State v. Dye, ___ N.C. App. ____, 802 S.E.2d 737 (June 20, 2017). The trial court erred by imposing satellite-based monitoring for a period of thirty years due to a violation of G.S. 14-208.40A. Here, the Static-99 revealed a risk assessment of four points, which translated into a "Moderate-High" risk category. Pursuant to existing law, the "Moderate-High" risk category is insufficient to support a finding that the highest possible level of supervision and monitoring was required.

Evidence

Authentication

State v. Moore, ___ N.C. App. ___, 803 S.E.2d 196 (July 18, 2017). Although admission of video evidence was error, it was not prejudicial error. An officer testified that the day after the incident in question he asked the manager of a convenience store for a copy of the surveillance video made by store cameras. The manager allowed the officer to review the video but was

unable to copy it. The officer used the video camera function on his cell phone to make a copy of the surveillance footage, which was copied onto a computer. At trial, he testified that the copy of the cell phone video accurately showed the contents of the video that he had seen at the store. The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he had observed on the day in question. The transcript reveals no testimony concerning the type of recording equipment used to make the video, its condition on the day in question, or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. As such, the State failed to offer a proper foundation for introduction of the video as either illustrative or substantive evidence. The court went on to find that introduction of the video was not prejudicial.

Rule 403

State v. West, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). When a trial court properly determines, pursuant to Evidence Rule 403, that the probative value of evidence about a victim's sexual history is substantially outweighed by its potential for unfair prejudice, the trial court does not err by excluding the evidence, regardless of whether it falls within the scope of the Rape Shield Rule. The defendant was convicted of second-degree sexual offense. On appeal he argued that the trial court erred by denying his ability to cross-examine the victim regarding the victim's commission of sexual assault when he was a child. Specifically, the victim had told an officer that he had sexually assaulted his half-sister when he was eight or nine years old and thereafter was placed in a facility until he reached 18 years old. The defendant asserted that the victim's statement about this assault was admissible for impeachment because it was inconsistent with the victim's previous statements to law enforcement about how and when he was removed from his home as a child. The trial court found that the victim's statement about sexually assaulting his sister was evidence of prior sexual behavior protected by the Rape Shield Law and also was inadmissible because any probative value is substantially outweighed by the likelihood of unfair prejudice and confusion to the jury. The court declined to address the defendant's argument that a prior sexual assault committed by a victim is not protected under the Rape Shield law, concluding instead that the trial court properly excluded the evidence under Rule 403. The sexual behavior at issue occurred more than a decade earlier and involved no factual elements similar to the charges in question. The incident is disturbing and highly prejudicial and the circumstances of the victim's removal from his family home as a child are of remote relevance to the offense charged. Moreover, other evidence, including testimony that the defendant's DNA matched a swab taken from the victim shortly after the assault, render the victim's inconsistent statements about facts less relevant to the contested factual issues at trial, namely the defendant's denial that any sexual encounter occurred. The court also rejected the defendant's argument that exclusion of this evidence impermissibly prevented the jury from hearing evidence that the victim was not a virgin of the time of the offense, contrary to his statement to the defendant that he was a virgin.

State v. Broyhill, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). Even if a psychiatrist was not testifying as an expert, the trial court nevertheless acted within its discretion by excluding his testimony under Rule 403.

Confrontation Clause & Related Hearsay Issues

State v. McKiver, ___ N.C. ___, 799 S.E.2d 851 (June 9, 2017). Reversing the Court of Appeals, the Supreme Court held that the statements made by an anonymous 911 caller informing the police of a possible incident involving a firearm and describing the suspect were nontestimonial. The circumstances surrounding the caller's statements objectively indicate that the primary purpose was to enable law enforcement to meet an ongoing emergency. The primary purpose of the call was to inform the police of a possible dispute involving an unidentified man brandishing a firearm outside the caller's home on a public street in a residential subdivision. The caller reacted by going to her home and staying away from the window and an officer retrieved his patrol rifle before entering the scene. "As is evident from the precautions taken by both the caller and the officers on the scene, they believed the unidentified suspect was still roving subdivision with a firearm, posing a continuing threat to the public and law enforcement." To address this threat, an officer requested that the dispatcher place a reverse call to the caller to get more information about the individual at issue and, once received, quickly relayed that information to other officers to locate and apprehend the suspect.

State v. Miller, ___ N.C. App. ____, 801 S.E.2d 696 (June 20, 2017), *review allowed*, ___ N.C. ___, 802 S.E.2d 731 (Aug. 17, 2017). In a case in which the defendant was charged with killing his estranged wife and injuring her boyfriend, the trial court erred by admitting evidence in violation of the defendant's confrontation clause rights. At trial, a law enforcement officer testified to what the defendant's wife told him during an earlier domestic abuse investigation. The victim's statements to the officer in that earlier incident were made after she fled from the defendant in her car and called the police from a safe location. The purpose of the officer's questions was to determine what happened, not what was happening. The court held: "These statements to the officer plainly addressed what happened, not what was happening, and they were not made during any immediate threat or ongoing emergency. Thus, we agree with [the defendant] that these statements were testimonial in nature and thus subject to the Confrontation Clause." The court went on to reject the State's argument that the defendant had a prior opportunity to cross-examine his wife at an earlier trial, noting that there was no evidence in the record that the wife made the statements at the prior trial or that if she did, the defendant was afforded an opportunity for cross-examination. The court also rejected the State's argument that the mere fact that he killed his wife constituted a forfeiture of his confrontation rights, noting: forfeiture requires some showing that the defendant killed the witness at least in part to prevent the witness from testifying.

State v. Clonts, ___ N.C. App. ____, 802 S.E.2d 531 (June 20, 2017), *temporary stay allowed*, ___ N.C. ___, 800 S.E.2d 668 (July 7, 2017). (1) A witness's pretrial deposition testimony, taken in preparation of the criminal case, was clearly testimonial for purposes of the Confrontation Clause. (2) The trial court's finding were insufficient to establish that the witness was unavailable for purposes of the Rule 804(b)(1) hearsay exception and the Confrontation Clause. The entirety of the trial court's findings on this issue were: "The [trial court] finds [the witness] is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed." The trial court made no findings that would support more than mere inference that the State was unable to procure her attendance by process or other reasonable means; made no findings concerning the State's efforts

to procure the witness's presence at trial; and made no findings demonstrating the necessity of proceeding to trial without the witness's live testimony. The trial court did not address the option of continuing trial until the witness returned from deployment. It did not make any finding that the State made a good-faith effort to obtain her presence at trial, much less any findings demonstrating what actions taken by the State could constitute good-faith efforts. It thus was error for the trial court to grant the State's motion to admit the witness' deposition testimony in lieu of her live testimony at trial. (3) The court went on to find that even if the trial court's findings of fact and conclusions had been sufficient to support its ruling, the evidence presented to the trial court was insufficient to support an ultimate finding of "unavailability" for purposes of Rule 804. It noted in part that the State's efforts to "effectuate [the witness's] appearance" were not "reasonable or made in good faith." (4) The court found that the facts of the case did not support a finding that the witness was unavailable under the Confrontation Clause. In this respect, the court noted that no compelling interest justified denying the defendant's request to continue the trial to allow for the witness's live testimony. It added: "The mere convenience of the State offers no such compelling interest." It continued: "We hold that . . . in order for the State to show that a witness is unavailable for trial due to deployment, the deployment must, *at a minimum*, be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." (quotation omitted).

Cross-Examination & Impeachment

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this homicide case, the trial court did not err by allowing the State to question the defendant's expert witness on automatism regarding the amount of fees he received for testifying in other, unrelated criminal cases. The challenged evidence was relevant to "test partiality towards the party by whom the expert was called." It explained: "From the large sums of money that [the defendant]'s expert earned by testifying solely on behalf of criminal defendants, a reasonable jury could infer that the expert had an incentive to render opinions favorable to the criminal defendants who employ him."

State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (June 20, 2017). The trial court did not abuse its discretion by sustaining the State's objection to the introduction of an unauthenticated screenshot to impeach the victim's credibility. Although it was permissible for counsel to ask the defendant questions about the screenshot, he could not impeach the victim's credibility with extrinsic evidence to prove the contents of the screenshot where no foundation had been laid and the materiality of the post had not been demonstrated.

404(b) Evidence

State v. Watts, ___ N.C. ___, 802 S.E.2d 905 (Aug. 18, 2017) (per curiam). The court modified in part and affirmed the lower court's decision in *State v. Watts*, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016). In this child sexual assault case, the Court of Appeals held, over a dissent, that the trial court committed reversible error by admitting 404(b) evidence. The charges at issue arose from the defendant's alleged sexual assault on an eleven-year-old girl to whom defendant was like a "grandpa." The State sought to introduce at trial 404(b) evidence. Specifically a witness to testify that the defendant had forced his way into her apartment and raped her in 2003.

Those alleged events resulted in indictments for rape and breaking or entering against the defendant, but those charges were dismissed in 2005. The trial court allowed the 404(b) evidence to be admitted. After the witness testified, defense counsel moved to strike the testimony, for limiting instruction, or in the alternative a mistrial. The trial court denied the defendant's motions. The Court of Appeals held that admission of this evidence was prejudicial error. It reasoned that the trial court erred by determining that the evidence was relevant to show opportunity and that the evidence was not sufficiently similar to show common plan or scheme. The Court of Appeals further concluded that "[a]dding to the prejudicial nature" of the testimony was the fact that the trial court did not instruct the jury to consider the evidence only for the 404(b) purpose for which it was admitted. The Supreme Court rejected the State's argument that defense counsel's motion did not constitute a request for a limiting instruction. It went on to hold:

> Our General Statutes provide that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial. (citations omitted).

Opinions

Sexual Assault Cases

State v. Crabtree, ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). The court per curiam affirmed the decision below, *State v. Crabtree*, ___ N.C. App. ___, 790 S.E.2d 709 (Sept. 6, 2016). In this child sexual assault case, the Court of Appeals held that neither a child interviewer from the Child Abuse Medical Evaluation Clinic nor a DSS social worker improperly vouched for the victim's credibility; however, the court of appeals held, over a dissent, that although a pediatrician from the clinic improperly vouched for the victim's credibility, no prejudice occurred. In the challenged portion of the social worker's testimony, the social worker, while explaining the process of investigating a report of child sexual abuse, noted that the pediatrician and her team "give their conclusions or decision about those children that have been evaluated if they were abused or neglected in any way." This statement merely described what the pediatrician's team was expected to do before sending a case to DSS; the social worker did not comment on the victim's case, let alone her credibility. In the challenged portion of the interviewer's testimony, he characterized the victim's description of performing fellatio on the defendant as "more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about." This testimony left the credibility determination to the jury and did not improperly vouch for credibility. However, statements made by the pediatrician constituted improper vouching. Although the pediatrician properly described the five-tier rating system that the clinic used to evaluate potential child abuse victims, she ventured into improper testimony when she testified that "[w]e have sort of five categories all the way from, you know, we're really sure [sexual

abuse] didn't happen to yes, we're really sure that [sexual abuse] happened" and referred to the latter category as "clear disclosure" or "clear indication" of abuse in conjunction with her identification of that category as the one assigned to the victim's interview. Also, her testimony that her team's final conclusion that the victim "had given a very clear disclosure of what had happened to her and who had done this to her" was an inadmissible comment on the victim's credibility. However, the defendant was not prejudiced by these remarks.

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). In this child sexual abuse case the court applied the new *Daubert* standard and concluded that the trial court did not err by admitting certain expert testimony. At trial Kelli Wood testified as an expert in clinical social work, specializing in child sexual abuse cases. The defendant argued that the trial court abused its discretion by allowing Wood to testify that it is not uncommon for children to delay the disclosure of sexual abuse and by allowing Wood to provide possible reasons for delayed disclosures. According to the defendant, Wood's testimony was unreliable because she had not conducted on research herself and instead relied on studies conducted by others. The court found that this argument—that the trial court abused its discretion by admitting Wood's testimony based on a review of research on delayed disclosures combined with her professional experience— to "directly conflict[]" with Rule 702. It noted that experience alone or experience combined with knowledge and training is sufficient to establish a proper foundation for expert testimony. Here, Wood testified that her testimony on delayed disclosures was grounded in 200 hours of training, 11 years of forensic interviewing experience, conducting over 1200 forensic interviews with 90% of those focusing on sex abuse allegations, and reviewing over 20 articles on delayed disclosures. The court noted that similar testimony had been admitted under an earlier version of Rule 702, and that case law was still good law. The court also rejected the defendant's argument that the testimony was inadmissible because it was not the product of reliable principles and methods. The defendant argued that the research Wood relied on was flawed in a number of respects. The court noted that these concerns were addressed examination and cross-examination of Wood and that Wood was able to provide detailed explanations for each of these concerns.

State v. Dye, ___ N.C. App. ____, 802 S.E.2d 737 (June 20, 2017). In this statutory rape case, the court rejected the defendant's argument that the trial court erred by allowing the State's witness, Dr. Rothe, to improperly bolster the victim's credibility. Rothe made no definitive diagnosis that the victim had experienced sexual abuse. Instead, Rothe detailed her examination of the victim, and testified that the absence of the victim's hymen in the 5-7 o'clock area was "suspicious" for vaginal penetration and that "having an absent hymen in that section of posterior rim is very suspicious for sexual abuse." Rothe appropriately cautioned that her findings, while suspicious for vaginal penetration and sexual abuse, were not conclusive; Rothe explained that "the only time . . . a clinical provider . . . can say sexual abuse happened is if we see that hymen within three days of the sexual abuse[.]" Since Rothe had not examined the victim within three days of the alleged sexual abuse, she explained that the "nomenclature becomes difficult." Rothe readily conceded on cross-examination that the gap of eight months between the alleged abuse and the examination would "affect [her] ability to determine some results" of her examination; that there is "a lot of variation in what one would consider normal in what a hymen of a prepubescent or pubescent girl looks like" and the appearance of the victim's hymen could fall within that normal variation; and that conclusive results were not possible without a "baseline"

examination conducted before the alleged abuse. Rothe further testified on cross that the results of the victim's examination were "suspicious but not conclusive" for vaginal penetration. It is clear that Rothe did not opine that sexual abuse had in fact occurred. Rothe's testimony that the results of the victim's examination were "suspicious" of vaginal penetration and sexual abuse is consistent with testimony the court has found to be permissible, including an expert's opinion that the results of an examination are "consistent with" sexual abuse.

Drug Cases

State v. Carter, ___ N.C. App. ___, 803 S.E.2d 464 (Aug. 15, 2017). In this drug case, the court held that although the trial court erred by allowing lay opinion testimony identifying the substance at issue as crack cocaine based on a visual identification, the error was not prejudicial where the State presented expert testimony, based on a scientifically valid chemical analysis, that the substance was a controlled substance. The trial court allowed the arresting officer, a Special Agent Kluttz with the North Carolina Department of Alcohol Law Enforcement, to identify the substance as crack cocaine. Agent Kluttz based his identification on his training and experience and his perceptions of the substance and its packaging. He was not tendered as an expert. The State also introduced evidence in the form of a Lab report and expert testimony by a chemical analyst with the North Carolina State Crime Laboratory. This witness testified that the results of testing indicated that the substance was consistent with cocaine. North Carolina Supreme Court precedent establishes two rules in this area: First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. And second, testimony identifying a controlled substance based on visual inspection—whether presented as an expert or lay opinion—is inadmissible. Applying this law, the court agreed with the defendant that Agent Kluttz's identification of the substance as crack cocaine was inadmissible lay opinion testimony. However given the other admissible evidence that identified the substance as a controlled substance based on a chemical analysis, the defendant failed to demonstrate prejudice and therefore to establish plain error.

State v. Alston, ___ N.C. App. ____, 802 S.E.2d 753 (June 20, 2017). In this drug case, the trial court committed plain error by allowing a law enforcement officer to testify that pills found at the defendant's home were Alprazolam and Oxycodone, where the identification was based on a visual inspection of the pills and use of a website, drugs.com. Under North Carolina law, pills cannot be identified as controlled substances by visual identification.

Impaired Driving & HGN

State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (June 9, 2017). Reversing the Court of Appeals, the court held that Evidence Rule 702(a1) does not require the trial court to *explicitly* recognize a law enforcement officer as an expert witness pursuant to Rule 702(a) before he can testify to the results of a HGN test. Rather, the court noted, prior case law establishes that an implicit finding will suffice. Reviewing the record before it, the court found that here, by overruling the defendant's objection to the witness's testimony, the trial court implicitly found that the officer was qualified to testify as an expert. The court noted however that its ability to review the trial court's decision "would have benefited from the inclusion of additional facts supporting its determination" that the officer was qualified to testify as an expert.

State v. Sauls, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court did not commit plain error by allowing a trooper to testify at trial about the HGN test he administered on the defendant during the stop where the State never formally tendered the trooper as an expert under Rule 702. The court noted that during the pendency of the appeal the state Supreme Court decided *State v. Godwin*, ___ N.C. ___, ___ 800 S.E.2d 47, 48 (2017) (Evidence Rule 702(a1) does not require a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702 before the officer may testify to the results of a HGN test), which controls this case. As in *Godwin*, the defendant was not arguing that the officer was unqualified to testify as an expert, but only that he had to be formally tendered as such. Under *Godwin* "it was simply unnecessary for the State to make a formal tender of the trooper as an expert on HGN testing."

State v. Younts, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this DWI case to which the amended version of Evidence Rule 702 applied, the court held that a trial court does not err when it admits expert testimony regarding the results of a Horizontal Gaze Nystagmus (HGN) test without first determining that HGN testing is a product of reliable principles and methods as required by subsection (a)(2) of the rule. Evidence Rule 702(a1) obviates the State's need to prove that the HGN testing method is sufficiently reliable.

Mental Health Experts

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). In this homicide case, the trial court did not err by allowing the State's expert witness on automatism to testify to the defendant's state of mind at the time of the shooting. The expert endocrinologist testified that based on his experience with hypoglycemia and his review of the defendant's medical records and account of what had occurred on the day of the shooting, the defendant's actions were "not caused by automatism due to hypoglycemia." The court rejected the defendant's argument that this testimony, while couched in expert medical testimony, was merely speculation about the defendant state of mind at the time of the shooting. Here, the expert testified that in his opinion the defendant was not in a state of automatism at the time because he did not suffer from amnesia, a key characteristic of the condition. The trial court acted well within its discretion by admitting this testimony.

On Credibility

State v. Prince, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). In this child abuse case, the expert witness's testimony did not constitute improper vouching for the victim. At trial Holly Warner, a nurse practitioner, testified as an expert. Warner had evaluated the victim after he was placed in foster care. At trial she related what the victim told her about his injuries and what she observed during her evaluation of him before she gave her medical opinion. When she related the victim's disclosure about how his injury occurred and who caused them, Warner was describing her process for gathering necessary information to make a medical diagnosis and was not commenting on the victim's credibility. In neither her direct examination nor cross-examination did Warner state that the child was believable, credible or telling the truth.

Photographs

State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (June 20, 2017). The trial court did not commit plain error by admitting for illustrative purposes a Facebook picture of the defendant and an accomplice in which the defendant's middle finger was extended. At trial the State called a detective who testified that the victim showed him a picture of the defendant and the accomplice on the defendant's Facebook page for identity purposes. The detective printed that picture and it was admitted at trial for illustrative purposes, over the defendant's objection. The trial court properly admitted the photograph pursuant to G.S. 8-97 to illustrate the detective's testimony that the victim used the photograph to identify the defendant and his accomplice. The photograph was properly authenticated and the trial court gave a limiting instruction as to its use.

Rule of Completeness (Rule 106)

State v. Broyhill, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). The trial court did not abuse its discretion by excluding statements from the defendant's custodial interviews on April 23rd and 25th while admitting statements from a third custodial interview on April 26th. On appeal the defendant argued that his prior statements should have been admitted under Rule 106 because they would have enhanced the jury's understanding of the third statement. The defendant failed to demonstrate that the third statement was out of context when it was introduced and that the two prior statements were either explanatory of or relevant to the third.

State v. Hensley, ___ N.C. App. ____, 802 S.E.2d 744 (June 20, 2017). The trial court did not abuse its discretion by admitting a more complete version of a detective's notes after the defendant opened the door by asking about one portion of those notes. The court rejected the defendant's argument that it was improper to admit the notes under Rule 106 (remainder of or related writings or recorded statements) because the State's request to do so was not done contemporaneously with the original cross-examination of the detective. The court went on to find that the trial court did not abuse its discretion under Rule 403 in admitting the notes.

Arrest, Search, and Investigation

Arrests

State v. Messer, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). In this armed robbery and murder case, the trial court did not err by concluding that law enforcement officers had probable cause to arrest the defendant. Among other things, the defendant placed a telephone call using the victim's cell phone about 20 minutes before the victim's death was reported to law enforcement; the defendant spent the previous night at the victim's residence; the victim's son had last seen his father with the defendant; the victim's Smith and Wesson revolver was missing and a Smith and Wesson revolver was found near the victim's body; and the defendant was seen on the day of the victim's death driving an automobile matching the description of one missing from the victim's used car lot.

Stops

State v. Goins, ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). For the reasons stated in the dissenting opinion below, the court reversed the decision of the Court of Appeals in *State v. Goins*, ___ N.C. App. ___, 789 S.E.2d 466 (July 5, 2016). In that case, the Court of Appeals held, over a dissent, that a stop of the defendant's vehicle was not supported by reasonable suspicion. The stop occurred in an area of high crime and drug activity. The Court of Appeals majority concluded that the defendant's mere presence in such an area cannot, standing alone, provide the necessary reasonable suspicion for the stop. Although headlong flight can support a finding of reasonable suspicion, here, it determined, the evidence was insufficient to show headlong flight. Among other things, there was no evidence that the defendant saw the police car before leaving the premises and he did not break any traffic laws while leaving. Although officers suspected that the defendant might be approaching a man at the premises to conduct a drug transaction, they did not see the two engage in suspicious activity. The officers' suspicion that the defendant was fleeing from the scene, without more, did not justify the stop. The dissenting judge concluded that the officers had reasonable suspicion for the stop. The dissenting judge criticized the majority for focusing on a "fictional distinction" between suspected versus actual flight. The dissenting judge concluded: considering the past history of drug activity at the premises, the time, place, manner, and unbroken sequence of observed events, the defendant's actions upon being warned of the police presence, and the totality of the circumstances, the trial court correctly found that the officers had reasonable suspicion for the stop.

State v. Johnson, ___ N.C. ___, 803 S.E.2d 137 (Aug. 18, 2017). The Supreme Court reversed the decision below, *State v. James Johnson*, ___ N.C. App. ___, 784 S.E.2d 633 (April 5, 2016), which had held that because a police officer lacked reasonable suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant's motion to suppress. The defendant was stopped at a red light on a snowy evening. When the light turned green, the officer saw the defendant's truck abruptly accelerate, turn sharply left, and fishtail. The officer pulled the defendant over for driving at an unsafe speed given the road conditions. The Supreme Court held that the officer had reasonable suspicion to stop the defendant's vehicle. It noted that G.S. 20-141(a) provides that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." The Court concluded:

> All of these facts show that it was reasonable for [the] Officer . . . to believe that defendant's truck had fishtailed, and that defendant had lost control of his truck, because of defendant's abrupt acceleration while turning in the snow. It is common knowledge that drivers must drive more slowly when it is snowing, because it is easier to lose control of a vehicle on snowy roads than on clear ones. And any time that a driver loses control of his vehicle, he is in danger of damaging that vehicle or other vehicles, and of injuring himself or others. So, under the totality of these circumstances, it was reasonable for [the] Officer . . . to believe that defendant had violated [G.S.] 20-141(a) by driving too quickly given the conditions of the road.

The Court further noted that no actual traffic violation need have occurred for a stop to occur. It clarified: "To meet the reasonable suspicion standard, it is enough for the officer to *reasonably believe* that a driver has violated the law."

State v. Walker, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). No reasonable suspicion supported a stop. At approximately 5 pm dispatch notified a trooper on routine patrol that an informant-driver reported that another driver was driving while intoxicated. The informant reported that the driver was driving from the Hubert area towards Jacksonville, traveling about 80 to 100 mph while drinking a beer. He also claimed that the driver was driving "very erratically" and almost ran him off the road "a few times." While responding to the dispatch, the informant flagged down the trooper and said that the vehicle in question had just passed through the intersection on US 258, heading towards Richlands. The trooper headed in that direction and stopped the defendant's vehicle within 1/10 of a mile from the intersection. The defendant was arrested and charged with DWI and careless and reckless driving. The defendant unsuccessfully moved to suppress in District Court and appealed to Superior Court. After a hearing, the Superior Court granted the motion to suppress. The Court of Appeals found that the tip did not have sufficient indicia of reliability to provide reasonable suspicion for the stop. Although the informant was not anonymous, because the defendant's vehicle was out of sight, the informant was unable to specifically point out the defendant's vehicle to the trooper. The trooper did not observe the vehicle being driven in a suspicious or erratic fashion. Additionally, it is unknown whether the trooper had the vehicle's license plate number before or after the stop and whether the trooper had any vehicle description besides a "gray Ford passenger vehicle." The court distinguished prior case law involving tips that provided enough information so that there was no doubt as to which particular vehicle was being reported. Here, the informant's ambiguous description did not specify a particular vehicle. Additionally, no other circumstances enabled the trooper to further corroborate the tip; the trooper did not witness the vehicle behaving as described by the informant.

State v. Sauls, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). Reasonable suspicion supported the traffic stop. At the time of the stop it was very late at night; the defendant's vehicle was idling in front of a closed business; the business and surrounding properties had experienced several break-ins; and the defendant pulled away when the officer approached the car. Considered together, this evidence provides an objective justification for stopping the defendant.

State v. Nicholson, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 22, 2017). Over a dissent, the court held that an officer lacked reasonable suspicion for a stop. The officer had approached a vehicle that was operated by another person and in which the defendant was a passenger. At the suppression hearing the officer testified that at the time of the seizure, he had no evidence of any criminal activity that he could identify. The only specific fact the officer identified was that the defendant was pulling a toboggan down over his head. The State pointed to several factors in support of its argument that reasonable suspicion existed, including the fact that the front passenger seat was empty and the defendant was sitting in the back, directly behind the driver; the vehicle was stationary in the middle of the road; the officer knew that the two had just been in a heated argument; the driver provided inconsistent answers when asked whether everything was okay; and the stop occurred in the early morning hours. However, the officer had already questioned the two individuals twice and released the driver so he could go to work after the officer assessed the situation. Moreover, when asked why he seized the defendant and inquired whether he was armed, the officer stated it was "just a common thing" that he asked everybody who is out in the early

morning hours. The court noted that such a basis for seizure would make any individual in the area subject to seizure. Taken together the facts did not provide reasonable suspicion.

Exclusionary Rule

State v. Hester, ___ N.C. App. ___, 803 S.E.2d 8 (July 18, 2017). The court held, over a dissent, that even if the initial stop was not supported by reasonable suspicion, the trial court properly denied the defendant's motion to suppress where the evidence sought to be suppressed--a stolen handgun--was obtained after the defendant committed a separate crime: pointing a loaded, stolen gun at the deputy and pulling the trigger. The evidence at issue was admissible under the attenuation doctrine, a doctrine holding that evidence is admissible when the connection between the unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that the interest protected by the constitutional guarantee that has been violated would not be served by suppression. Here, the State presented a sufficient intervening event—the defendant's commission of a crime--to break any causal chain between the presumably unlawful stop and the discovery of the stolen handgun. It added: "This Court can conceive only in the most rare instances where [the] deterrence benefits of police conduct to suppress a firearm outweigh[s] its substantial social costs of preventing a defendant from carrying a concealed, loaded, and stolen firearm, pulling it at an identified law enforcement officer and pulling the trigger." (quotations omitted). The court rejected the notion that the State could not assert the attenuation doctrine on appeal because it failed to argue that issue before the trial court.

Interrogation & Confession

State v. Hammonds, ___ N.C. ___, ___ S.E.2d ___ (Sept. 29, 2017). Because the defendant was in custody while confined under a civil commitment order, the failure of the police to advise him of his *Miranda* rights rendered inadmissible his incriminating statements made during the interrogation. On December 10, 2012, a Stephanie Gaddy was robbed. On December 11, 2012, after the defendant was taken to a hospital emergency room following an intentional overdose, he was confined pursuant to an involuntary commitment order upon a finding by a magistrate that he was "mentally ill and dangerous to self or others." Officers identified the defendant as a suspect in the robbery and learned he was confined to the hospital under the involuntary commitment order. On December 12 they questioned him without informing him of his *Miranda* rights. The defendant provided incriminating statements. At trial he unsuccessfully moved to suppress the statements made during the December 12th interview. The defendant was convicted and he appealed. Before the Court of Appeals, the majority determined that the trial court properly found that the defendant was not in custody at the time of the interview and that the trial court's findings of fact supported its conclusion of law that the confession was voluntary. A dissenting judge concluded that the trial court's findings of fact were insufficient. The defendant filed an appeal of right with the Supreme Court, which vacated the opinion of the Court of Appeals and instructed and the trial court to hold a new hearing on the suppression motion. After taking additional evidence the trial court again denied the motion. When the case came back before the Supreme Court, it reversed. The court noted, in part, that the defendant's freedom of movement was already severely restricted by the civil commitment order. However the officers failed to inform him that he was free to terminate the questioning and, more importantly,

communicated to him that they would leave only after he spoke to them about the robbery. Specifically, they told him that "as soon as he talked, they could leave." The court found that "these statements, made to a suspect whose freedom is already severely restricted because of an involuntary commitment, would lead a reasonable person in this position to believe that he was not at liberty to terminate the interrogation without first answering his interrogators' questions about his suspected criminal activity." (quotations omitted).

State v. Knight, ___ N.C. ___, 799 S.E.2d 603 (June 9, 2017). Applying *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the court held that the defendant understood his *Miranda* rights and through a course of conduct indicating waiver, provided a knowing and voluntary waiver of those rights. During the interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or that he wanted an attorney. In fact, the 40-minute video of the interrogation shows that the defendant was willing to speak with the detective. After being read his rights, the defendant indicated that he wanted to tell his side of the story and he talked at length during the interrogation, often interrupting the detective, and responding without hesitation to the detective's questions. The video also shows that the defendant emphatically denied any wrongdoing; provided a detailed account of the evening's events; and seemed to try to talk his way out of custody. The court found this last point "worth emphasizing because it appears that, when faced with a choice between invoking his rights or trying to convince the police that he was innocent, defendant chose to do the latter." The court concluded that the defendant's course of conduct indicating waiver was much more pronounced than that of the defendant in *Berghuis*, who largely remained silent during a lengthy interrogation and who gave very limited responses when he did speak and nonetheless was found to have implicitly waived his rights. The court went on to conclude that, as in *Berghuis*, there was no evidence that the defendant's statements were involuntary. The defendant was not threatened in any way and the detective did not make any promises to get the defendant to talk. The interrogation was conducted in a standard room and lasted less than 40 minutes. The only factor that could even arguably constitute coercion was the fact that the defendant's arm was handcuffed to a bar on the wall in the interrogation room. The court noted however that his chair had an armrest, his arm had an ample range of motion, and he did not appear to be in discomfort during the interrogation. Thus, the court concluded, the defendant voluntarily waived his *Miranda* rights. The court went on to reject the defendant's argument that he did not understand his rights, again citing *Berghuis*. Here, the detective read all of the rights aloud, speaking clearly. The video shows that the defendant appeared to be listening and paying attention and that he speaks English fluently. The court noted that the defendant was mature and experienced enough to understand his rights, in part because of his prior experience with the criminal justice system. The trial court found the defendant gave no indication of cognitive issues, nor was there anything else that could have impaired his understanding of his rights. The court rejected the defendant's argument that the State must prove that the defendant explicitly stated that he understood his rights. Rather, it concluded that the State simply must prove, under the totality of the circumstances, that the defendant in fact understand them. The court went on to conclude that even if the defendant had expressly denied that he understood his rights, such a bare statement, without more, would not be enough to outweigh other evidence suggesting that he in fact understand them. The court summarized:

> [T]he fact that a defendant affirmatively denies that he understands his rights cannot, on its own, lead to suppression. Again, while an express written or oral

> statement of waiver of *Miranda* rights is usually strong proof of the validity of that waiver, it is neither necessary nor sufficient to establish waiver. Likewise, a defendant's affirmative acknowledgement that he understands his *Miranda* rights is neither necessary nor sufficient to establish that a defendant in fact understood them, because the test for a defendant's understanding looks to the totality of the circumstances. Just because a defendant says that he understands his rights, after all, does not mean that he actually understands them. By the same token, just because a defendant claims not to understand his rights does not necessarily mean that he does not actually understand them. In either situation, merely stating something cannot, in and of itself, establish that the thing stated is true. That is exactly why a trial court must analyze the totality of the circumstances to determine whether a defendant in fact understood his rights. As a result, even if defendant here had denied that he understood his rights—and again, in context it appears that he did not—that would not change our conclusion in this case. (citation omitted).

It continued, noting that any suggestion in the Court of Appeals' opinion suggesting that a defendant must make some sort of affirmative verbal response or affirmative gesture to acknowledge that he has understood his *Miranda* rights for his waiver to be valid "is explicitly disavowed." (citation omitted).

State v. Saldierna, ___ N.C. App. ___, 803 S.E.2d 33 (July 18, 2017). Because the juvenile defendant did not knowingly, willingly, and understandingly waive his rights, the trial court erred by denying the defendant's motion to suppress his statement made to an interrogating officer. The then sixteen-year-old defendant was arrested at his home in South Carolina in connection with incidents involving several homes around Charlotte. Before questioning, the detective read the defendant his rights and asked whether he understood them. After initialing and signing an English version of the Juvenile Waiver of Rights form, the defendant asked to call his mother before undergoing custodial questioning. The call was allowed, but the defendant could not reach his mother. The custodial interrogation then began. During the interrogation the defendant confessed his involvement in the incidents. After he was charged, he unsuccessfully sought to suppress his statements. The court held that his motion should have been granted. The defendant had only an eighth grade education and Spanish was his primary language. He could write in English, but had difficulty reading English and understanding spoken English. The transcript of the audio recording in which the defendant was said to have waived his rights revealed that the detective spoke to the defendant entirely in English and that the defendant gave several "[unintelligible]" or non-responses to the detective's questions pertaining to whether or not he understood his rights. There was no indication that the defendant had any familiarity with the criminal justice system and the record indicates that the defendant did not fully understand (or might not have fully understood) the detective's questions. The court concluded: "Because the evidence does not support the trial court's findings of fact . . . that defendant understood [the] Detective's . . . questions and statements regarding his rights, we conclude that he did not legitimately waive[] his *Miranda* rights. As a result, we decline to give any weight to recitals, like the juvenile rights waiver form signed by defendant, which merely formalize[d] constitutional requirements." (quotations omitted). It added: "To be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but in fact. It should be unequivocal

and unassailable when the subject is a juvenile." Applying this standard to the case at hand, the court explained:

> Here, the waiver was signed in English only, and defendant's unintelligible answers to questions such as, "Do you understand these rights?" do not show a clear understanding and a voluntary waiver of those rights. Defendant stated firmly to the officer that he wanted to call his mother, even after the officer asked (unnecessarily), "Now, before you talk to us?" Further, defendant reiterated this desire, even in spite of the officer's aside to other officers in the room: "He wants to call his mom." Such actions would show a reasonable person that this juvenile defendant did not knowingly, willingly, and understandingly waive his rights. Rather, his last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful, was a strong indication that he did not want to waive his rights at all. Yet, after a second unsuccessful attempt to reach his working parent failed, this juvenile, who had just turned sixteen years old, probably felt that he had no choice but to talk to the officers. It appears, based on this record, that defendant did not realize he had the choice to refuse to waive his rights, as the actions he took were not consistent with a voluntary waiver. As a result, any "choice" defendant had to waive or not waive his rights is meaningless where the record does not indicate that defendant truly understood that he had a choice at all.
>
> Furthermore, the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, "[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights." Here, too much evidence contradicts the English language written waiver signed by defendant, which, in any event, is merely a "recital" of defendant's purported decision to waive his rights. Accordingly, it should not be considered as significant evidence of a valid waiver. (citations and footnote omitted).

State v. Moore, ___ N.C. App. ___, 803 S.E.2d 196 (July 18, 2017). The trial court did not err by denying the defendant's motion to suppress statements made to an officer while the officer was transporting the defendant to the law enforcement center. It was undisputed that the defendant made the inculpatory statements while in custody and before he had been given his *Miranda* rights. However, the court held that the defendant was not subjected to interrogation; rather, his statements were spontaneous utterances.

Plain View & Protective Sweep

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this felon in possession of a firearm case, 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. (1) The court began by finding that the protective sweep was proper. Specifically, 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) Over a dissent, the court held 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.

Search Warrants

State v. Worley, ___ N.C. App. ___, 803 S.E.2d 412 (July 18, 2017). The trial court properly denied the defendant's motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods connected to a breaking and entering of a horse trailer. The defendant argued that the search warrant affidavit establish no nexus between the cabin and the criminal activity. The court found however "that under the totality of the circumstances, the accumulation of reasonable inferences drawn from information contained

within the affidavit sufficiently linked the criminal activity to defendant's cabin." Among other things, the affidavit established that when one of the property owners hired the defendant to work at their farm, several tools and pieces of equipment went missing and were never recovered; immediately before the defendant moved out of state, someone broke into their daughter's car and stole property; the defendant rented a cabin close to their property around the same time as the reported breaking and entering and larceny; and the defendant had prior convictions for first-degree burglary and felony larceny. Based on this and other evidence discussed in detail in the court's opinion, the affidavit established a sufficient nexus between the criminal activity and the defendant's cabin.

Blood Samples

State v. Romano, ___ N.C. ___, 800 S.E.2d 644 (June 9, 2017). The court held, in this DWI case, that in light of the U.S. Supreme Court's decisions in *Birchfield v. North Dakota* (search incident to arrest doctrine does not justify the warrantless taking of a blood sample; as to the argument that the blood tests at issue were justified based on the driver's legally implied consent to submit to them, the Court concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense"), and *Missouri v. McNeely* (natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant; exigency must be determined on a case-by-case basis), G.S. 20-16.2(b) (allowing blood draw from an unconscious person) was unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment. An officer, relying on G.S. 20-16.2(b), took possession of the defendant's blood from a treating nurse while the defendant was unconscious without first obtaining a warrant. The court rejected the State's implied consent argument: that because the case involved an implied consent offense, by driving on the road, the defendant consented to having his blood drawn for a blood test and never withdrew this statutorily implied consent before the blood draw. It continued:

> Here there is no dispute that the officer did not get a warrant and that there were no exigent circumstances. Regarding consent, the State's argument was based solely on N.C.G.S. § 20-16.2(b) as a per se exception to the warrant requirement. To be sure, the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw, but the statute alone does not create a per se exception to the warrant requirement. The State did not present any other evidence of consent or argue that under the totality of the circumstances defendant consented to a blood draw. Therefore, the State did not carry its burden of proving voluntary consent. As such, the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant.

Criminal Offenses

Participants in Crime

State v. Glidewell, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). In this habitual misdemeanor larceny case, the evidence was sufficient to support the trial court's instruction on the theory of acting in concert. On appeal, the defendant argued that the State's evidence was

insufficient to show that he and his accomplice acted with a common purpose to commit a larceny or that he aided or encouraged his accomplice. According to the defendant, the evidence showed that he was simply present when his accomplice committed the crime. Here, the evidence showed that the defendant rode with his accomplice in the same car to the store; the two entered the store together; they looked at merchandise in the same section of the store; they were seen on surveillance video returning to the same area behind the clothing rack, stuffing shirts into their pants; and the two left the store within seconds of each other and exited the parking lot in a vehicle driven by the accomplice.

State v. Cannon, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of aiding and abetting larceny. The charges arose out of the defendant's involvement with store thefts. A Walmart loss prevention officer observed Amanda Eversole try to leave the store without paying for several clothing items. After apprehending Eversole, the loss prevention officer reviewed surveillance tapes and discovered that she had been in the store with William Black, who had taken a number of items from store shelves without paying. After law enforcement was contacted, the loss prevention officer went to the parking lot and saw Black with the officers. Black was in the rear passenger seat of an SUV, which was filled with goods from the Walmart. A law enforcement officer testified that when he approached Black's vehicle the defendant asked what the officers were doing. An officer asked the defendant how he knew Black and the defendant replied that he had only just met "them" and had been paid $50 to drive "him" to the Walmart. The defendant also confirmed that he owned the vehicle. Citing this and other evidence, the court held that the trial court did not err by denying the motion to dismiss.

Homicide

State v. Coleman, ___ N.C. App. ___, ___ S.E.2d ___ (July 18, 2017). (1) The evidence was sufficient with respect to the defendant's voluntary manslaughter conviction. The defendant was charged with first-degree murder. At trial the defendant admitted that he shot and killed his wife. He argued however that as a result of diabetes, his blood sugar was dangerously low at the time of the shooting, causing him to act in a manner that was not voluntary. The defendant moved for a directed verdict on the first-degree murder charges as well as the lesser charges of second-degree murder and voluntary manslaughter. The judge denied this motion and the jury found him guilty of voluntary manslaughter. The court rejected the defendant's argument that acting in the "heat of passion" was an element of voluntary manslaughter, noting that for this offense the State need only prove that the defendant killed the victim by an intentional and unlawful act and that the defendant's act was a proximate cause of death. Here, the defendant admitted that he shot his wife. His sole defense was that he did not act voluntarily due to low blood sugar, which put him in a state of automatism. The State presented expert testimony that he was not in such a state. Thus, there was substantial evidence from which the jury could reject the defendant's automatism defense and conclude that the defendant intentionally shot and killed his wife—the only elements necessary to prove voluntary manslaughter. (2) The trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of involuntary manslaughter. In the context of a shooting, the charge of involuntary manslaughter requires evidence of the absence of intent to discharge the weapon. This fact distinguishes involuntary

manslaughter from its voluntary counterpart, which requires proof of intent. The defendant's argument fails because there was no evidence at trial suggesting that the defendant did not intend to shoot his wife. Rather, the defendant's defense relied on his argument that he was in a state of automatism--a complete defense to all criminal charges--which the jury rejected. Here, there was no evidence suggesting that the shooting was an accident.

Assaults

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). The trial court erred by denying the defendant's motion to dismiss charges of assault inflicting serious bodily injury where there was insufficient evidence that the officer sustained serious bodily injury from the defendant's bites. There was insufficient evidence of a permanent or protracted condition that causes extreme pain. Although there was evidence that the bite caused swelling and bruising that resolved in about one month, there was no evidence that the injury continued to cause the officer significant pain subsequent to his initial hospital treatment. Furthermore there was insufficient evidence of serious, permanent disfigurement, notwithstanding discoloration at the site of the bite.

Sexual Assaults & Related Offenses

State v. Baker, ___ N.C. ___, 799 S.E.2d 816 (June 9, 2017). Reversing the Court of Appeals, the court held that the evidence was sufficient to support the defendant's conviction for attempted first-degree rape of a child. The Court of Appeals had reversed the defendant's conviction finding, in part, that the evidence supported only a conviction for completed rape, not an attempted rape. Citing precedent, the Supreme Court held that evidence of a completed rape is sufficient to support an attempted rape conviction.

Sex Offender Crimes

Packingham v. N.C., 582 U.S. ___, 137 S. Ct. 1730 (June 19, 2017). North Carolina's statute, G.S. 14–202.5, making it a felony for a registered sex offender to gain access to a number of websites, including common social media websites like Facebook and Twitter, violates the First Amendment. After the defendant, a registered sex offender, accessed Facebook, he was charged and convicted under the statute. The Court of Appeals struck down his conviction, finding that the statute violated the First Amendment. The N.C. Supreme Court reversed. The U.S. Supreme Court granted certiorari and reversed North Carolina's high court. Noting the case "is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," the Court noted that it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." The Court found that even assuming that the statute is content neutral and thus subject to intermediate scrutiny, it cannot stand. In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest. Considering the statute at issue, the Court concluded:

> [T]the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to

> information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."
>
> In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. (citations omitted)

The Court went on to hold that the State had not met its burden of showing that "this sweeping law" is necessary or legitimate to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The Court was careful to note that its opinion "should not be interpreted as barring a State from enacting more specific laws than the one at issue." It continued: "Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."

State v. Anderson, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 1, 2017). (1) The evidence was insufficient to support a conviction under G.S. 14-208.18(a)(1), for being a sex offender on the premises of a daycare. The defendant was seen in a parking lot of a strip mall containing a daycare, other businesses, and a restaurant. Next-door to the daycare was a hair salon; next to the hair salon was a tax business. The three businesses shared a single building as well as a common parking lot. A restaurant in a separate, freestanding building shared the same parking lot. None of the spaces in the parking lot were specifically reserved or marked as intended for the daycare. The daycare, including its playground area, was surrounded by a chain-link fence. The court agreed with the defendant that the State failed to present sufficient evidence that the shared parking lot was part of the premises of the daycare. It stated: "[T]he shared parking lot is located on premises that are not intended primarily for the use, care, or supervision of minors. Therefore, we conclude that a parking lot shared with other businesses (especially with no designation(s) that certain spaces "belong" to a particular business) cannot constitute "premises" as set forth in subsection (a)(1) of the statute." (2) The defendant's guilty plea to unlawfully being within 300 feet of a daycare must be vacated in light of a Fourth Circuit's decision holding G.S. 14-208.18(a)(2) to be unconstitutional. The defendant was indicted and pled guilty to violating G.S. 14-208.18(a)(2), which prohibits certain persons from being within 300 feet a location intended primarily for the use, care, or supervision of minors. While his direct appeal was pending, the Fourth Circuit held that statute to be unconstitutionally overbroad in violation of the First Amendment. Thus the conviction must be vacated.

Larceny Related Offenses

State v. Jones, ___ N.C. ___, 800 S.E.2d 54 (June 9, 2017). The evidence was sufficient to support the defendant's convictions for three counts of felony larceny. The defendant, a truck driver who worked as an independent contractor, was overpaid because a payroll processor accidentally typed "$120,000" instead of "$1,200" into a payment processing system, resulting in an excess deposit in the defendant's bank account. Although the defendant was informed of the error and was asked not to remove the excess funds from his bank account, he made a series of withdrawals and transfers totaling over $116,000. In connection with one of the withdrawals, the defendant went to a bank branch. The teller who assisted him noted the large deposit and asked the defendant about it. The defendant replied that he had sold part of the business and requested further withdrawals. Because of the defendant's actions, efforts to reverse the deposit were unsuccessful. The defendant was convicted of three counts of larceny on the basis of his three withdrawals of the erroneously deposited funds. The Court of Appeals vacated the defendant's convictions, finding that he had not committed a trespassory taking. The Supreme Court reversed. The court noted that to constitute a larceny, a taking must be wrongful, that is, it must be "by an act of trespass." A larcenous trespass however may be either actual or constructive. A constructive trespass occurs when possession of the property is fraudulently obtained by some trick or artifice. However the trespass occurs, it must be against the possession of another. Like a larcenous trespass, another's possession can be actual or constructive. With respect to construing constructive possession for purposes of larceny, the court explicitly adopted the constructive possession test used in drug cases. That is, a person is in constructive possession of the thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. The court found that the depositor retained constructive possession of the excess funds even after they had been transferred to the defendant's account. Specifically, the depositor had the intent and capability to maintain control and dominion over the funds by affecting a reversal of the deposit. The fact that the reversal order was not successful does not show that the depositor lacked constructive possession. The court went on to conclude that the defendant did not simultaneously have possession of the funds while they were in his account, a fact that would have precluded a larceny conviction. The court concluded that the defendant "was simply the recipient of funds that he knew were supposed to be returned in large part. He therefore had mere custody of the funds, not possession of them." It reasoned that when a person has mere custody of a property, he or she may be convicted of larceny when the property is appropriated to his or her own use with felonious intent.

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). As conceded by the State, the evidence was insufficient to establish misdemeanor larceny where the defendant was in lawful possession of the property at the time she removed it. After eviction proceedings were instituted against the defendant at one residence, she moved into a new home. Because the new home did not have appliances, she moved the appliances from her original home into the new home, having made plans to return them before the date she was required to be out the first residence. However she was arrested and charged with larceny of the appliances before that date expired.

State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). The evidence was sufficient to convict the defendant of larceny of a firearm. The court rejected the defendant's argument that

the evidence was insufficient to show that he intended to permanently deprive the victim of a firearm, noting: "Generally, where a defendant takes property from its rightful owner and keeps it as his own until apprehension, the element of intent to permanently deny the rightful owner of the property is deemed proved." Here, the defendant was apprehended by law enforcement officers with the stolen pistol hidden in the spare tire well of his vehicle.

State v. Bacon, ___ N.C. App. ___, 803 S.E.2d 402 (July 18, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 460 (Aug. 4, 2017). Because there was insufficient evidence to establish that the value of the stolen items exceeded $1000, the trial court erred by failing to dismiss a charge of felonious larceny. The items in question, stolen during a home break-in, included a television and earrings. Although the State presented no specific evidence concerning the value of the stolen items, the trial court ruled that their value was a question of fact for the jury. This was error. A jury cannot estimate the value of an item without any evidence put forward to establish a basis for that estimation. Although certain property may, by its very nature, be of value obviously greater than $1000 the television and earrings in this case are not such items.

State v. Falana, ___ N.C. App. ___, 802 S.E.2d 582 (July 5, 2017). Where there was insufficient evidence as to the ownership of the property in question, a vehicle, the evidence was insufficient to convict the defendant of felony conversion under G.S. 14-168.1. The indictment alleged that the vehicle was owned by a natural person named as Ezuma Igwe but the State failed to provide substantial evidence that Igwe owned the vehicle. North Carolina law defines a vehicle owner as the person holding legal title to it but here, Igwe never received title to the vehicle in question.

Obtaining Property by False Pretenses

State v. Street, ___ N.C. App. ____, 802 S.E.2d 526 (June 20, 2017). The doctrine of recent possession applies to obtaining property by false pretenses. Thus, the trial court did not err by instructing the jury on this doctrine.

Injury to Property Offenses

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court erred by denying the defendant's motion to dismiss a charge of misdemeanor injury to personal property. First, the State failed to present sufficient evidence showing that the defendant intended to cause injury to the personal property. The property in question was appliances, owned by the defendant's landlord, that the defendant was alleged to have damaged while moving them from one home to another. The only evidence on point was the defendant's own testimony, in which she acknowledged that the damage could have occurred during moving. This was insufficient to show that the defendant intentionally caused the damage. Second, the evidence was insufficient to establish that the defendant was the person who damaged the appliances.

RDO

State v. Peters, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 5, 2017). The evidence was sufficient to sustain a conviction for resisting, delaying, and obstructing an officer (RDO). The court rejected the argument that the evidence was insufficient evidence to show that the defendant

delayed or intended to delay an officer. The officer responded to a Walmart store, where a loss prevention officer had detained the defendant for theft. When the officer asked the defendant for an identification card, the defendant produced a North Carolina ID. The officer then radioed dispatch, asking for information related to the license number on the identification. Dispatch reported that the name associated with the identification number different from the one listed on the identification card. The officer asked the defendant if the numbers were correct, and the defendant confirmed that they were. Upon further questioning the defendant noted that there may have been a missing "8" at the end of the identification number. The defendant confirmed that no other numbers were missing. However dispatch again reported that the name did not match the new identification number. The officer then asked dispatch to search using the defendant's name and date of birth. The search revealed that the defendant's identification number also included a "0." The defendant was charged with RDO based on verbally giving an incorrect driver's license identification number. The evidence showed that the defendant's conduct delayed the officer and that she intended such a delay. The court noted, in part, that the officer testified, based on his experience, that individuals being investigated for charges similar to those at issue scratch numbers off the of their identification cards to create difficulty in identification.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of resisting an officer. The court rejected the defendant's argument that the officer was not discharging a lawful duty at the time of the stop because he did not have reasonable suspicion that the defendant had committed a crime. Having held otherwise in another portion of the opinion, the court rejected this argument.

Drug Offenses

State v. Miller, ___ N.C. ___, 800 S.E.2d 400 (June 9, 2017). Reversing a unanimous decision of the Court of Appeals, *State v. Miller*, ___ N.C. App. ___, ___, 783 S.E.2d 512 (2016), the court rejected the defendant's as-applied challenge to the constitutionality of G.S. 90-95(d1)(1)(c) (felony to possess a pseudoephedrine product when the defendant has a prior conviction for possession or manufacture of methamphetamine). After holding that the General Assembly intended the statute to be a strict liability offense, the Court of Appeals had gone on to hold that the statute was unconstitutional "as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law." The Supreme Court began by noting that, as a general rule, ignorance of the law or a mistake of law is no defense to a criminal prosecution. In *Lambert v. California*, 355 U.S. 225 (1957), however, the United States Supreme Court sustained and as applied challenge to a municipal ordinance making it unlawful for any individual who had been convicted of a felony to remain in Los Angeles for more than five days without registering with the Chief of Police. In that case the defendant had no actual knowledge of the registration requirement and the ordinance did not require proof of willfulness. The issue presented was whether the registration act violated due process when applied to a person who has no actual knowledge of the duty to register, and where no showing is made of the probability of such knowledge. Acknowledging the rule that ignorance of the law is no excuse, the U.S. Supreme Court pointed out that due process conditions the exercise of governmental authority on the existence of proper notice where a person, wholly passive and unaware of any criminal

wrongdoing, is charged with criminal conduct. Because the ordinance at issue in *Lambert* did not condition guilt on "any activity" and there were no surrounding circumstances which would have moved a person to inquire regarding registration, actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply were necessary before a conviction under the ordinance could stand consistent with due process. *Lambert* thus carves out a narrow exception to the general rule that ignorance of the law is no excuse. The subsequent *Bryant* decision from this court establishes that if the defendant's conduct is not "wholly passive," because it arises either from the commission of an act or failure to act under circumstances that reasonably could alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* does not apply. Turning to the facts of the case, the court noted that the defendant actively procured the pseudoephedrine product at issue. Moreover, the defendant never argued that he was ignorant of the fact that he possessed a pseudoephedrine product or that he had previously been convicted of methamphetamine possession. His conduct thus differs from that at issue in *Lambert* and in this court's *Bryant* decision in that it was not a "wholly passive" failure to act. The court found no need to determine whether the surrounding circumstances should have put the defendant on notice that he needed to make inquiry into his ability to lawfully purchase products containing pseudoephedrine and that his as applied challenge failed. And it went on to conclude that the issue of whether the statute was a strict liability offense was not properly before it.

State v. Alston, ___ N.C. App. ____, 802 S.E.2d 753 (June 20, 2017). The evidence was sufficient to sustain a conviction for maintaining a dwelling. Officer recovered from the home a Schedule I controlled substance, marijuana, a glass jar that had the odor of marijuana, Garcia y Vega cigar wraps, a marijuana roach, digital scales, sandwich bags, and a security camera set up in the living room that observed the front yard. The defendant, a convicted felon, had constructive possession of a handgun. And an officer observed traffic at the residence over several days consistent with illegal drug trade and observed a confidential source successfully buy a controlled substance from the residence.

State v. Yisrael, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 15, 2017). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver marijuana. The defendant argued that the State failed to present sufficient evidence of his intent to sell or deliver the drugs and that the evidence shows the marijuana in his possession was for personal use. As to the quantity of marijuana, here 10.88 grams. Although the amount of drugs may not be sufficient, standing alone, to support an inference of intent to sell or deliver, other facts supported this element, including the packaging of the drugs. Additionally, the 20-year-old defendant was carrying a large amount of cash ($1,540) and was on the grounds of a high school. Moreover, a stolen, loaded handgun was found inside the glove compartment of the vehicle.

Post-Conviction Proceedings

Clerical Errors/Error Correction

State v. Lynch, ___ N.C. App. ___, 803 S.E.2d 190 (July 5, 2017). Over a dissent, the court rejected the defendant's argument that there was a clerical error in the judgment. Although the trial court stated after the jury returned the verdict that it was "going to arrest judgment" on the

trafficking by delivery charge, the trial court did not pronounce the sentence at that time because the defendant failed to appear. At a sentencing hearing held several weeks later, the trial court noted that the defendant had been found guilty on three trafficking counts--including trafficking by delivery--and consolidated the trafficking offenses into one judgment. The judgment form reflects that the three offenses were so consolidated. The trial court's failure to arrest judgment on the trafficking by delivery offense was not a clerical error.

Motions for Appropriate Relief

State v. Todd, ___ N.C. ___, 799 S.E.2d 834 (June 9, 2017). The Supreme Court held that it had jurisdiction to decide an appeal from a divided decision of the Court of Appeals reversing a trial court's ruling denying a MAR. The defendant was convicted of armed robbery. He was unsuccessful on his direct appeal. The defendant then filed an MAR arguing that the evidence was insufficient to support his conviction and that his appellate counsel was ineffective for failing to raise this claim on appeal. The trial court denied the defendant's MAR. A divided Court of Appeals reversed, with instructions to grant the MAR and vacate the conviction. The Supreme Court noted that G.S. 7A-30(2) provides an automatic right of appeal based on a dissent at the Court of Appeals. However, that automatic right of appeal is limited by G.S. 7A-28, which states that decisions of the Court of Appeals upon review of G.S. 15A-1415 MARs (MARs by the defendant filed more than 10 days after entry of judgment) are final and not subject to further review. However, the supervisory authority granted to the court by Article IV, Section 12 of the North Carolina Constitution gave the court a restriction to hear the appeal.