

District Court Judges 2022 Summer Conference
Criminal Case Update
June 21, 2022

Cases covered include published criminal and related decisions from the North Carolina appellate courts decided between September 21, 2021 and May 17, 2022. Summaries are prepared by School of Government faculty and staff. To view all of the case summaries, go the [Criminal Case Compendium](#). To obtain summaries automatically by email, sign up for the [Criminal Law Listserv](#). Summaries are also posted on the [North Carolina Criminal Law Blog](#).

Criminal Procedure

There was probable cause to believe that a person whose license was revoked for refusing a chemical analysis after being charged with DWI was operating a vehicle and the procedures of G.S. 20-16.2 do not violate due process

[Edwards v. Jessup](#), ___ N.C. App. ___, 2022-NCCOA-157 (Mar. 15, 2022). The superior court erred in reversing a DMV civil revocation of a driver's license in a case where the appellee refused to consent to a chemical analysis after being charged with DWI. An officer responded to a call that a driver had fallen asleep in the drive-through lane of a fast-food restaurant and discovered the appellee asleep in the driver's seat of her vehicle, which was not running and was parked in the parking lot. After an investigation where the appellee admitted to falling asleep while in the drive-through lane and failed a field sobriety test, she was charged with DWI. The appellee refused to consent to a blood sample for a chemical analysis, causing the DMV to revoke her license pursuant to G.S. 20-16.2 and sustain the revocation following an administrative hearing. The superior court reversed the revocation on two grounds, finding that there was a lack of evidence that the appellee was operating a motor vehicle and also finding that the procedures of G.S. 20-16.2 deprived the appellee of due process. Leaving open the question of whether there was sufficient evidence to convict the appellee of DWI, the Court of Appeals found that the officer had probable cause to believe that the appellee was operating the vehicle, as required by the statute. As for the due process issue, the Court of Appeals found that the procedures prescribed by G.S. 20-16.2 do not violate due process merely because DMV hearing officers are DMV employees and there is no attorney at revocation hearings putting on the State's case.

An attempted robbery with a dangerous weapon indictment was not fatally defective for failing to include the name of a specific victim

[State v. Oldroyd](#), ___ N.C. ___, 2022-NCSC-27 (Mar. 11, 2022). In this Yadkin County case, a defendant pled guilty to second-degree murder, attempted robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon in 2013. The defendant filed a motion for appropriate relief asserting that the indictment for the attempted robbery charge was fatally defective in that it did not include the name of a victim, but rather described the victims as “employees of the Huddle House” located at a particular address. The trial court denied the motion. A divided panel of the Court of Appeals agreed with the defendant. *State v. Oldroyd*, 271 N.C. App. 544 (2020). The Supreme Court reversed the Court of Appeals, concluding that the indictment sufficiently informed the defendant of the crime he was accused of and protected him from being twice put in jeopardy for the same offense. The Court rejected the defendant’s argument, based on cases decided before the enactment of the Criminal Procedure Act of 1975, that indictments for crimes against a person must “state with exactitude” the name of a person against whom the offense was committed. The Court also distinguished prior cases finding indictments defective when they named the wrong victim or did not name any victim at all. Under the modern requirements of G.S. 15A-924(a)(5), the Court concluded that the attempted robbery with a dangerous weapon charge here was not defective. Therefore, the Court reversed the Court of Appeals and reinstated the trial court order denying the defendant’s motion for appropriate relief.

(1) There was no fatal variance in charge for injury to personal property where named victim was not the legal owner, but had a special interest in the property; (2) restitution amount was not speculative where it was based on evidence of fair market value

[State v. Redmond](#), ___ N.C. App. ___, 2022-NCCOA-5 (Jan. 4, 2022). Upon trial de novo in superior court, the defendant in this case was convicted of misdemeanor injury to personal property for throwing a balloon filled with black ink onto a painting during a protest at an arts event in Asheville. The defendant received a suspended 30-day sentence and was ordered to pay \$4,425 in restitution. On appeal, the defendant argued that her motion to dismiss the injury to personal property charge should have been granted due to a fatal variance and argued that the restitution amount was improperly based on speculative value. The appellate court rejected both arguments.

The charging document alleged that the defendant had damaged the personal property of the artist, Jonas Gerard, but the evidence at trial indicated that the painting was the property of the artist’s corporation, Jonas Gerard Fine Arts, Inc., an S corporation held in revocable trust, where Jonas Gerard was listed as both an employee and the sole owner. Although this evidence established that the artist and the corporation were separate legal entities, each capable of owning property, the court held that the state’s evidence sufficiently demonstrated that the artist named in the pleading was nevertheless a person who had a “special interest” in the property and was therefore properly named in the charging instrument. The painting was not yet complete, it was still in the artist’s possession at the time it was damaged, and the artist regarded himself and the corporation as functionally “one and the same” and he “certainly held out the paintings as his own.” Finding the facts of this case analogous to *State v. Carr*, 21 N.C. App. 470 (1974), the appellate court held that the charging document was “sufficient to notify

Defendant of the particular piece of personal property which she was alleged to have damaged,” and the trial court did not err in denying the motion to dismiss for a fatal variance.

The restitution amount was also supported by competent evidence. A witness for the state testified that a potential buyer at the show asked what the painting would cost when completed and was told \$8,850, which was the gallery’s standard price for paintings of that size by this artist. The artist also testified that the canvas was now completely destroyed, and the black ink could not be painted over. The trial court ordered the defendant to pay half that amount as restitution. The appellate court held that the fact that the painting “had not yet been purchased by a buyer does not mean that the market value assigned by the trial court for restitution was speculative.” The evidence presented at trial was sufficient to establish a fair market value for the painting prior to it being damaged, and the trial court’s restitution order would not be disturbed on appeal.

Probation violation properly alleged absconding and provided sufficient notice to the defendant of the charges

[State v. Crompton](#), 380 N.C. 220, 2022-NCSC-14 (Feb. 11, 2022). In this probation revocation case from Buncombe County, the defendant failed to contact his probation officer for nearly three months until his arrest. After more than month of not being able to contact the defendant, the probation officer filed a violation report accusing him of absconding and other violations. The absconding violation alleged that the defendant failed to report to the probation office, failed to return his probation officer’s calls, failed to provide his current address, failed to make himself available for supervision, and noted that the last in-person contact with the defendant was more than a month ago. The defendant represented himself at hearing, admitted the violations, and was revoked. At the Court of Appeals, a divided panel affirmed the revocation (summarized here). A dissenting judge there would have held that the violation report did not sufficiently plead absconding and that the State’s evidence was insufficient to establish willful absconding. The defendant appealed based on the dissent, and the North Carolina Supreme Court affirmed.

The Court found that the defendant had adequate notice that he was accused of absconding probation. The allegation of violation need only describe the defendant’s conduct in violating probation and need not state the condition of probation violated by the conduct. The allegations here described the defendant’s conduct with appropriate specificity. That the conduct described in the absconding violation also violated regular, non-revocable conditions of probation did not render the allegation improper—an argument the Court called “meritless.” *Crompton* Slip op. at 12. The defendant’s admission to absconding at the hearing and argument to the trial judge to run his suspended sentences concurrent further demonstrated that the defendant had effective notice of the allegations. In the words of the Court:

[The] defendant here was sufficiently and properly informed by the probation violation reports of his alleged violations and his alleged conduct which

constituted the alleged violations, including the alleged absconding behavior which defendant admitted. *Id.* at 13.

The trial court therefore did not abuse its discretion in revoking the defendant's probation.

Justice Earls dissented. She would have found that the violation report only alleged violations of regular, non-revocable conditions of probation and that the defendant only admitted to as much.

The trial court erred by sentencing the defendant to a period of period of supervised probation exceeding the time specified in G.S. 15A-1343.2(d) without making a specific finding that a longer period was necessary, as required by the statute

[State v. Porter](#), ___ N.C. App. ___, 2022-NCCOA-166 (Mar. 15, 2022). In an assault on a female case, the State conceded that the trial court erred by sentencing the defendant to 24 months of supervised probation without making a specific finding, as required by G.S. 15A-1343.2(d), that a probationary period longer than 18 months was necessary. The court remanded the case for resentencing.

The trial court did not abuse its discretion in imposing a special condition of probation

[State v. Medlin](#), ___ N.C. ___, 2022-NCSC-25 (Mar. 11, 2022). In this Cabarrus County case involving a defendant convicted of obtaining property by false pretenses, the Supreme Court affirmed the decision of the Court of Appeals, 2021-NCCOA-313, which had concluded that the trial court did not abuse its discretion in imposing a special condition of probation under G.S. 15A-1343. Though not discussed in the Supreme Court's opinion, the special condition at issue was that the defendant not have any contact with the victim—his mother-in-law, who also had legal custody of his three children. The defendant had argued that a probation condition forbidding all contact with his mother-in-law would conflict with the terms of his child custody order, which allowed limited visitation with his children each week. Highlighting the Court of Appeals' observation that trial judges have substantial discretion in devising probation conditions, the Supreme Court affirmed the lower court's conclusion that the condition was reasonably related to protection of the victim and the defendant's rehabilitation.

The defendant was ineligible for termination from the sex-offender registry because he did not satisfy the requisite period of registration. North Carolina's ten-year registry requirement under G.S. 14-208.12A(a) does not violate the Equal Protection Clauses of the United States and North Carolina Constitutions

[State v. Fritsche](#), ___ N.C. App. ___, 2022-NCCOA-339 (May. 17, 2022). In 2000, the defendant pleaded guilty to sexual exploitation of a child in violation of Colorado's laws. The defendant served eight years in prison and registered with the Colorado Sex Offender Registry in 2008, as required by Colorado law. In February 2020, the defendant moved from Colorado to Florida and registered with the Florida Sex Offender Registry, as required by Florida law. The defendant

moved to North Carolina in October 2020 and filed a petition requesting a judicial determination of his requirement to register in North Carolina as a sex offender. The trial court entered an order in 2021 requiring that the defendant register as a sex offender on the North Carolina Sex Offender Registry, and the defendant did so on the following business day. The defendant then filed a petition pursuant to G.S. 14- 208.12A for termination of his requirement to register as a sex offender. The trial court denied the defendant’s petition on the ground that the defendant did not satisfy all of the conditions for early termination of his requirement to register as a sex offender, in that he had not been registered as a sex offender for ten years in North Carolina.

On appeal, the defendant argued that the trial court erred in denying his petition to terminate his requirement to register as a sex offender because the Court’s holding in *In re Borden*, 216 N.C. App. 579 (2011), was incorrectly decided and should be overturned. In *Borden*, the Court of Appeals interpreted the statutory phrase “ten years from the date of initial county registration” as limiting eligibility for removal from the North Carolina sex-offender registry to offenders who have been registered for at least ten years from their initial date of registration *in a North Carolina county*, rather than ten years from the offender’s initial date of registration in *any* jurisdiction. Slip op. at ¶ 12. Here, the Court determined that although the defendant initially registered as a sex offender in Colorado in 2008, he initially registered as a sex offender in North Carolina in 2021. The Court thus held that because the defendant did not satisfy the statute’s requisite period of registration, he was ineligible for termination from the sex-offender registry.

The defendant argued, in the alternative, that the trial court erred in denying his petition to terminate his requirement to register as a sex offender because the termination statute’s ten-year North Carolina registry requirement violates the Equal Protection Clause. The Court of Appeals determined that an individual’s residency at the time of his initial registration as a sex offender is not inherently suspect, and thus applied a rational basis review to determine whether the statute violated the Equal Protection Clause. The Court concluded that the requirement that a defendant be registered in North Carolina as a sex offender for at least ten years in order to be eligible for early termination of sex offender registration is rationally related to the State’s legitimate interests in maintaining public safety and protection. The Court also concluded that the defendant was treated the same as all other registered sex offenders who initially enrolled in another jurisdiction’s sex-offender registry based upon an out-of-state conviction. The Court thus held that the ten-year North Carolina registry requirement under G.S. 14-208.12A(a) does not violate the Equal Protection Clauses of the United States and North Carolina Constitutions.

Arrest, Search, and Investigation

(1) Stop based on alleged misplacement of the defendant’s registration plate renewal sticker was supported by reasonable suspicion; (2) If officer was mistaken in believing that law required sticker to be placed on right side of plate, the mistake was reasonable

[State v. Amator](#), 2022-NCCOA-293, ___ N.C. App. ___ (May. 3, 2022). In this McDowell County case, the defendant appealed from a judgment finding her guilty of trafficking in methamphetamine. She was convicted based on the discovery of drugs found in her car during a traffic stop. On appeal, she argued that the trial court erred in denying her motion to suppress the evidence discovered during the traffic stop, contending that the officer did not have reasonable suspicion to initiate the stop based on an alleged misplacement of her registration plate renewal sticker.

The Court of Appeals concluded that the trial court did not err in denying the defendant’s motion to suppress. Defendant was stopped for a violation of G.S. 20-66(c), which requires that the registration renewal sticker be displayed in the place prescribed by DMV. At the time the defendant was stopped, DMV had begun issuing single month/year renewal stickers but had not updated administrative code provisions that required that separate “month and year stickers . . . be displayed on the plate in the correct position.” 19A N.C.A.C. 3C.0237 (2018). The registration card accompanying the single sticker instructed that the sticker be placed on the upper right corner of the plate; nevertheless, the defendant placed the sticker on the upper left corner of the plate. The Court held that the relevant law was ambiguous, that the officer relied on a quick reference guide and the instructions on the registration card in concluding there was a violation, and that this provided reasonable suspicion for the stop. If the officer was mistaken, the Court held, his mistake was reasonable.

(1) In the absence of a plea arrangement, a defendant is not required to give notice of his intent to appeal to pursue right to appeal denial of motion to suppress; (2) Officer did not have reasonable suspicion to stop the car in which the defendant was traveling based on its transporter license plate, and officer’s mistake of law regarding license plate was not objectively reasonable

[State v. Jonas](#), ___ N.C. App. ___, 2021-NCCOA-660 (Dec. 7, 2021). In this Cabarrus County case, the defendant was convicted of possession of a Schedule II controlled substance based on 0.1 grams of methamphetamine found in a backpack in the trunk of a vehicle in which the defendant was a passenger. The defendant moved to suppress the evidence on the basis that it was seized in connection with a traffic stop that was not supported by reasonable suspicion. The trial court denied the motion. Defendant pled guilty, without a plea arrangement with the State, and appealed.

(1) G.S. 15-979(b) provides that an order finally denying a motion to suppress may be reviewed upon an appeal from a judgment of conviction, including a judgment entered upon a plea of guilty. The North Carolina Supreme Court held in *State v. Reynolds*, 298 N.C. 380 (1979), that when a defendant intends to appeal from the denial of a motion to suppress pursuant to G.S. 15A-979(b), the defendant must give notice of that intention to the prosecutor and the court

before plea negotiations are finalized. Absent such notice, the right to appeal is waived. The Court of Appeals held that the *Reynolds* notice requirement did not apply in the instant case because the defendant did not plead guilty as part of a plea arrangement. Thus, the defendant had a statutory right to appeal without having provided notice to the State and the trial court before entering his guilty plea.

(2) The officer who stopped the car in which the defendant was traveling testified that he stopped the car because it emerged from the empty parking lot of a closed business, a trailer had recently been stolen in that area, and the car was equipped with transporter plate, which the officer had never seen placed on a vehicle other than a truck. The Court of Appeals noted that, despite the officer's belief to the contrary, G.S. 20-79.2 "clear[ly] and unambiguous[ly]" permits transporter plates to be used on motor vehicles generally, not just trucks. Though the Fourth Amendment tolerates objectively reasonable mistakes, the Court concluded that the officer's mistake about the transporter plates was not objectively reasonable because the statute was not ambiguous. Thus, the officer's belief regarding the transporter plates could not support reasonable suspicion. The Court determined that the additional facts that the business was closed and there was a recent trailer theft in the area were insufficient to support reasonable suspicion. Accordingly, the Court held that the trial court erred in denying the defendant's motion to suppress. It reversed the trial court's order and remanded the case to the trial court for entry of an order vacating the defendant's guilty plea.

Though none of the circumstances alone would satisfy constitutional requirements, when considered in their totality, they provided officers with reasonable articulable suspicion to stop the defendant

[State v. Royster](#), 280 N.C. App. 281, 2021-NCCOA-595 (Nov. 2, 2021). In this Forsyth County case, the defendant was charged with possession of a firearm by a felon, several drug crimes including trafficking opium or heroin by possession, possession of a weapon on school property, and attaining the status of habitual felon after an investigatory stop on school grounds stemming from an anonymous tip. The police received a detailed anonymous report saying that a black male named Joseph Royster who went by the nickname "Gooney" had heroin and a gun in the armrest of his black Chevrolet Impala with a specific license plate number, that he was wearing a white t-shirt and blue jeans, had gold teeth and a gold necklace, and that he was parked near South Fork Elementary School. An experienced officer who received the tip searched a police database that showed a person by that name as a black male with gold teeth and a history of drug and weapon charges. Officers went to the named elementary school, saw a vehicle with the specified license plate number matching the description in the tip in the parking lot, and eventually saw a person matching the description in the tip return to the vehicle. When that person quickly exited the vehicle, reached back into it, and turned it off, began to walk away from officers and reached for his waistband, officers frisked him for weapons and detained him for a narcotics investigation. The defendant moved to suppress, arguing that officers did not have reasonable articulable suspicion for the stop. The trial court denied the motion and the defendant pled guilty.

On appeal of the denial of the motion to suppress, the defendant argued that the anonymous call did not demonstrate sufficient reliability. The Court of Appeals noted that the anonymous call itself merely provided identifying information, and there was nothing inherent in the tip itself that would give officers reasonable suspicion to make the stop. The Court rejected the State's argument, based on *Navarette v. California*, 572 U.S. 393 (2014), that the caller's use of a phone to make the tip sufficiently bolstered its reliability, because there was no evidence as to whether the caller used 911 or a non-emergency number or otherwise preserved her anonymity. The Court was likewise unpersuaded that the caller's use of the defendant's nickname showed a level of familiarity with the defendant that made the call sufficiently reliable in its assertion of illegality. Thus, the anonymous call itself was insufficient to provide officers with reasonable articulable suspicion.

Looking at the totality of the circumstances, however, the Court concluded that officers did have reasonable articulable suspicion. The defendant's actions in exiting the vehicle, reaching back into it, walking away from officers, and reaching for his waistband demonstrated evasive behavior that went beyond merely walking away from officers and supported a finding of reasonable suspicion for the stop. Additionally, the caller's allegation that the defendant was in possession of a firearm, coupled with his presence on school grounds and his prior criminal record obtained through the police database gave officers reasonable suspicion that he was in possession of a firearm, and that he was thus violating the criminal statute prohibiting the possession of a firearm on school property. As a result, the stop was deemed proper, and the Court concluded that the trial court did not err in denying the defendant's motion to suppress.

The trial court's findings supporting its denial of the defendant's motion to suppress were not supported by competent evidence and a deputy may have unlawfully extended a seizure of the defendant that was initiated based upon the deputy's mistaken belief that the defendant was the subject of outstanding arrest warrants

[State v. Mullinax](#), ___ N.C. App. ___, 2022-NCCOA-165 (Mar. 15, 2022). In a drug possession case, some of the trial court's findings in denying the defendant's motion to suppress were not supported by competent evidence. A uniformed deputy approached the defendant while she sat in her car in a parking lot based on the deputy's mistaken belief that the defendant was a different person, a Ms. McConnell, who was the subject of outstanding arrest warrants. Five minutes after obtaining the defendant's driver's license and a total of eight minutes into the encounter, the deputy returned to the defendant's car having determined that she was not Ms. McConnell and was not subject to any outstanding warrants. At that time, the deputy did not return the defendant's license and asked for consent to search the car. Fifty seconds later a backup deputy arrived and noticed what he suspected were drugs in the defendant's pocket. The backup deputy asked to search the defendant's pockets, retrieved a bag of methamphetamine, and placed her under arrest. Ruling on the defendant's motion to suppress, the trial court found that the defendant was not seized at the time the first deputy returned to her car while still in possession of her license and "essentially found" that no gap in time occurred between the return to the car and the discovery of drugs in the defendant's pocket. Contrary to the trial court, the Court of Appeals determined based on its review of

bodycam footage of the incident that the defendant was seized at some point prior to the deputy's return to the defendant's car, though it did not resolve the legality of the seizure. Saying that the case was similar to *State v. Parker*, 256 N.C. App. 319 (2017), where it held that a stop was illegally extended without reasonable articulable suspicion, the Court of Appeals remanded the case for additional findings as to whether any such suspicion justified the defendant's continued seizure during the delay between the deputy's return to the defendant's vehicle and the detection of the drugs in her pocket by the backup deputy 50 seconds later.

Criminal Offenses

In this human trafficking case involving multiple victims, (1) the trial court did not abuse its discretion by allowing the defendant to represent himself; (2) the indictments were sufficient to convey subject matter jurisdiction; (3) the trial court did not err by entering judgments for multiple counts of human trafficking for each victim; and (4) the trial court did not err in determining the defendant's prior record level

[State v. Applewhite](#), ___ N.C. App. ___, 2021-NCCOA-694 (Dec. 21, 2021). In this human trafficking case involving multiple victims, (1) the trial court did not abuse its discretion by allowing the defendant to represent himself; (2) the indictments were sufficient to convey subject matter jurisdiction; (3) the trial court did not err by entering judgments for multiple counts of human trafficking for each victim; and (4) the trial court did not err in determining the defendant's prior record level.

(1) The Court of Appeals rejected the defendant's argument that the trial court's statements concluding that he had an "absolute right" to represent himself coupled with the trial court's failure to consider whether he fell into the "gray area" of being competent to stand trial but incapable of representing himself was a mistake of law requiring a new trial. While the defendant suffered from an unspecified personality disorder and drug use disorders, the record showed that the trial court "undertook a thorough and realistic account of Defendant's mental capacities and competence before concluding Defendant was competent to waive counsel and proceed *pro se*." The Court of Appeals noted that after interacting with him, considering his medical conditions, and receiving testimony concerning his forensic psychiatric evaluation, two judges had ruled that Defendant was competent to proceed and represent himself. The Court of Appeals said that even if the trial court erred in allowing the defendant to represent himself, he invited the error by disagreeing with the manner of representation of appointed counsel and any such error was harmless beyond a reasonable doubt.

(2) The Court of Appeals rejected the defendant's arguments concerning the sufficiency of the seventeen indictments charging him with human trafficking of six different victims. The Court noted that the indictments alleged every element of the offense within a specific time frame for each victim and tracked the language of the relevant statute word for word.

(3) The Court then turned to and rejected the defendant's argument that human trafficking is a continuous offense and may only be charged as one crime for each victim. The Court explained that the defendant's interpretation of G.S. 14-43.11, which explicitly provides that each violation of the statute "constitutes a separate offense," would "result in perpetrators exploiting victims for multiple acts, in multiple times and places, regardless of the length of the timeframe over which the crimes occurred as long as the Defendant's illegal actions and control over the victim were 'continuous.'" The Court characterized human trafficking as "statutorily defined as a separate offense for each instance."

(4) Finally, the Court determined that the defendant failed to show any error in the trial court's calculation of his prior record level for sentencing purposes. With regard to a prior federal felon in possession of a firearm charge, the defendant conceded its classification as a Class G felony on the basis of substantial similarity by not objecting at trial when given the opportunity. Likewise with regard to a misdemeanor drug paraphernalia charge, the defendant conceded its classification as a Class 1 misdemeanor by not objecting when given the opportunity.

Judge Arrowood concurred in part and dissented in part by separate opinion, expressing his view that it was improper to convict the defendant of multiple counts per victim of human trafficking. Judge Arrowood explained that North Carolina precedent, specifically involving issues of first impression addressing statutory construction, "clearly instructs that, where a criminal statute does not define a unit of prosecution, a violation thereof should be treated as a continuing offense." Judge Arrowood then proceeded with a lengthy and detailed analysis of the appropriate unit of prosecution for human trafficking in North Carolina.

(1) Sufficient evidence supported dogfighting convictions; (2) Leading question during State's direct examination was not error; (3) The trial court did not err by ordering restitution for all the seized animals or by failing to explicitly consider the defendant's ability to pay, but erred in converting the restitution award to a civil judgment absent statutory authorization

[State v. Crew](#), ___ N.C. App ___, 2022-NCCOA-35 (Jan. 18, 2022). The defendant was charged with and convicted of dogfighting and related offenses in Orange County. (1) He argued the evidence was insufficient to establish his specific intent to keep the dogs for purposes of fighting. The court disagreed. When the county Animal Services officials visited the property, they found equipment used in the strength training of dogs, at-home medications used to treat animal wounds, and an apparent dogfighting pit, as well as notes on preparing dogs for fights and dogfighting magazines. There was also evidence that many of the dogs had medical conditions commonly associated with dogfighting. This was sufficient evidence of the defendant's specific intent, and the trial court properly denied the motion to dismiss for insufficient evidence.

(2) During direct examination of its expert witness, the State asked a leading question about the defendant's intent. The defendant did not object at trial but complained on appeal that the

question amounted to plain error. The court disagreed, noting that trial courts have the discretion to allow leading questions concerning evidence previously admitted without objection, as was the case here. The court further observed that plain error review is not available for discretionary decisions of the trial court, and the case “did not remotely approach” the circumstances where invocation of Rule 2 of the Rules of Appellate Procedure was warranted to obtain review. Even assuming plain error review was available, the court found there was no error—plain or otherwise—and rejected this argument.

(3) The trial court ordered the defendant to pay Animal Services restitution in the amount of \$70,000 for its care and keep of the animals and immediately converted the award to a civil judgment (presumably based on the 60-month minimum active portion of the sentence imposed in the case). Thirty dogs were seized from the defendant’s property, but he was only convicted of offenses relating to 17 of the animals. According to the defendant, the restitution award should have therefore been proportionally reduced. The court disagreed, observing that “[t]he trial court may impose restitution for ‘any injuries or damages arising directly and proximately out of the offense committed by the defendant,’” pointing to G.S. 15A-1340.34(c). *Crew Slip op.* at 9. Because the defendant’s crimes resulted in the removal of all the animals, he could properly be held responsible for the cost of caring for the animals.

The defendant also argued that the trial court erred in failing to consider his ability to pay before ordering restitution. While the trial court need not make express findings on the issue, G.S. 15A-1340.36(a) requires the judge to consider the defendant’s ability to pay among several other factors when deciding restitution. Here, there was evidence in the record concerning the defendant’s income, the price of a “good puppy,” and of the defendant’s living arrangements. “Based on this evidence, the trial court’s determination that the defendant had the ability to pay was within the court’s sound discretion and certainly not manifestly arbitrary or outside the realm of reason.” *Crew Slip op.* at 10-11.

Finally, the defendant argued the trial court improperly converted the restitution award to a civil judgment. The court agreed. The restitution statutes distinguish between offenses subject to the Crime Victim’s Rights Act (“VRA”) and offenses exempt from that law. G.S. 15A-1340.38 expressly authorizes a trial court to convert an award of restitution to a civil judgment in VRA cases. No similar statutory authorization exists for non-VRA cases. While some other offenses have separate statutory provisions permitting conversion of a restitution award to a civil judgment (*see, e.g.*, G.S. 15-8 for larceny offenses), no such statute applied to the crimes of conviction here. The court noted that G.S. 19A-70 authorizes animal services agencies to seek reimbursement from a defendant for the expenses of seized animals and observed that the agency failed to pursue that form of relief. The court rejected the State’s argument that the trial court’s action fell within its inherent authority. The civil judgments were therefore vacated. The convictions and sentence were otherwise undisturbed.

There was sufficient evidence that the defendant committed multiple assaults against his girlfriend where a “distinct interruption” occurred between the assaults

[State v. Dew](#), 379 N.C. 64, 2021-NCSC-124 (Oct. 29, 2021). There was sufficient evidence that the defendant committed multiple assaults against his girlfriend and the Court was equally divided as to whether there was sufficient evidence to establish that the defendant used his hands, feet, or teeth as deadly weapons. The Court characterized “the question of how to delineate between assaults—to know where one assault ends and another begins—in order to determine whether the State may charge a defendant with multiple assaults” as an issue of first impression. Reviewing case law, the Court explained that a single assault “might refer to a single harmful contact or several harmful contacts within a single incident,” depending on the facts. The Court declined to extend the three-factor analysis of *State v. Rambert*, 341 N.C. 173 (1995), applicable to discharging a firearm into occupied property, to assault cases generally, saying that the *Rambert* factors were “not the ideal analogy” because of differences in the nature of the acts of discharging a firearm and throwing a punch or kick. The Court determined that a defendant may be charged with more than one assault only when there is substantial evidence that a “distinct interruption” occurred between assaults. Building on Court of Appeals jurisprudence, the Court said:

[W]e now take the opportunity to provide examples but not an exclusive list to further explain what can qualify as a distinct interruption: a distinct interruption may take the form of an intervening event, a lapse of time in which a reasonable person could calm down, an interruption in the momentum of the attack, a change in location, or some other clear break delineating the end of one assault and the beginning of another.

The Court went on to explain that neither evidence of a victim’s multiple, distinct injuries nor evidence of different methods of attack alone are sufficient to show a “distinct interruption” between assaults.

Turning to the facts at hand, the Court concluded that evidence showing that the defendant beat the victim for hours inside a trailer and subsequently beat the victim in a car while driving home was sufficient to support multiple charges of assault. The assaults were separated by an intervening event interrupting the momentum of the attack – cleaning the trailer and packing the car. The assaults also were distinct in time and location. Though the defendant was charged with at least two assaults for conduct occurring inside the trailer, the Court concluded that the evidence indicated that there was only a single assault inside the trailer as the attack was continuous and ongoing.

Sufficient evidence existed for the jury to find that the defendant was aware of a DVPO; Court of Appeals erred in failing to view the evidence in the light most favorable to the State

[State v. Tucker](#), 380 N.C. 234, 2022-NCSC-15 (Feb. 11, 2022). In this case from Mecklenburg County, the defendant was convicted of violating a domestic violence protective order (“DVPO”) while in possession of a deadly weapon, as well as felony breaking or entering in violation of the DVPO, assault with a deadly weapon, and assault on a female. The defendant was served with an ex parte DVPO and a notice of hearing on the question of a permanent

DVPO. He failed to attend the hearing, and a year-long DVPO was entered in his absence. On appeal, a unanimous Court of Appeals vacated the breaking or entering and DVPO violation convictions, finding that the defendant lacked notice of the permanent DVPO and therefore could not have willfully violated that order (summarized here). On discretionary review, the North Carolina Supreme Court reversed.

The ex parte DVPO was served on the defendant and indicated that a hearing would be held to determine whether a longer order would be entered. Though the defendant was not present at the hearing, he acknowledged his awareness of the DVPO during his arrest in the victim's apartment the day after the hearing on the permanent order by stating he knew the plaintiff had obtained a DVPO—a remark captured on an officer's bodycam. While this remark could have referred to the ex parte DVPO, it was sufficient evidence of the defendant's knowledge of the permanent order when viewed in context in the light most favorable to the State. The Court of Appeals erred by failing to apply that standard. According to the unanimous Court:

Defendant's statement, 'I know,' in addition to his other statements, conduct, and the timing of such conduct, supports this holding. The existence of evidence that could support different inferences is not determinative of a motion to dismiss for insufficient evidence. The evidence need only be sufficient to support a reasonable inference. *Tucker Slip op.* at 10 (citations omitted).

The Court of Appeals was therefore reversed, and the defendant's convictions reinstated.

(1) Conviction for making a threat under G.S. 14-16.7(a) requires proof that it was a “true threat,” meaning that the statement was both objectively threatening to a reasonable recipient and subjectively intended as a threat by the speaker; (2) the state presented sufficient evidence of such a threat to withstand defendant's motion to dismiss, but conviction was vacated and remanded for new trial where the jury was not properly instructed on this issue consistent with the First Amendment.

[State v. Taylor](#), 379 N.C. 589, 2021-NCSC-164 (Dec. 17, 2021). The facts of this case were previously summarized following the Court of Appeals decision in *State v. Taylor*, 270 N.C. App. 514 (2020), available here. Briefly, the defendant in this case wrote several social media posts allegedly threatening an elected district attorney over her decision not to seek criminal charges in connection with the death of a child. The defendant was convicted of threatening a court officer under G.S. 14-16.7(a) and appealed. The Court of Appeals held that the defendant's convictions were in violation of the First Amendment and vacated the conviction. The state sought and obtained discretionary review at the state Supreme Court. The higher court concluded that the defendant's conviction was properly vacated but remanded the case for a new trial rather than entry of a judgment of acquittal.

The Supreme Court began its analysis by reviewing the events that prompted the defendant's Facebook posts, the contents of those posts, and the state's evidence purportedly supporting the charges, such as evidence that the prosecutor was placed in fear by the threats. Next, the

higher court summarized the opinion of the Court of Appeals, which held that the offense required proof of both general and specific intent on the part of the defendant. The appellate court held that the defendant could only be constitutionally convicted under this statute if he made a “true threat,” meaning that the defendant not only made a statement that was objectively threatening (i.e., one which would be understood by those who heard or read it as a serious expression of intent to do harm), but also that he made that statement with the subjective intent that it be understood as a threat by the recipient. Finding that the state failed to make a sufficient showing of those requirements, the Court of Appeals held the statements were protected speech under the First Amendment and vacated the conviction.

Undertaking its own review, the state Supreme Court noted that the First Amendment broadly protects the fundamental right of free speech, and only certain limited categories of speech involving obscenity, defamation, incitement, fighting words, and “true threats” can be constitutionally restricted. The court reviewed *Watts v. United States*, 394 U.S. 705 (1969), which distinguished true threats from other types of protected speech. The court identified three factors from *Watts* that were relevant to evaluating the case at hand, although no single factor is dispositive: (i) the statute at issue must be interpreted with the First Amendment in mind; (ii) the public’s right to free speech is even more substantial than the state’s interest in protecting public officials; and (iii) the court must consider the context, nature and language of the statement, and the reaction of the listener. Next, the court reviewed the fractured opinions from another true threats case, *Virginia v. Black*, 538 U.S. 343 (2003). After considering the contrasting interpretations offered by the state and the defendant in the present case as to how *Black’s* holdings should be construed, the court ultimately concluded that “a speaker’s subjective intent to threaten is the pivotal feature separating constitutionally protected speech from constitutionally proscribable true threats.” Based on the precedent above and reiterating the importance of the free speech interest at stake, the court held that a true threat is defined as “an objectively threatening statement communicated by a party which possesses the subjective intent to threaten a listener or identifiable group,” and “the State is required to prove both an objective and a subjective element in order to convict defendant under N.C.G.S. § 14-16.7(a).”

Applying that definition and framework, the state Supreme Court then considered whether the trial court erred by denying the defendant’s motion to dismiss. On a motion to dismiss, the question for the trial court is whether there is substantial evidence, when viewed in the light most favorable to the state, to support each element of the offense and find that the defendant was the perpetrator. In this case there was no dispute that the defendant wrote the posts at issue, and they contained ostensibly threatening language that was not clearly “political hyperbole” or other protected speech. The state Supreme Court acknowledged that cases raising First Amendment issues are subject to an independent “whole record review,” but explained that this supplements rather than supplants traditional appellate review, and it is not inconsistent with the traditional manner of review on a motion to dismiss. Under this standard of review, the trial court did not err by ruling that the state had presented sufficient evidence to withstand a motion to dismiss and submit the case to the jury.

However, because the trial court did not properly instruct the jury on the charged offense consistent with the subjective intent requirement under the First Amendment, the conviction was vacated, and the case was remanded to the trial court for a new trial and submission of the case to a properly instructed jury.

Justice Earls concurred with the majority's conclusion that the First Amendment requires the state to prove both the objective and subjective aspects of the threat but dissented on the issue of whether the state's evidence was sufficient to withstand a motion to dismiss in this case and disagreed with the majority's interpretation and application of whole record review. In Justice Earls' view, the defendant's Facebook posts could not have been viewed as a serious intent to inflict harm when considered in context by a reasonable observer, and even if they could, the state offered insufficient evidence to show that this was the defendant's subjective intent.

There was sufficient circumstantial evidence that the defendant was the driver of a moped

[State v. Ingram](#), ___ N.C. App. ___, 2022-NCCOA-264 (Apr. 19, 2022). In this Rowan County case, the defendant appealed after being convicted of impaired driving after a jury trial. The conviction stemmed from a 2017 incident in which the defendant was found unresponsive on a fallen moped in the middle of the road. Field sobriety tests and a toxicology test indicated that the defendant was impaired. The trial court denied the defendant's motion to dismiss, and the defendant was convicted. On appeal, the defendant contended that the trial court erred by denying his motion to dismiss because there was insufficient evidence that he drove the moped. Though no witness testified to seeing the defendant driving the moped, the Court of Appeals concluded that there was sufficient circumstantial evidence that he did. He was found alone, wearing a helmet, lying on the double yellow line in the middle of the road and mounted on the seat of the fallen moped. The Court thus found no error.

(1) Probable cause existed that defendant committed the offense of DWI, and exigent circumstances existed to justify warrantless blood draw; (2) Trial court did not abuse its discretion by not taking judicial notice of a weather report; (3) Analyst's testimony and laboratory report were properly admitted as analyst testified to his independent opinion based on his analysis and review of data collected by other analysts and wrote the report based on that analysis; (4) Chain of custody report was admissible because State established adequate chain of custody; (5) Substantial evidence supported convictions for driving while impaired, assault with a deadly weapon inflicting serious injury, and felony serious injury by vehicle.

[State v. Bucklew](#), ___ N.C. App. ___, 2021-NCCOA-659 (Dec. 7, 2021). In this Martin County case, the defendant was convicted of assault with a deadly weapon inflicting serious injury, felony serious injury by vehicle and driving while impaired for his driving of a vehicle after consuming prescription medications, crossing into oncoming traffic, hitting two other vehicles, and seriously injuring another driver.

(1) The defendant, who was seriously injured in the crash and was taken to the hospital, had a “few coherent moments” in which he agreed to allow his blood to be withdrawn and analyzed for evidence of impairment. The defendant subsequently moved to suppress evidence of the blood analysis on the basis that there was not probable cause to believe he was driving while impaired, the blood was withdrawn without a warrant, and there were no exigent circumstances. The trial court denied the motion, and the Court of Appeals found no error. The Court first determined that the following evidence established probable cause: (a) a witness called 911 to report erratic driving by the defendant before the defendant crashed his vehicle into two other vehicles; (b) there were no skid marks at the scene to indicate that the defendant attempted to stop his vehicle; (c) the defendant admitted to taking oxycodone, valium, and morphine earlier in the day; and (d) after the crash, the defendant was lethargic, had slurred speech, droopy eyelids, and a blank stare. The Court then concluded that exigent circumstances existed as the officer did not have time to obtain a search warrant given the extent of the defendant’s injuries; indeed, the hospital postponed administering necessary pain medication to the defendant until after the State withdrew his blood. After the blood draw, the defendant was air-lifted to another hospital for a higher level of care.

(2) The defendant argued that the trial court erred by failing to take judicial notice of the National Weather Station’s weather conditions (the “Weather Report”) on the date of the collision. The Court of Appeals disagreed, reasoning that the Weather Report was not a document of indisputable accuracy for purposes of Rule 201(b) of the North Carolina Rules of Evidence because it did not state the level of rain that was occurring at the time of the crash. Thus, the Court of Appeals reasoned, the trial court was not required to take judicial notice of the report under Rule 201(d) but was free to use its discretion pursuant to Rule 201(c). And, the Court of Appeals concluded, the trial court did not abuse its discretion by declining to take judicial notice of the Weather Report.

(3), (4) The defendant argued on appeal that the trial court erred in admitting testimony from an analyst regarding the analysis of defendant’s blood, the analyst’s report, and the accompanying chain of custody report. The Court of Appeals found no error. The Court determined that the analyst’s testimony and his report were admissible because, even though the analyst relied on data collected by and tests performed by others, the analyst himself analyzed and reviewed the data, forming his own independent expert opinion and writing his own report. The Court further held that the trial court did not err by admitting the chain of custody report because the State established an adequate chain of custody through testimony of the law enforcement officer who submitted the blood and the analyst who prepared the report.

(5) The Court of Appeals determined that the trial court did not err in denying defendant’s motion to dismiss for insufficient evidence. Defendant’s erratic driving, the severity of the crash, his admission to taking medications, his impaired behavior, and the results of the analysis of defendant’s blood provided substantial evidence of impaired driving. Defendant’s driving in an erratic and reckless manner while impaired and crashing into another vehicle without appearing to have braked, seriously injuring the other driver provided substantial evidence of

assault with a deadly weapon inflicting serious injury. Finally, the serious injury to the other driver caused by defendant's impaired driving provided substantial evidence of felony serious injury by vehicle.

Judge Dietz concurred in the judgment, writing separately to state that he would have resolved the suppression issue solely based on the evidence of impairment establishing probable cause and the exigency resulting from the need to draw blood before medical professionals administered additional medications.