APPELLATE CASES INTERPRETING 15A-910

The purpose of discovery under our statutes is to protect the defendant from unfair surprise by the introduction of evidence he cannot anticipate. **State v. Payne** 327 NC 194 (1990)

Subsection (a) gives the Judge broad and flexible powers to rectify the situation if a party fails to comply with discovery orders or provisions of the discovery Article. **Official Commentary 15A-910.**

By it's plain meaning, GS 15A-910(a) ensures that in criminal proceedings the trial court has the authority to require both the State and the Defendants to comply with North Carolina's discovery statutes and any orders entered pursuant to those statutes. To this end, GS 15A-910 authorizes a trial court to impose sanctions on the parties in addition to exercising the court's inherent contempt powers; however, nothing in the language of the statute indicates that this authority extends so far as to punish either the State or a criminal defendant for the actions of non-parties. **State v. Gillespie 362 NC 150 (2008).**

A trial court is not required to impose sanctions for late discovery. Instead, it is a matter of discretion for the trial judge. **State v. Lofton 2006 NC App Lexis 2120 (2006).**

It is within the trial court's sound discretion whether to impose sanctions for a failure to comply with discovery requirements, including whether to admit or exclude evidence, and the trial court's decision will not be reversed by this Court absent an abuse of discretion. An abuse of discretion results from a ruling so arbitrary that it could not have been the result of a reasoned decision or from a showing of bad faith by the State in its noncompliance. **State v. McClary 157 NC App 70 (2003), State v. Gayton 185 NC App 122 (2007)** and many others.

Which of the several remedies available under that statute should be applied in a particular case is a matter within the trial court's sound discretion, not reviewable on appeal in the absence of a showing of an abuse of discretion. **State v. Morrow 31 NC App 654 (1976), State v. McDonald 191 NC App 782 (2008).**

As this Court has stated, last minute or "day of trial" production to the defendant of discoverable materials the State intends to use at trial is an unfair surprise and may raise statutory violations. We do not condone either non-production or a "sandbag" delivery of relevant discoverable materials and documents by the State. **State v. Castrejon 175 NC App 685 (2006), State v. Herrera 2009 NC App Lexis 126 (2009).**

A defendant's right to discovery is statutory. Constitutional rights are not implicated in determining whether the State complied with these discovery statutes. There is no general constitutional or common law right to discovery in criminal cases. **State v. Haselden 357 NC 1 (2003), Weatherford v. Bursey 429 US 545 (1977), State v. Cook 362 NC 285 (2008).**

Determining whether the State failed to comply with discovery is a decision left to the sound discretion of the trial court. **State v. Jackson 340 NC 310 (1995), State v. Carter 2010 NC App Lexis 197 (2010).**

In addition, the choice of which sanction to apply, if any, rests in the sound discretion of the trial court. **State v. Gladden 315 NC 398 (1985), State v. Carter 2010 NC App Lexis 197 (2010).**

It is important to note that while NCGS 15A-910 sets out possible curative actions, it does not require the court to impose any sanction. **State v. Alston 307 NC 321 (1983), State v. Carter 2010 NC App Lexis 197 (2010).**

Scenario 1: The State seeks to call eyewitness Hicks, who was not mentioned in the pretrial discovery response or two supplemental responses, nor was he on the witness list. (The State first revealed the Hick's name after jury selection.) Should you preclude the witness from testifying?

State v. Gaddy 2009 NC App Lexis 346 (2009)

Initially, the trial court ruled that Hicks would not be allowed to testify. Subsequently, however, the court called a recess to allow the State and Defendant to meet with Hicks. Thereafter, the trial court announced that "[s]ince the defense attorney and the State have both had an opportunity to talk with Mr. Hicks, considering all of the circumstances, I am reversing my ruling . . . and he will be allowed to testify over objection." Defendant argues that the court erred in not excluding the evidence under *N.C. Gen. Stat. § **15A-910(**a)(3)*. Although we agree with the trial court that the State's actions and omissions at a minimum "[r]eek[ed] of sloppiness" and were "just absolutely inexcusable[,]" and we admonish the prosecutor for such conduct, we cannot say the trial court abused its discretion in selecting the second option under *section **15A-910(**a)* and granting a recess to allow Defendant to meet with Hicks before he testified. **[*13]** *See State v. Fenn, 94 N.C. App. 127, 133, 379 S.E.2d 715, 719* (finding no abuse of discretion where the trial court granted the defendant a recess in order to review the evidence not produced by the State in discovery), *disc. review denied, 325 N.C. 548, 385 S.E.2d 504 (1989)*. Defendant's assignment of error is thus overruled.

Scenario 2: In direct examination, a child witness in a sex offense case testifies for the first time that the Defendant told her in the hallway at home "Don't say nothing. Don't say nothing." The Defendant objects because the statement is the only evidence in the trial in which any implication of guilt is attributed to the Defendant, it was not produced in discovery and is highly prejudicial. The Defendant contends the only possible remedy is to grant a mistrial.

State v. Lofton 2006 NC App Lexis 2120 (2006).

Here, the trial judge chose not to grant a mistrial, but rather excluded the evidence by giving a strong instruction to **[*10]** the jury to disregard the testimony and then polling the jury to ensure that each juror could do so. Defendant has failed to demonstrate that the selection of this sanction was manifestly unreasonable.

Defendant argues that the statement was so inherently prejudicial -- as the only statement by defendant implying acknowledgment of wrongdoing -- that no juror could disregard the statement. This case does not, however, involve the admission of otherwise inadmissible evidence. Instead, the trial court sustained the objection and issued instructions to the jury to disregard the testimony as a *sanction* for discovery violations under *N.C. Gen. Stat. § **15A-910*** (2005).

Further, the decision regarding which sanction, if any, to impose rests entirely within the discretion of the trial court, and that decision will not be reversed in the absence of a showing of abuse of discretion. *Id. See also State v. Smith, 135 N.C. App. 649, 658, 522 S.E.2d 321, 328 (1999)* ("A trial court is not required to impose sanctions for late discovery. Instead, it is a matter of discretion for the trial judge.")

Scenario 3: When would granting a mistrial be an appropriate remedy for the trial Judge to consider using?

State v. Jaaber 176 NC 752 (2006)

Because the trial court is not **required** to impose any sanctions for abuse of discovery orders, what sanctions to impose, if any, are within the trial court's discretion." *State v. McCarver*, 341 N.C. 364, 383, 462 S.E.2d 25, 35 (1995) (emphasis added) (citing *State v. Alston*, 307 N.C. 321, 298 **[*756]** S.E.2d 631 (1983)). Further, "[a] mistrial is appropriate only when there are such serious improprieties as would make it impossible to attain a fair and impartial **[***7]** verdict under the law." *State v. Blackstock*, 314 N.C. 232, 243-44, 333 S.E.2d 245, 252 (1985). "Whether to grant a motion for mistrial is within the sound discretion of the trial court, and its ruling will not be disturbed on appeal unless it is so clearly erroneous as to amount to a manifest abuse of discretion." *McCarver*, 341 N.C. at 383, 462 S.E.2d at 36 (citing *State v. Ward*, 338 N.C. 64, 92-93, 449 S.E.2d 709, 724 (1994))

Scenario 4: The State seeks to introduce a series of photographs of the Defendant's tattoos that indicate possible gang involvement, none of which were produced in discovery.

State v. Gayton 185 NC App 122 (2007).

Per *N.C. Gen. Stat. 15A-903(a)(1)* (2005), the State must "[m]ake available to the defendant the complete files of all law enforcement and prosecutorial agencies," where "'file'" includes "any . . . matter or evidence obtained during the investigation of the offenses alleged to have been committed by the defendant." *Id*. When a party fails to comply with these guidelines, "[p]rior to finding any sanctions appropriate, the court shall consider both the materiality **[***12]** of the subject matter and the totality of the circumstances surrounding an alleged failure to comply with this Article[.]" *N.C. Gen. Stat. **15A-910(**b)* (2005).

The trial judge ruled that all the evidence would be **[**280]** admitted, noting that defendant was, obviously, aware of his own tattoos, and thus his attorney could have found out about them at any time; and, further, that defendant's motion *in limine* to

exclude any gang-related evidence showed clearly that he had some notice that such materials were going to be presented at trial.

We cannot say that the trial court abused its discretion in admitting this evidence. The court was not required to exclude the evidence even had it found that the State violated discovery requirements. As mentioned above, the court must consider the totality of the circumstances, and given the overwhelming evidence of defendant's guilt, **[***13]** the court was within its rights to hold that these few photographs need not be excluded. As such, we overrule this assignment of error.

Scenario 5: The State seeks to introduce certain photographs to illustrate the testimony of a police officer, none of which were produced in discovery as required.

State v. Jones 151 NC App 317 (2002)

Following Officer Smith's testimony, the State moved to introduce exhibits one through seven, which included certain photographs. Defendant objected to the admission of the photographs because they had not been provided to defendant during discovery.

The trial **[***11]** court found that this is a violation of the discovery order in this case.

Counsel for the State, the Assistant D.A., an officer of the court, stated he only received these photographs this morning during jury selection. That he immediately thereafter gave them to counsel for the defendant. Counsel for the State contends that the defendant was placed on notice. That he was advised that there had been fingerprints and photographs and that the counsel for the defendant did not seek to secure those.

The trial court then found that the State sought to introduce the photographs for the limited purpose of illustrating the testimony of the witness, that the photographs were relevant, and that their probative value was not outweighed by unfair prejudice to defendant.

In his brief to our Court, defendant argues that the trial court failed "to properly exercise its discretion by considering sanctions for this discovery violation[.]"

We find the trial court did not abuse its discretion in this case by failing to impose sanctions upon the State for **[***13]** the discovery violation. *N.C. Gen. Stat. § **15A-910*** leaves the determination of whether to impose sanctions solely within the discretion of the trial court and does not require the trial court to make specific findings on the record that it considered sanctions before determining not to impose sanctions.
Also, the transcript in this case demonstrates the trial court properly considered the circumstances surrounding the production of the photographs.

The trial court found that defendant was not surprised by the introduction of the photographs at trial, but rather was on notice of the existence of the photographs. Although the State committed a discovery violation, the circumstances of the violation did not require imposition of a sanction. Therefore, the trial court's failure to impose

sanctions was the result of a reasoned decision and was not **[***14]** an abuse of discretion.

Scenario 5: Does the order finding a discovery violation (or not) and what sanction to impose (if any) need to be in a particular form?

State v. Jones 151 NC App 317.

*N.C. Gen. Stat. § **15A-910*** leaves the determination of whether to impose sanctions solely within the discretion of the trial court and does not require the trial court to make specific findings on the record that it considered sanctions before determining not to impose sanctions.

{(But see State v. Cook 362 NC 285 where the split panel of the Court of Appeals had ordered the matter be sent back to the trial court "to hold a hearing to make findings of fact and conclusions of law concerning, among other things, whether the State complied with N.C.G.S. § 15A-903

My opinion is that if your decision is a determination of no violation/violation and your judicial response, at a minimum you should state on the record the basis for your decision of violation/no violation and that in the exercise of discretion, considering the materiality of the subject matter and the totality of the circumstances, the outcome that you've selected if you found a discovery violation. This tracks the language of 15A-910(b). If you've got unlimited time, you could file a written order to memorialize your findings, which would already be in the record, but a written order is not required.

However, if your decision is to use the contempt option, or "other appropriate orders" (such as censure) a formal written order will be necessary. (See attachment – order of Judge Rand to censure witnesses pursuant to a discovery violation.)

Scenario 6: Can the trial court preclude a defendant from using defenses that were not properly declared as required by 15A-905(c) as a sanction for violating the discovery rules?

State v. McDonald 191 NC App 782 (2008).

On the afternoon of the first day of trial, the State moved for an order precluding defendant from asserting any of the defenses covered by *N.C. Gen. Stat. § 15A-905(c)* on the ground that defendant had not responded to the State's reciprocal motions for discovery and for notice of defenses. Defense counsel stated that defendant intended to assert the defense of accident, and professed to be unaware of the State's motion for reciprocal discovery, suggesting that such a motion may have been served on defendant's prior counsel. The State produced four or five separate motions requesting notice of defenses, **[***4]** including some that had been served on defendant's trial counsel. The trial judge requested that defendant state for the record any defense that

defendant intended to assert. Defense counsel stated that defendant intended to assert the defenses of accident and duress. The trial judge then specifically enumerated each of the other defenses set forth in *N.C. Gen. Stat. § 15A-905(c)(1)* that defendant would be precluded **[**465]** from asserting. At that time, defense counsel stated that defendant also wished to assert the defenses of diminished capacity and voluntary intoxication.

The State objected to the assertion of any of the defenses listed in the statute on the basis of untimeliness and undue prejudice. The trial judge ruled that the defense would be permitted to assert the defenses of accident and duress, but was barred from asserting any other defense.

The record reveals that, although the trial court did not allow defendant to assert the defenses of voluntary intoxication or diminished capacity, defendant was allowed to assert the defenses of duress and accident, which were not disclosed pursuant to *N.C. Gen. Stat. § 15A-905*. The State acknowledged to the trial court that it had anticipated the accident defense. Further, unlike the diminished capacity and voluntary intoxication defenses, the defense of duress would not require substantial preparation **[***7]** on the part of the State, including the engagement of experts.

The trial court's decision to allow defendant to use two defenses demonstrates that it affirmatively exercised its discretion **[*787]** and precluded only those defenses that would have prejudiced the State. We hold that the trial court's imposition of sanctions pursuant to *N.C. Gen. Stat. §* ***15A-910*** was not arbitrary and was not an abuse of discretion.

(It is important to note in this case the Defendant did not preserve his constitutional claim that the trial court ruling deprived him of his due process right to present a defense, so the entire analysis of this case is based upon the discovery statute.)

Scenario 7: The Defendant's two experts on mental health issues failed to produce any reports or data regarding their examination of the Defendant, even though the State sought the information leading up to the trial to prepare for mental health defenses. Can the trial judge bar the Defendant's expert's testimony at trial due to their failure to produce any report or data in a timely manner?

State v. Gillispie 362 NC 150 (2008)

The State moved to prohibit defendant from presenting any mental health defense or, in the alternative, to require him to provide requested documentation to Dorothea Dix Hospital staff so that they could evaluate defendant's mental condition at the time of the offense. [This was after numerous discovery hearings and orders leading up to the trial week.]

On 29 November 2004, the day defendant's trial was set to begin, the trial court held a hearing on the State's and defendant's motions. **[*154]** After hearing arguments from both sides, the trial court entered an order prohibiting defendant from introducing testimony from Nathan Strahl, M.D., Ph.D., a private practice psychiatrist and consultant associate **[***7]** to Duke University Medical Center, and from Jerry W. Noble, Ph.D., a private practice clinical psychologist and instructor for the Wake Forest University School of Medicine's department of psychiatry, concerning any mental health defense to be

offered by defendant. Thereafter, the trial court heard arguments on defendant's motion to continue and then denied the motion.

Nothing in the language of the statute indicates that this authority extends so far as to punish either the State or a criminal defendant for the actions of non-parties. For this reason, the record demonstrates that the trial court in this case exceeded its statutory authority to sanction defendant.

It is readily apparent from this portion of the transcript that the trial court based its decision to sanction defendant solely upon the conduct of defendant's expert witnesses, thus acting under a misapprehension of law that the actions of a non-party in a **[*156]** criminal proceeding can trigger a trial court's authority under *N.C.G.S. § 15A-910* to sanction a party. The trial court therefore erred as a matter of law when it entered its order sanctioning defendant, and defendant is entitled to a new trial.

Scenario 8: The State seeks to have two witnesses testify about statements attributed to the Defendant, statements that were not revealed to the Defendant until the morning of the trial.

State v. Herrera 2009 NC App Lexis 126 (2009)

With regard to Mr. Valladares's statement, the State claimed that they lost track of Mr. Valladares following his initial interview on 2 September 2004 and that they were not able to locate him until 7 October 2007. The State told the court that during the 2 September 2004 interview, Mr. Valladares denied knowing anything regarding the crime. The State also told the court that they did not learn that defendant had purportedly told Mr. Valladares that he killed the victim until the evening of 7 October 2007, and that they disclosed this evidence as soon as possible. Mr. Valladares testified that when he was interviewed by police in September 2004, he did tell them that defendant admitted **[**26]** he had killed the victim.

The court found: (1) that when Mr. Valladares was interviewed on 2 September 2004, he denied knowing anything about the matter; (2) that he was unavailable to the State until 7 October 2007; (3) "that the prosecutor, as an Officer of the Court" stated that the State was unable to obtain this information until 7 October and that the statements were provided to defendant at the earliest possible date, which was 8 October.

With regard to Mr. Gonzalez's testimony, defendant argued that given that Mr. Gonzalez worked for the police department as an interpreter/translator when the crime occurred and that Mr. Gonzalez testified that **[*81]** he believed he had told the investigating officers about defendant's alleged statements at a prior time, disclosure of this information on the morning of trial was a clear discovery violation. The State told the court that they did not provide this information to defendant until the morning of trial because they did not learn of it until that time. The court explicitly asked the prosecutor: "[A]s an officer of the Court, are you saying that you did not know anything about these statements . . . until Monday morning, October the 8th?" He **[**27]** responded, "[c]orrect, Your Honor, and upon learning [of] it, I went and typed it up and then I saw [Detective]

West and inquired of her about that. It was my impression that was the first [time] that [she] was aware of it as well."

The trial court found that: (1) defendant strenuously argued that the State clearly violated the discovery statutes and that if not, the evidence should still be disallowed under Rule 403; and (2) the prosecutor stated as an officer of the court that he did not know of these statements until the morning of 8 October. The Court further noted that discovery was provided to defense counsel prior to trial and that while there was a motion to have this testimony suppressed, defendant did not bring a motion to continue the trial.

The Court allowed both Mr. Valladares and Mr. Gonzalez to testify to these statements over defense counsel's objection, and the court granted defendant standing objections as to this testimony.

Here, the State clearly had a duty to disclose this testimony pursuant to *sections 15A-902*, *-903*, and *-907*, which it did on the morning of trial. The purpose of discovery procedures is to protect defendants from unfair surprise. *State v. Alston, 307 N.C. 321, 331, 298 S.E.2d 631, 639 (1983)* (citation omitted). Further, as this Court has stated "[l]ast minute or 'day of trial' production to the defendant of discoverable materials the State intends to use at trial is an unfair surprise and may raise . . . statutory violations. We do not condone either non-production or a 'sandbag' delivery of relevant discoverable materials and documents by the State." *State v. Castrejon, 635 S.E.2d 520, 526, 635 S.E.2d 520, 526 (2006)* (citation **[**32]** omitted), *appeal dismissed and disc. review denied, 361 N.C. 222, 642 S.E.2d 709 (2007)*.

We conclude the trial court did not abuse its discretion in allowing this testimony especially when defendant did not request a recess or continuance to address this newly disclosed evidence.

Scenario 9: The Defendant called witness 2 in his case in chief, who said that he gave the Defendant permission to go into the homeowner's house. The State seeks to introduce testimony of the homeowner offered in rebuttal that would indicate the Defendant did not receive permission to enter her house from another witness, and that the witness was actually surprised when they caught the Defendant in her house. Her testimony denying that the third party gave the Defendant permission was not produced in discovery.

State v. Blackburn 2009 NC App Lexis 281 (2009)

At trial, Defendant presented the testimony of Hawkins, which included Hawkins' statement that he had given Defendant consent to enter Ms. Caldwell's house. After Hawkins' testimony, the State introduced rebuttal testimony that Ms. Caldwell had not heard Hawkins state he had given Defendant consent prior to Hawkins' testimony at trial.

Ms. Caldwell's testimony on rebuttal that Hawkins **[*12]** said, "Why'd you do this, man? Why'd you do this?" upon finding Defendant in the house. Defendant argues that the State had prior knowledge of Ms. Caldwell's testimony, and failed to produce this statement during discovery.

The State, however, argues that it had no advance notice of Ms. Caldwell's statements. The State claims Ms. Caldwell's testimony was only intended to rebut Hawkins' testimony that he had provided consent to Defendant, which Ms. Caldwell had heard for the first time at trial. Prior to trial, Defendant renewed his discovery motion to disclose all prior statements, and **[*15]** the State said, "As far as I know, every prior statement that I have has been disclosed at this point." The State did not use Ms. Caldwell's statements during its opening statement. In his testimony, Hawkins admitted that he had not told the police he had provided consent prior to testifying at trial. Thus, the State claims it did not learn of Hawkins' statement until trial, at which point it introduced Ms. Caldwell's rebuttal testimony in response to Hawkins' testimony.

There is no violation of *N.C. Gen. Stat. § 15A-903(a)* when the State had no prior knowledge of the statement at issue. *See State v. Godwin, 336 N.C. 499, 506-07, 444 S.E.2d 206, 210 (1994)* (holding the State did not violate discovery rule where witness had not previously revealed the statement at issue to the State, and thus, the State could not have been expected to relate a statement of which it had no knowledge). Here, the record and trial transcript do not contain conclusive evidence as to whether the State had notice of Ms. Caldwell's rebuttal testimony in advance of Hawkins' testimony, and the evidence is, thus, insufficient to show that any discovery violation occurred in this matter. We hold the trial court **[*16]** did not abuse its discretion in admitting Ms. Caldwell's statement. Accordingly, these assignments of error are overruled.

Scenario 10: The State's seeks to call an expert on retrograde extrapolation. The State produced the witness' CV on the Wednesday before trial and on Friday before the trial produced the actual report which was dated one month earlier. The Defendant seeks a continuance on Monday, claiming discovery violation, unfair surprise and prejudice.

State v. Cook 362 NC 285 (2008)

The State retained Paul Glover as an expert witness in blood analysis and the effects of alcohol and drugs on human performance and behavior.

In a report dated 13 January 2006, Glover prepared a retrograde extrapolation of defendant's blood alcohol concentration at the time **[*288]** of the crash.

Defendant's trial had been set for Monday, 20 February 2006. On Wednesday, 15 February 2006, the State notified defendant that Glover would testify as an expert witness, supplying Glover's *curriculum vitae* but no other information. Two days later, on the afternoon of Friday, 17 February 2006, the State provided defendant with Glover's 13 January 2006 retrograde extrapolation report. The hearing transcript indicates that the prosecutor received the written report on that Friday.

Defendant contends the State, within a reasonable time before trial, failed to provide sufficient notice that Glover would be called as an expert witness, failed to provide sufficient notice of the nature of Glover's expert testimony, and failed to provide a copy of Glover's retrograde extrapolation report. Defendant maintains that he **[***10]** was prejudiced both by the State's late provision of discovery and by the court's denial of his

motion to continue. As to each issue, defendant presents arguments based on state and federal constitutional grounds and on statutory grounds.

We conclude the State **[***13]** violated N.C.G.S. § 15A-903(a)(2) when it failed to furnish defendant with sufficient notice within a reasonable time prior to trial. The record reveals that approximately five weeks elapsed between the preparation of the report and its disclosure to defendant the Friday before trial. Only upon receipt of the report did defendant learn he would be facing retrograde extrapolation testimony. Defendant then had just a weekend to find his own expert in this field and to decide whether to call such a witness to counter the State's evidence. Thus, under the facts of this case, the State's last-minute piecemeal disclosure of its expert's name, *curriculum vitae*, and written report was not "within a reasonable time prior to trial" as required by N.C.G.S. § 15A-903(a)(2).

Accordingly, we hold that the trial court abused its discretion in denying defendant's motion to continue.

In so holding, we are not establishing a bright line rule automatically mandating a continuance whenever a party is untimely in providing discovery.HN16 The pertinent statute itself only requires disclosure "within a reasonable time prior to trial, as specified by the court." N.C.G.S. § 15A-903(a)(2). Often, as here, a party providing discovery only a short time before trial has just received it and is disclosing it immediately. We acknowledge that HN17 trial judges must have substantial latitude to deal with the myriad unforeseeable circumstances that arise during the course of litigation. The trial court here faced a familiar but difficult decision where the motion had to be considered while the jury pool waited. Nevertheless, the information was prepared by the State's expert weeks before trial but was only revealed to defendant at the eleventh hour. The hearing transcript indicates that, even before receiving Glover's written report, the prosecutor planned to use retrograde extrapolation analysis, though no notice had been provided **[*296]** to defendant. The furnishing to defendant of Glover's **[***22]** *curriculum vitae* the Wednesday before trial was, standing alone, insufficient to put defendant on notice of the type of expert testimony he faced. While we are sympathetic to the trial court's dilemma, we believe that, in the absence of a satisfactory **[**881]** explanation in the record for the delay between the State's expert's preparation of the report and its provision to defendant by the prosecutor, the trial court should have allowed a continuance. In so holding, we express no opinion as to an appropriate duration, a matter best left to the discretion of the trial court.

Scenario 11: In a drug case, the State didn't produce the results of the SBI drug analysis prior to trial. The Defendant objects and the trial judge indicated he'd either grant a mistrial, or allow the Defendant a continuance or recess to review the test results, and allow him to voir dire the SBI analyst outside the presence of the jury. The Defendant contends that this is insufficient – only suppression of the results or a dismissal will be sufficient.

State v. Moore 152 NC App 156 (2002)

By his second assignment of error, defendant contends that, because of the **[***7]** State's failure to disclose lab reports of the off- white rock-like substance prior to trial, the trial court erred when it refused to suppress the lab reports and the testimony of two State Bureau of Investigation lab agents, or to dismiss the charges. Defendant maintains that the trial court abused its discretion in only allowing defendant the option of moving for a mistrial or having a continuance to review the lab reports. We disagree.

Here, the trial court offered defendant a continuance or recess so he could have independent lab testing conducted. Defendant was also offered an opportunity to request a mistrial. The State, meanwhile, was ordered to provide full discovery to defendant, who was then allowed time to review the lab reports and conduct a *voir dire* of the lab agents. Therefore, we cannot say the trial court's refusal to exclude the lab test results or dismiss with prejudice the charges against defendant was **[***9]** so arbitrary that it could not have been the result of a reasoned decision. Accordingly, we reject this assignment of error.

Scenario 12: At the Defendant's second trial, the State seeks to introduce in rebuttal to the Defendant's psychiatric expert, remarkably incriminating statements attributed to the Defendant made to a jail administrator, which were not produced until the day the case was called for trial the second time.

State v. McClary 157 NC App 70 (2003)

Also on rebuttal, Todd Davis ("Davis"), an Alamance County jail **[***4]** administrator, testified for the State that defendant voluntarily stated "I'm not trying to get out of my charges, because I'm guilty of killing my girlfriend. I did it and meant to. But I need medical treatment for my mental problem now. I cannot make it without help." Davis sent a letter detailing defendant's statement to the lead investigator, Sergeant Doug Murphy, but did not send it to the district attorney's office.

At defendant's first trial in May 2000, the trial court granted a motion to withdraw by defendant's original counsel and declared a mistrial.

The State did not meet the timing requirements in *N.C. Gen. Stat. § 15A-903(a)(2)* since it provided defendant with the statement on the day his case was called for trial, 12 March 2001. After hearing defendant's motions to suppress and continue, the trial court found that discovery had not been provided in a timely manner and ordered that the trial be recessed until 14 March 2001. This recess was ordered to allow defense counsel the opportunity to discuss the discovery with his client and defendant's psychiatric expert before proceeding with jury selection. The State did not call Davis as a witness until 18 days after it disclosed the statement to defendant. Davis testified as a rebuttal witness in response to testimony from defendant's psychiatric expert which put defendant's capacity to form the requisite intent to kill at issue. The trial court further found that the district attorney's office disclosed the statement as soon as it became aware of it and found that the State did not engage in bad faith in failing to disclose the statement at an earlier time. Based **[***9]** on the foregoing, we hold that the trial court did not abuse its discretion in denying defendant's **[**694]** motions and admitting his statement to Davis into evidence.

Scenario 13: On cross examination of State's witness, the Defense asks if the witness has talked with the Defendant since the incident, and his answer was "yes". The state seeks to question a witness in redirect about statements made by the Defendant during this conversation. The Defendant had offered to bribe the witness for not testifying. These statements attributed to the Defendant were not produced in discovery, but were not known to the State until the witness answered on the stand.

State v. Farmer 177 NC App 710 (2006)

Defendant argues the trial court should not have allowed Powell to testify that defendant offered to bribe him.

During cross-examination, defense counsel asked Powell if he had spoken with defendant after the alleged incident. Powell answered, "Yes." On re-direct, the State asked Powell about the substance of that conversation. Defendant objected, and the judge excused the jury.

A *voir dire* examination of Powell was conducted, including questions by the State, defense counsel, and the trial judge. Powell testified during *voir dire*, defendant had asked him not to testify against him and whether Powell could "forget everything that happened." Powell also testified he had not told the State about these conversations with defendant. The trial court overruled defendant's objection and allowed Powell to testify regarding **[***9]** the conversation. The trial court noted Crockett had made a similar allegation that defendant offered to pay her not to testify, and the State had promptly given defense counsel that information. The court concluded, "it would make no sense for [the District Attorney] to tell you about one and not tell you about the other if he's going to tell you about any."

In *State v. Godwin*, our Supreme Court held the trial court did not err when it admitted a witness's testimony that he had received a telephone **[*715]** call from the defendant who confessed to the witness that he had murdered the victim. *336 N.C. 499, 507, 444 S.E.2d 206, 210 (1994)*. The defendant objected to the admission of the testimony under a previous version of *N.C. Gen. Stat. § 15A-903*. *Id. at 506, 444 S.E.2d at 210*. The State is required to make known to the defendant oral statements made by the defendant that the State intended to offer into evidence, which were known to the State prior to or during the course of trial. *Id*. **[**248]** The State argued, "the substance of this statement was consistent with other statements made by defendant provided in discovery," and **[***10]** the witness had not previously revealed this information to the State. *Id*.

The Court held:

> The State cannot reasonably be expected to relate a statement to defendant which it has no knowledge of such as in the case at hand. Under these circumstances, we find that the State did not violate the discovery rules of *N.C.G.S. § 15A-903(a)*; thus, the trial court did not err in allowing this testimony.

Id. at 507, 444 S.E.2d at 210.

In *State v*. *Taylor*, our Supreme Court stated:

> A major purpose of the discovery procedures of *Chapter 15A* is to protect the defendant from unfair surprise. When the defendant does not inform the trial court of any potential unfair surprise, the defendant cannot properly contend that the trial court's failure to impose sanctions is an abuse of discretion.

332 N.C. 372, 384, 420 S.E.2d 414, 421 (1992) (internal quotations and citations omitted).

Although *Godwin* was decided prior to the 2004 amendment to *N.C. Gen. Stat. § 15A-903*, the amendment does not alter the applicability of the Court's reasoning to the issue before **[***11]** us. Powell testified he had never revealed the contents of his telephone conversation with defendant to the State. The State was unaware of this conversation but had provided defendant with a similar statement from Crockett alleging defendant's attempt to bribe her.

Defendant opened the door on cross-examination by asking Powell about later conversations between he and Powell. The State was entitled to chase the rabbit after defendant let it loose. Defendant knew the State had evidence that he had attempted to bribe Crockett and should not have been surprised when Powell testified defendant had attempted to bribe him. Defendant cannot now reasonably complain that Powell's **[*716]** testimony amounted to "unfair surprise."

Scenario 14: The State seeks to introduce a statement of the Defendant given to law enforcement early in the investigation (and apparently lost or forgotten by the officer) that was not produced until the second day of trial at 3:00 in the afternoon.

State v. Remley 2009 NC App Lexis 1851 (2009)

[The trial court found as follows:} "*The Court determines that the material was discoverable material and it should have been provided to the defendant in a timely manner and in any event prior to trial.* However, the Court determines that the statement was not available to the prosecutor or the District Attorney prior to the time when the statement was provided--or almost--substantially simultaneous with the detection of the statement by the prosecutor.

The Court determines that there has been no bad evidence of bad faith. None has been alleged. There has been no evidence of bad faith at this juncture. The Court has considered the totality of the circumstances surrounding the alleged failure to provide this article.

The defendant was given a recess, given an opportunity to prepare. The Court also informed the defense counsel if there were any other requests other than either dismissing of the charges or prohibition of the introduction of the evidence, that the Court will consider those. There were none requested. No further recesses were

requested. And no evidence of anything else that would be necessary to meet this evidence".

Thus, defendant does not argue the trial court erred in finding a violation. Rather, defendant argues the trial court erred in providing an inadequate remedy. HN2 We review the trial court's selection of a remedy for a violation of N.C. Gen. Stat. § 15A-910 for abuse of discretion.

The trial court's statement upon making its ruling demonstrates that it considered any possible prejudice to defendant and the various possibilities as to remedies and that it was open to consider additional requests from defendant. The trial court did not abuse its discretion by granting a recess in order to provide defendant with an "opportunity to prepare[,]" and the trial court indicated it was more than willing to provide defendant with more time to prepare or take other steps as necessary in order to ensure defendant received a fair trial.

("[A]lthough the trial judge did not impose any sanctions **[**9]** for failure to comply with discovery **[*163]** and indeed expressed his displeasure with the state's tactics with respect to discovery, he did in fact employ several of the curative actions suggested by N.C.G.S. § 15A-910. . . . We fail to find any abuse of discretion." (citation omitted)). Accordingly, the trial court did not abuse its discretion by granting a recess instead of dismissal of the charges or barring the statement from admission.