

SUMMER CRIMINAL LAW WEBINAR

Case and Legislative Update

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Stops



Good Faith Exception: Statutory Violations (# 2)

§ 15A-974. Exclusion or suppression of unlawfully obtained evidence.

(a) Upon timely motion, evidence must be suppressed if:

- (1) Its exclusion is required by the **Constitution** of the United States or the **Constitution** of the State of North Carolina; or
- (2) It is obtained as a result of a substantial violation of the **provisions of this Chapter**. In determining whether a violation is substantial, the court must consider all the circumstances . . .

Evidence shall not be suppressed **under this subdivision** if the person committing the violation of the provision or provisions under this Chapter acted under the objectively reasonable, good faith belief that the actions were lawful.

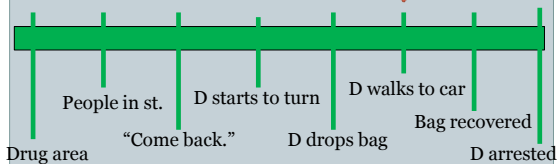
Statutory Violations

- Evidence shall not be suppressed under this subdivision if the person committing the violation of the provision or provisions under this Chapter acted under the **objectively reasonable, good faith belief that the actions were lawful.**
- Effective for trials and hearings on or after July 1, 2011

State v. Eaton (p. 2)



Seizure?



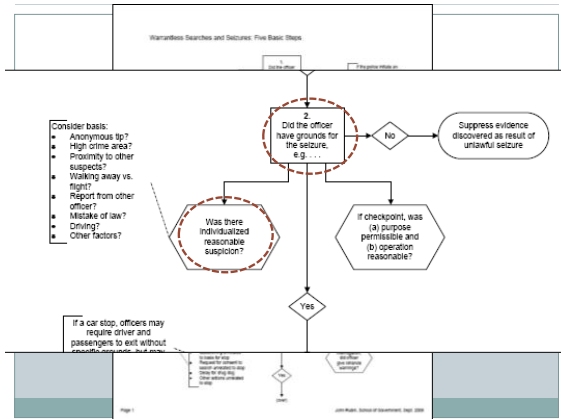
California v. Hodari D, 499 U.S. 621 (1991)

-7-
"the Fourth Amendment's protection against 'unreasonable . . . seizures' includes seizure of the person" but noted that

[t]he word "seizure" readily bears the meaning of a laying ~~one's~~ hands or application of physical force to restrain movement, even when it is ultimately unsuccessful. "she seized the purse-snatcher, but he broke out of her grasp.") It does not remotely apply, however, to the prospect of a policeman yelling "stop, in the name of the law" at a fleeing felon that continues to flee; that is no seizure.

An arrest requires either physical force (as described above) or, where that is absent, submission to the assertion of authority.

Id. at 626, 113 L.Ed. 2d at 696-97. The Court went on to hold that the defendant was not seized within the meaning of the Fourth Amendment when he discarded the cocaine because he had failed to comply with the officer's "show of authority" at the time. Id. at 628-29, 113 L.Ed. 2d at 699. The Court further determined that "[t]he cocaine abandoned while he was running was in this case not



NC Defender Manual

Ch. 17: Stops and Warrantless Seizures (28A:187)

18.1 Did the Officer Seize the Defendant?

The Fourth Amendment prohibits an officer from stopping or "seizing" a person without legally sufficient grounds, and evidence obtained by an officer after seizing a person may not be used to justify the seizure. See *Ford v. 30.3* is therefore critical for Fourth Amendment purposes to determine exactly when a seizure occurs.

A. Constitutional Exemptions

"Free to leave" test. As a general rule, a person is seized when, in view of all of the circumstances, a reasonable person would have believed that he or she was not "free to leave." See *U.S. v. Brinegar*, 338 U.S. 160 (1950); *Florida v. Broussard*, 400 U.S. 591 (1971); see also *Florida v. Broussard*, 501 U.S. 429 (1991) (where a person's freedom of movement is restricted for reasons independent of police conduct, such as when a person is a passenger on a bus, the test is whether a reasonable person would have felt free to decline the officer's request or resistance if necessary). The "free to leave" test is used to determine whether a person has been seized requires a lesser degree of restraint than the test for "custody" used to determine whether a person is entitled to Miranda warnings. See *Illinois v. McArthur*, 531 U.S. 131 (2001) (over the custody is whether there was formal arrest or restraint on freedom of movement of degree associated with formal arrest).

A seizure (custody) occurs if an officer takes a person into custody, physically restrains the person, or otherwise requires the person to submit to the officer's authority. An encounter may be considered "custodial" and not a seizure, however, if a person voluntarily engages in conversation with an officer.

Factors. Factors to consider in determining whether an encounter is custodial or a seizure include:

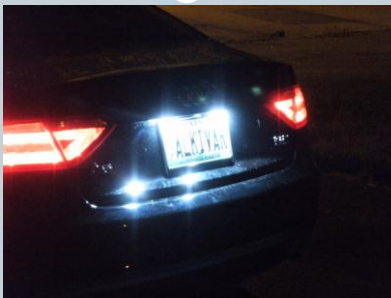
- number of officers present;
- display of weapons by officers;
- physical touching of defendant;
- use of language or tone of voice indicating that compliance is required;
- holding a person's identification papers or property;
- blocking the person's path; and
- obstruction or shining of lights.

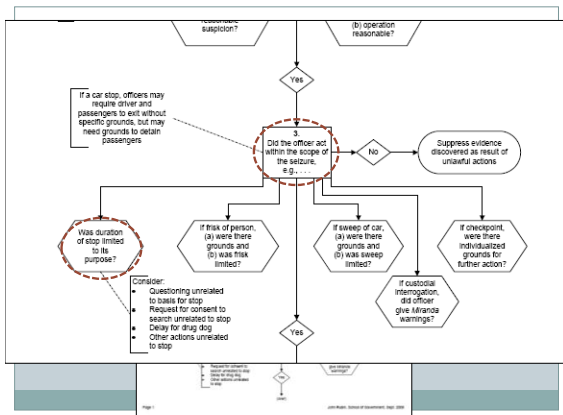
See *Illinois v. McArthur*, 531 U.S. 131 (2001) (discussing factors); *Illinois v. McArthur*, 531 U.S. 131 (2001) (discussing factors); *Illinois v. McArthur*, 531 U.S. 131 (2001) (discussing factors).

State v. Chlopek (p. 2)

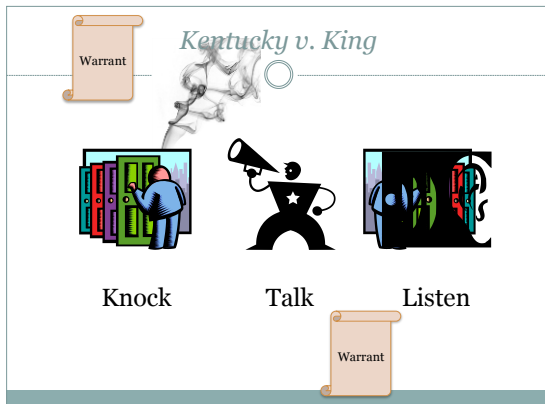


State v. Ford (p. 3)





Entries



Kentucky v. King

- Court rejected various “genuineness” requirements
- However, exigency does not excuse warrant if
 - police violate Fourth Amendment by actions or
 - police threaten to violate Fourth Amendment (e.g., open up or we’re coming in)
- Matters for future litigation
 - What is threat to violate?
 - What is exigency?

Searches



State v. Foy (p. 5)



D arrested and secured
in patrol car

Meanwhile...
officers search vehicle



Actions after Vehicle Stop and Arrest

- *Arizona v. Gant*, 129 S.Ct. 1710 (2009)
 - Before *Gant*, officers could search passenger compartment, including containers within passenger compartment, incident to arrest of occupant
- Now, officers may search passenger compartment incident to arrest of occupant only if:
 - Arrestee is unsecured and within reaching distance of passenger compartment at time of search, or

evidence relevant to the crime of arrest
or arrest might be found in the vehicle

Outstanding arrest
warrant?

Most traffic offenses?

Impaired driving?

Traffic stop that reveals drug offense?

Carrying a Concealed Weapon ?

No
No
Maybe
Probably

State v. Foy (p. 5)

• “It was reasonable for the officers in this case to believe that offense-related evidence would be in defendant’s truck.”

• “Unlike driving without a license and certain other traffic violations, the crime of CCW is more akin to illegal narcotics possession, where evidence of the crime of arrest may be found in the vehicle...”

State v. Mbacke (p. 5)



Direct evidence of crime of arrest

Mental Health Issues and Counsel's Role



What Now?



- **Indiana v. Edwards**
 1. Capacity to stand trial
 2. Capacity to represent self
 3. Knowing and voluntary waiver
- **Lane I**
- **Reid**
- **Lane II**
- **But see In re P.D.R.**
(6/7/11)
- Does the Constitution permit a ~~judge~~ to limit the defendant's self-representation right by insisting on counsel at trial because the defendant lacks the capacity to conduct his own defense?

Counsel for Commitment Proceedings



- **In re Watson (p. 10)**
 - Court recognizes that G.S. 122C-268 states:
 - The respondent **shall** be represented by counsel of his choice; or if he is indigent within the meaning of G.S. 7A-450 or refuses to retain counsel if financially able to do so, he **shall** be represented by counsel appointed in accordance with rules adopted by the Office of Indigent Defense Services.
 - Court then finds waiver of counsel invalid because trial judge didn't determine that waiver was knowing and voluntary.
- **My opinion?**
 - The statute doesn't permit waiver.

Insanity and Commitment: *Hartley* (p. 6)

- **Pattern instruction**

- Automatic commitment and hearing within 50 days
- If defendant is not discharged, rehearing in another 90 days and periodically thereafter

- **Requested instruction**

- Hearing where original trial held
- Hearing open to public
- Evidence that defendant committed homicide in relevant past is prima facie evidence of dangerousness
- After 50 day and 90 day hearing, next review is 180 days and thereafter once a year until defendant is no longer mentally ill or dangerous to self or others

Criminal Procedure

SBI Lab: March 31, 2011 (Legis. # 4)

- Advisory board
- Studies and protocols
- Professional certification
- Ombudsman
- **Admissibility**
- **Discovery**

Closing Arguments

- State v. Hartley (p. 26)
- State v. Twitty (p. 26)
- State v. Wright (p. 29)
- State v. Oakes (p. 31)



Partial Verdicts: *State v. Sargeant* (p. 17)

- Judge: I've been "thinking about this . . ."
"If we don't have the verdict, I should say verdicts by 5:00 p.m. I am going to make an inquiry if they've reached a verdict on any of the counts. If they have, it is my plan to take . . . those verdicts . . . before we adjourn for the evening. The reason being if they've reached a verdict on one or more and not on all and something happens over the evening hour I've got a problem. If we take those verdicts tonight, I won't have that problem."
- A bigger problem?
 - Procedure violates defendant's right to unanimous jury verdict

Probation (Legis. # 13)



**No more tolling
for new charges!**
for people placed on probation on or after 12/1/2011

No Tolling

- **2009**
 - Tolling language in 15A-1344(d) repealed
 - New 15A-1344(g) with tolling language and credit-back provision added
- **2011**
 - 15A-1344(g) repealed; no more tolling!
- **Applicable to people placed on probation on or after Dec. 1, 2011**

Protecting the Appeal

- **I am Staples Hughes, your Appellate Defender**



And be sure not to forget *State v. Blackmon* (on p. 19)

- **This is *State v. Hughes* (p. 16)**
 - Appellate entries form (AOC-CR-350) signed by judge and clerk and indicating defendant was appealing is NOT ENOUGH.
 - You must give notice orally on the record or in writing.

Evidence Issues

Crawford

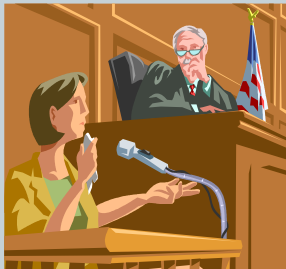
- I am Justice Antonin Scalia



What happened to my majority?
Michigan v. Bryant (p. 20)

Substitute Analysts

- State v. Hartley p. 20
- State v. Garnett p. 21
- State v. Jones p. 21
- State v. Williams p. 22



Visual ID of CS?



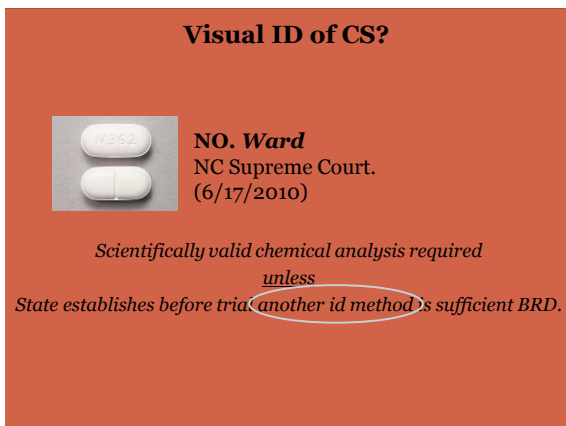
NO. Ward
NC Supreme Court.
(6/17/2010)

*Scientifically valid chemical analysis required
unless*

State establishes before trial another id method is sufficient BRD.







State v. Woodard (p. 23)



State v. Dobbs (p. 25)



404(b) Evidence

- Character evidence is generally inadmissible
 - Evidence of specific acts is restricted in particular because it is potentially damaging
- The evidence must be offered for a relevant purpose and not for character
 - *S v. Towe* (p. 28)
- The test is not similarity of the alleged acts and proximity in time, although those are outer limits
 - *Beckelheimer, Gray* (p. 27), *Davis* (p. 29)
- The evidence must pass the Rule 403 balancing test
- The evidence must be in proper form (not a conviction)
 - *Cole* (p. 32); *State v. Wilkerson*, 356 N.C. 418 (2002)

Hearsay

- *State v. Sargeant* (p. 30)
 - Co-defendant's statement admissible under residual hearsay exception when offered by DEFENDANT

More Hearsay

- *State v. Elkins* (p. 30)



No worries, your Honor.
The statements are not
being offered for the truth
of the matter asserted.

Crimes

“The Unborn Victims of Violence Act/Ethen’s Law” (# 11)

- New offenses
 - Class A murder
 - Murder punishable as second-degree murder
 - Voluntary manslaughter
 - Involuntary manslaughter
 - Assault inflicting serious bodily injury
 - Battery
- Knowledge not required except for Class A murder
- Exceptions

New Drug Offenses: June 1, 2011 (# 3)

- Mephedrone
- MDPV
- Synthetic cannabinoid





Crimes



- *State v. Wiggins*, p. 38
 - Simultaneous possession and/or use of multiple firearm is one offense of possession of firearm by felon
- *State v. Wilkins*, p. 40-41
 - Insufficient evidence of intent to sell or deliver
 - 1.89 grams of marijuana only
 - Divided into three small bags only
 - Cash of \$1264.00 only
- Habitual felon cases
 - *State v. Eaton*, p. 50: Drug trafficking
 - *State v. Womak*, p. 54: Applicability of Harbison



CANCELLED

State v. Cobos (p. 11)



Street Gangs



Registration and Monitoring for
People Convicted of Sex Offenses

Registration and Aggravated Registration

- **State v. Pell, p. 48**
 - Insufficient evidence that serial peeper posed danger to community and should be required to register
- **State v. Clark, p. 49**
 - Statutory rape necessarily involves use of force or threat of serious violence and so is aggravated offense
 - Compare *State v. Santos*, p. 42: Statutory sexual offense is not an aggravated offense

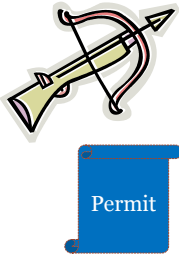
Monitoring and Other Restrictions

- **More Clark**
 - Court says no IAC in civil SBM proceeding.
 - But see *In re Bishop*, 92 N.C. App. 662 (1989) (statutory right to counsel in TPR case includes right to effective assistance of counsel; otherwise, statutory right to counsel would be "empty formality").
- **State v. Miller, p. 50**
 - No district court jurisdiction on bring-back hearing
- **State v. Crowder, p. 54**
 - Visiting isn't residing with minor in violation of probation

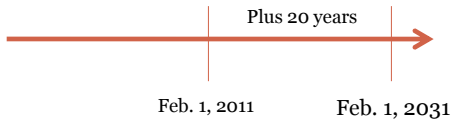
SORNA Bill, H 772

- **What should you tell your clients?**
 - Original compliance bill
 - New "tiers"
 - Facts of crime considered in determining appropriate tier
 - Some new reportable crimes (but not crime against nature)
 - Now a study bill only!
 - Any changes delayed until 2012
 - Federal deadline not met

Fewer Offenses (# 10, 16)



Firearms Restoration (# 1)



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Felony and Misdemeanor Case Update

2011 Summer Criminal Law Webinar

(Includes cases decided between November 16, 2010 and May 23, 2011)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw. To obtain the summaries automatically by email, go to www.sog.unc.edu/node/490.

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Investigation Issues

Police Authority

Stop and arrest by campus police officers while off campus were constitutional and not a substantial statutory violation

State v. Scruggs, __ N.C. App. __, 706 S.E.2d 836 (Mar. 1, 2011). Even if a stop and arrest of the defendant by campus police officers while off campus violated G.S. 15A-402(f), the violation was not substantial. The stop and arrest were constitutional and the officers were acting within the scope of their mutual aid agreement with the relevant municipality.

Grounds for Stop

Defendant was not seized when he dropped baggie before complying with officer's request to come back; baggie was abandoned property in which the defendant no longer retained a reasonable expectation of privacy

State v. Eaton, __ N.C. App. __, 707 S.E.2d 642 (Mar. 1, 2011). Citing *California v. Hodari D*, 499 U.S. 621 (1991), the court held that the defendant was not seized when he dropped a plastic baggie containing controlled substances. An officer was patrolling at night in an area where illegal drugs were often sold, used, and maintained. When the officer observed five people standing in the middle of an intersection, he turned on his blue lights, and the five people dispersed in different directions. When the officer asked them to come back, all but the defendant complied. When the officer repeated his request to the defendant, the defendant stopped, turned, and discarded the baggie before complying with the officer's show of authority by submitting to the officer's request. Additionally, the court held that the baggie was abandoned property in which the defendant no longer retained a reasonable expectation of privacy. As such, no Fourth Amendment violation occurred when an officer obtained the baggie.

Numerous copper thefts in county did not provide reasonable suspicion to stop construction vehicle at around 12:30AM

State v. Chlopek, __ N.C. App. __, 704 S.E.2d 563 (Jan. 18, 2011). An officer lacked reasonable suspicion to stop the defendant's vehicle. Around midnight, officers were conducting a traffic stop at Olde Waverly Place, a partially developed subdivision. While doing so, an officer noticed the defendant's construction vehicle enter the subdivision and proceed to an undeveloped section. Although officers had been put on notice of copper thefts from subdivisions under construction in the county, no such thefts had been reported in Olde Waverly Place. When the defendant exited the subdivision 20-30 minutes later, his vehicle was stopped. The officer did not articulate any specific facts about the vehicle or how it was driven which would justify the stop; the fact that there had been numerous copper thefts in the county did not support the stop.

Reasonable suspicion existed for vehicle stop where officers had good faith but mistaken believe the driver had a revoked license as well as reliable information about defendant/passenger's drug sales

State v. Williams, __ N.C. App. __, 703 S.E.2d 905 (Jan. 18, 2011). Officers had reasonable suspicion to

stop a vehicle in which the defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales provided by three informants. Two of the informants were confidential informants who had provided good information in the past. The third was a patron of the hotel where the drug sales allegedly occurred and met with an officer face-to-face. Additionally, officers corroborated the informants' information. As such, the informants' information provided sufficient indicia of reliability. The officer's mistake about who was driving the vehicle was reasonable, under the circumstances.

Violation of New Jersey constitution in connection with vehicle stop in that state provided no grounds for suppression; vehicle stop was not improperly prolonged where officer detained occupants for over an hour to get a consent to search form in Spanish

State v. Hernandez, __ N.C. App. __, 704 S.E.2d 55 (Dec. 21, 2010). Any alleged violation of the New Jersey constitution in connection with a stop in that state leading to charges in North Carolina, provided no basis for the suppression of evidence in a North Carolina court. As a passenger in a vehicle that was stopped, the defendant had standing to challenge the stop. The trial court properly denied a motion to suppress asserting that the vehicle stop was improperly prolonged. An officer stopped the truck after observing it follow too closely and make erratic lane changes. The occupants were detained until a Spanish language consent to search form could be brought to the location. The defendant challenged as unconstitutional this detention, which lasted approximately one hour and ten minutes. The court distinguished cases cited by the defendant, explaining that in both, vehicle occupants were detained after the original purpose of the initial investigative detention had been addressed and the officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis held not to provide a reasonable suspicion that criminal activity was afoot. Here, however, since none of the occupants had a driver's license or other identification, the officer could not issue a citation and resolve the initial stop. Because the challenged delay occurred when the officer was attempting to address issues arising from the initial stop, the court determined that it need not address whether the officer had a reasonable suspicion of criminal activity sufficient to justify a prolonged detention. Nevertheless, the court went on to conclude that even if the officer was required to have such a suspicion in order to justify the detention, the facts supported the existence of such a suspicion. Specifically: (a) the driver did not have a license or registration; (b) a man was in the truck bed covered by a blanket; (c) the defendant handed the driver a license belonging to the defendant's brother; (d) the occupants gave inconsistent stories about their travel that were confusing given the truck's location and direction of travel; (e) no occupant produced identification or a driver's license; (f) the men had no luggage despite the fact that they were traveling from North Carolina to New York; and (g) the driver had tattoos associated with criminal gang activity.

Reasonable suspicion existed for vehicle stop where officers testified rear tag was not sufficiently lit, regardless of whether stop was pretextual

State v. Ford, __ N.C. App. __, 703 S.E.2d 768 (Dec. 21, 2010). The trial court properly denied the defendant's motion to suppress when officers had reasonable suspicion to believe that the defendant committed a traffic violation supporting the traffic stop. The stop was premised on the defendant's alleged violation of G.S. 20-129(d), requiring that a motor vehicle's rear plate be lit so that under normal atmospheric conditions it can be read from a distance of 50 feet. The trial court found that normal conditions existed when officers pulled behind the vehicle; officers were unable to read the license plate with patrol car's lights on; when the patrol car's lights were turned off, the plate was not visible within the statutory requirement; and officers cited the defendant for the violation. The defendant's evidence

that the vehicle, a rental car, was “fine” when rented did not controvert the officer’s testimony that the tag was not sufficiently illuminated on the night of the stop. Citing *Whren v. United States*, 517 U.S. 806, 813 (1996), the court rejected the defendant’s argument that a stop for an alleged violation of G.S. 20-129(d) (motor vehicle’s rear plate must be lit so that it can be read from a distance of 50 feet) was pretextual. Under *Whren*, the reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved.

Warrantless Searches

Warrantless search to prevent destruction of evidence was justified by exigent circumstances rule

Kentucky v. King, 563 U.S. ____ (May 16, 2011). The Court reversed and remanded a decision of the Kentucky Supreme Court and held that the exigent circumstances rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. Police officers set up a controlled buy of crack cocaine outside an apartment complex. After an undercover officer watched the deal occur, he radioed uniformed officers to move in, telling them that the suspect was moving quickly toward the breezeway of an apartment building and urging them to hurry before the suspect entered an apartment. As the uniformed officers ran into the breezeway, they heard a door shut and detected a strong odor of burnt marijuana. At the end of the breezeway they saw two apartments, one on the left and one on the right; they did not know which apartment the suspect had entered. Because they smelled marijuana coming from the apartment on the left, they approached that door, banged on it as loudly as they could and announced their presence as the police. They heard people and things moving inside, leading them to believe that drug related evidence was about to be destroyed. The officers then announced that they were going to enter, kicked in the door, and went in. They found three people inside: the defendant, his girlfriend, and a guest who was smoking marijuana. During a protective sweep, the officers saw marijuana and powder cocaine in plain view. In a subsequent search, they found crack cocaine, cash, and drug paraphernalia. The police eventually entered the apartment on the right, where they found the suspected drug dealer who was the initial target of their investigation. On these facts, the state supreme court determined that the exigent circumstances rule did not apply because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. The U.S. Supreme Court rejected this interpretation stating, “the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable.” It concluded: “Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed.”

Probable cause and exigent circumstances supported search of defendant’s mouth where defendant attempted to swallow four packages of cocaine

State v. Williams, __ N.C. App. __, 703 S.E.2d 905 (Jan. 18, 2011). Probable cause and exigent circumstances supported an officer’s warrantless search of the defendant’s mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant’s vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant’s person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer’s presence. Exigent circumstances

existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

Passenger had no standing to challenge vehicle search

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011). The defendant had no standing to challenge the search of a vehicle. The defendant was a passenger, did not own the vehicle, and did not assert a possessory interest in the vehicle or its contents. Although a passenger who has no possessory interest in a vehicle has standing to challenge a vehicle stop or a detention beyond the scope of the initial seizure, a passenger who has no possessory interest in the vehicle or its contents has no standing to challenge a search of the vehicle.

Search of vehicle after arrest for carrying a concealed weapon violated *Gant* on facts

State v. Mbacke, __ N.C. App. __, 703 S.E.2d 823 (Jan. 4, 2011), *temporary stay and writ allowed by* __ N.C. __, 705 S.E.2d 388 (Jan. 20, 2011). Over a dissent, the court held that a search of the defendant's vehicle after he was arrested for carrying a concealed weapon violated *Gant*. The court rejected the State's argument that the search was justified under *Gant* because the officers had reason to believe that they would find evidence in the vehicle supporting the crime of arrest, stating: "we find it unreasonable to believe an officer will find in, or even need to seek from, a defendant's vehicle further evidence of carrying a concealed weapon when the officer has found the defendant off the defendant's own premises and carrying a weapon which is concealed about his person."

Search of vehicle after arrest for carrying a concealed weapon did not violate *Gant* on facts

State v. Foy, __ N.C. App. __, 703 S.E.2d 741 (Dec. 21, 2010), *disc. review allowed*, __ N.C. __, 705 S.E.2d 388 (2011). The trial court erred by suppressing evidence obtained pursuant to a search incident to arrest. After stopping the defendant's vehicle, an officer decided not to charge him with impaired driving but to allow the defendant to have someone pick him up. The defendant consented to the officer retrieving a cell phone from the vehicle. While doing that, the officer saw a weapon and charged the defendant with carrying a concealed weapon. Following the arrest, officers searched the defendant's vehicle, finding additional contraband, which was suppressed by the trial court. The court noted that under *Arizona v. Gant*, 556 U.S. __, 173 L. Ed. 2d 485 (2009), officers may search a vehicle incident to arrest only if the arrestee is within reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. Citing *State v. Toledo*, __ N.C. App. __, 693 S.E.2d 201 (2010), the court held that having arrested the defendant for carrying a concealed weapon, it was reasonable for the officer to believe that the vehicle contained additional offense-related contraband, within the meaning of the second *Gant* exception.

Search Warrants

Search warrant supported by probable cause where investigator provided information of ongoing drug activity at defendant's home and defendant's prior involvement with drugs

State v. McCain, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). The court held in this drug case, the

search warrant was supported by probable cause. In his affidavit, the Investigator stated that he had received information within the past 30 days from confidential reliable informants (“CRIs”) that the defendant was selling narcotics from his residence; during June and July of 2008, the sheriff’s department had received information from anonymous callers and CRIs that drugs were being sold at the defendant’s residence; in July 2008, the Investigator met with a “concerned citizen” who stated that the defendant was supplying drugs to his sister who was addicted to “crack” cocaine; the defendant’s residence had been “synonymous with the constant sale and delivery of illegally controlled substances” as the defendant had been the subject of past charges and arrests for possession with intent to sell and deliver illegal controlled substances; and the defendant’s criminal background check revealed a “prior history” of possession of narcotics. Given the specific information from multiple sources that there was ongoing drug activity at the defendant’s residence combined with the defendant’s past criminal involvement with illegal drugs, sufficient probable cause was presented the affidavit. The court further concluded that the information from the informants properly was considered, noting that the CRIs had been “certified” because information provided by them had resulted in arrests and convictions in the past, they were familiar with the appearance, packaging, and effects of cocaine, they provided statements against penal interest, the Investigator had met personally with the concerned citizen, and the CRIs, callers, and the concerned citizen had all given consistent information that during the months of June and July 2008, illegal drugs were being sold at the defendant’s residence.

Search warrant was not invalid although street number was incorrect

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010) The court rejected the defendant’s argument that a search warrant executed at a residence was invalid because the application and warrant referenced an incorrect street address. Although the numerical portion of the street address was incorrect, the warrant was sufficient because it contained a correct description of the residence.

Miranda

Defendant was not in custody on facts although officer formed subjective intent to detain him

State v. Hartley, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). The defendant was not in custody when he confessed to three homicides. Officers approached the defendant as he was walking on the road, confirmed his identity and that he was okay, told him that three people had been injured at his residence, and asked him if he knew anything about the situation. After the defendant stated that he did not know about it, an officer conducted a pat down of the defendant. The defendant’s clothes were damp and his hands were shaking. An officer told the defendant that the officer would like to talk to him about what happened and asked if the defendant would come to the fire department, which was being used as an investigation command post. The officer did not handcuff the defendant and told him that he was not under arrest. The defendant agreed to go with the officers, riding in the front passenger seat of the police car. The officers entered a code to access the fire department and the defendant followed them to a classroom where he sat at one table while two officers sat across from him at a different table. Officers asked the defendant if he wanted anything to eat or drink or to use the restroom and informed him that he was not under arrest. An officer noticed cuts on the defendant’s hands and when asked about them, the defendant stated that he did not know how he got them. Although the officer decided that she would not allow the defendant to leave, she did not tell the defendant that; rather, she said that forensic evidence would likely lead to apprehension of the perpetrator. When she asked the defendant if there was anything else that he wanted to tell her, he confessed to the murders. Due to a

concern for public safety, the officer asked where the murder weapon was located and the defendant told her where it was. The officer then left the room to inform others about the confession while another officer remained with the defendant. The defendant then was arrested and given *Miranda* warnings. He was not handcuffed and he remained seated at the same table. He waived his rights and restated his confession. The court concluded that the defendant was not in custody when he gave his initial confession, noting that he was twice told that he was not under arrest; he voluntarily went to the fire department; he was never handcuffed; he rode in the front of the vehicle; officers asked him if he needed food, water, or use of the restroom; the defendant was never misled or deceived; the defendant was not questioned for a long period of time; and the officers kept their distance during the interview and did not use physical intimidation. The court rejected the defendant's argument that the pat-down and the officer's subjective intent to detain him created a custodial situation. The court also rejected the defendant's argument that the interrogation was an impermissible two-stage interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004), concluding that the case was distinguishable from *Seibert* because the defendant was not in custody when he made his first confession.

Defendant was not in custody where he was told to remain in patrol car

State v. Clark, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). A reasonable person in the defendant's position would not have believed that he or she was under arrest or restrained in such a way as to necessitate *Miranda* warnings. Key factors in the *Miranda* custody determination include: whether a suspect is told he or she is free to leave, is handcuffed, or is in the presence of uniformed officers and the nature of any security around the suspect. There was no evidence that officers ever explicitly told the defendant that he was being detained. The court rejected the defendant's argument that because he was moved to a patrol car and instructed to remain there when he came in contact with the victim's father and that he was told to come back and stay when he attempted to talk to his girlfriend, the victim's sister, this was tantamount to a formal arrest. The court concluded that the officers' actions were nothing more than an attempt to control the scene and prevent emotional encounters between a suspect and members of the victim's family. Moreover, even if the defendant was detained at the scene, his statements are untainted given that the detective expressly told him that he was not under arrest, the defendant repeatedly asked to speak with the detective, and the defendant voluntarily accompanied the detective to the sheriff's department.

Defendant's statements were freely and voluntarily made although he had used crack cocaine that day

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010). The court rejected the defendant's argument that because he was under the influence of cocaine he did not knowingly, intelligently, and understandingly waive his *Miranda* rights or make a statement to the police. Because the defendant was not under the influence of any impairing substance and answered questions appropriately, the fact that he ingested crack cocaine several hours prior was not sufficient to invalidate the trial court's finding that his statements were freely and voluntarily made. At 11:40 pm, unarmed agents woke the defendant in his cell and brought him to an interrogation room, where the defendant was not restrained. The defendant was responsive to instructions and was fully advised of his *Miranda* rights; he nodded affirmatively to each right and at 11:46 pm, signed a *Miranda* rights form. When asked whether he was under the influence of any alcohol or drugs, the defendant indicated that he was not but that he had used crack cocaine, at around 1:00 or 2:00 pm that day. He responded to questions appropriately. An agent compiled a written summary, which the defendant was given to read and make changes. Both the defendant and the agent signed the document at around 2:41 am. The agents thanked the defendant

for cooperating and the defendant indicated that he was glad to “get all of this off [his] chest.” On these facts, the defendant’s statements were free and voluntary; no promises were made to him, and he was not coerced in any way. He was knowledgeable of his circumstances and cognizant of the meaning of his words.

Identifications

Pretrial identifications that involved choosing photos from The Slammer were not unduly suggestive and did not violate Eyewitness identification Act

State v. Boozer, __ N.C. App. __, 707 S.E.2d 756 (Mar. 15, 2011). (1) The trial court properly denied the defendant’s motion to suppress asserting that an eyewitness’s pretrial identification was unduly suggestive. The eyewitness had the opportunity to view the defendant at close range for an extended period of time and was focused on and paying attention to the defendant for at least fifteen minutes. Additionally, the eyewitness described the defendant by name as someone he knew and had interacted with previously, and immediately identified a photograph of him, indicating high levels of accuracy and confidence in the eyewitness’s description and identification. Although the eyewitness stated that he recognized but could not name all of the suspects on the night of the attack, he named the defendant and identified a photograph of him the next day. (2) No violation of G.S. 15A-284.52 (eyewitness identification procedures) occurred. The eyewitness told the detective that he had seen one of the perpetrators in a weekly newspaper called the The Slammer, but did not recall his name. The detective allowed the eyewitness to look through pages of photographs in The Slammer, and from this process the eyewitness identified one of the defendants. The detective did not know who the eyewitness was looking for and thus could not have pressured him to select one of the defendants, nor does any evidence suggest that this occurred.

Pretrial and Trial Procedure

Right to Counsel

No error to appoint counsel in the absence of clear waiver; no error in allowing defendant to proceed pro se where defendant forfeited the right to counsel by willfully obstructing and delaying proceedings; trial court did not violate defendant’s due process rights by ordering an examination of his capacity to proceed without first holding a hearing

State v. Leyshon, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). (1) The trial court did not err by appointing counsel for the defendant where there was no clear and unequivocal waiver. The defendant refused to answer whether he waived or asserted his right to counsel and made contradictory statements on the issue. He stated: “I’m not waiving my right to assistance of counsel,” “I want to retain my right”, and “I’m reserving my rights”. He also said: “I don’t need an attorney”, “I refuse his counsel”, and “I’ll have no counsel”. (2) The trial court did not err by allowing the defendant to proceed pro se where the defendant forfeited his right to counsel. In July 2007, the defendant refused to sign a waiver of counsel form. At a Jan. 2008 hearing, the court twice advised the defendant of his right to counsel and repeatedly asked if he wanted a lawyer. The defendant refused to answer, arguing, “I want to find out if the Court has jurisdiction before I waive anything”. Even after the court explained the basis of its jurisdiction, the defendant refused to state if he wanted an attorney, persistently refusing to waive

anything until jurisdiction was established. At a July 2008 hearing, the defendant would not respond to the court's inquiry regarding counsel, asserting, "I'm not waiving my right to assistance of counsel," but also refusing the assistance of the appointed attorney. At the next hearing, he continued to challenge the court's jurisdiction and would not answer the court's inquiry regarding whether he wanted an attorney or to represent himself. Instead, he maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." The defendant willfully obstructed and delayed the proceedings and thus forfeited his right to counsel. (3) The court rejected the defendant's argument that his due process rights were violated when the trial judge failed to provide him with a hearing before ordering an examination of his capacity to proceed. G.S. 15A-1002 does not require the trial judge to conduct a hearing before such an examination. A defendant may request a hearing after the examination but failure to do so—as happened here—constitutes a waiver.

Defendant who chose to proceed pro se was competent to stand trial and made a knowing and voluntary waiver of his right to counsel

State v. Lane, 365 N.C. 7 (Mar. 11, 2011). This capital case came back before the N.C. Supreme Court after that court remanded in *State v. Lane*, 362 N.C. 667 (Dec. 12, 2008) (*Lane I*), for consideration under *Indiana v. Edwards*, 554 U.S. 164 (2008), as to whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. *Edwards* held that states may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves. At trial, the trial court had accepted the defendant's waiver of counsel and allowed the defendant to proceed pro se. Following a hearing, held on remand after *Lane I*, the trial court concluded that the defendant was competent to stand trial and to discharge his counsel and proceed pro se. The N.C. Supreme Court held that because the defendant never was denied his constitutional right to self-representation (he was allowed to proceed pro se), the U.S. "Supreme Court's holding in *Edwards*, that the State may deny that right if a defendant falls into the "gray area" of competence, does not guide our decision here." Slip op. at 22. Rather, the N.C. Supreme Court clarified, because the trial court found the defendant competent to stand trial, the issue was whether the defendant made a knowing and voluntary waiver of his right to counsel. On that issue, and after a detailed review of the trial court's findings, the court concluded that the trial court's inquiry was sufficient to support its determination that the defendant knowingly and voluntarily waived his right to counsel. In the course of that ruling, the court reaffirmed that a defendant's technical legal knowledge is not relevant to an assessment of a valid waiver of counsel. While *Lane I* could be read to suggest that the trial court always must undertake an *Edwards* inquiry before allowing a defendant to proceed pro se, *Lane II* suggests otherwise. In *Lane II*, the court clarified the options for the trial court, stating: For a defendant whose competence is at issue, he must be found [competent] before standing trial. If that defendant, after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel . . . ; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards*. The trial court must make findings of fact to support its determination that the defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel." Slip op. at 21 (citations omitted).

Waiver of counsel was improper in involuntary commitment hearing

In Re Watson, __ N.C. App. __, 706 S.E.2d 296 (Feb. 15, 2011). (1) Because the trial court failed to comply with the statutory mandates of G.S. 15A-1242, 122C-268(d), and IDS Rule 1.6, the respondent's waiver of counsel in his involuntary commitment hearing was ineffective. The court adopted language from *State v. Moore*, 362 N.C. 319, 327-28 (2008), endorsing a fourteen-question checklist for taking a waiver of counsel. The court also noted with approval language from an Arizona case suggesting the proper inquiry in involuntary commitment cases. (2) The fact that the respondent had standby counsel did not cure the improper waiver of counsel.

No violation of right to counsel occurred where officers interviewed defendant on new charges while he was in custody on unrelated ones; no violation of G.S. 7B-2101 occurred where defendant invoked his right to have his mother present but then initiated further discussion with officers; statute requiring electronic recordation of interrogations was not yet in effect

State v. Williams, __ N.C. App. __, 705 S.E.2d 409 (Feb. 1, 2011). No violation of the defendant's sixth amendment right to counsel occurred when detectives interviewed him on new charges when he was in custody on other unrelated charges. The sixth amendment right to counsel is offense specific and had not attached for the new crimes. Additionally, the trial court did not err by denying the defendant's motion to suppress statements made during a police interrogation where no violation of G.S. 7B-2101 occurred. The defendant, a 17-year-old juvenile, was already in custody on unrelated charges at the time he was brought to an interview room for questioning. When the defendant invoked his right to have his mother present during questioning, the detectives ceased all questioning. After the detectives had trouble determining how to contact the defendant's mother, they returned to the room and asked the defendant how to reach her. The defendant then asked them when he would be able to talk to them about the new charges (robbery and murder) and explained that the detectives had "misunderstood" him when he requested the presence of his mother for questioning. He explained that he only wanted his mother present for questioning related to the charges for which he was already in custody, not the new crimes of robbery and murder. Although the defendant initially invoked his right to have his mother present during his custodial interrogation, he thereafter initiated further communication with the detectives; that communication was not the result of any further interrogation by the detectives. The defendant voluntarily and knowingly waived his rights. Finally, the trial court did not err by denying the defendant's motion to suppress asserting that his interrogation was not electronically recorded in compliance with G.S. 15A-211. The statute applies to interrogations occurring on or after March 1, 2008; the interrogation at issue occurred more than one year before that date.

Waiver of counsel was sufficient although waiver form was deficient; trial court made adequate inquiry to determine that defendant's waiver was knowing, intelligent, and voluntary

State v. Paterson, __ N.C. App. __, 703 S.E.2d 755 (Dec. 21, 2010). (1) The defendant's waiver of counsel was sufficient even though a box on the waiver form was left blank and the form was executed before the court advised the defendant of the charges and the range of punishment. Citing *State v. Heatwole*, 344 N.C. 1, 18 (1996), and *State v. Fulp*, 355 N.C. 171, 177 (2002), the court first concluded that a waiver of counsel form is not required and any deficiency in the form will not render the waiver invalid, if the waiver was knowing, intelligent, and voluntary. Next, the court concluded that the waiver was not invalid because the trial court failed to go over the charges and potential punishments prior to the defendant signing the waiver form. The trial court discussed the charges and potential punishments with the defendant the following day, and defendant confirmed his desire to represent himself in open court.

Although the waiver form requires the trial judge to certify that he or she informed the defendant of the charges and punishments, given that the form is not mandatory, no prejudice occurs when the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts the right to proceed *pro se*. (2) The trial court conducted an adequate inquiry under G.S. 15A-1242. The court noted that there is no mandatory formula for complying with the statute. Here, the trial judge explicitly informed the defendant of his right to counsel and the process to secure a court-appointed attorney; the defendant acknowledged that he understood his rights after being repeatedly asked whether he understood them and whether he was sure that he wanted to waive counsel; the judge informed him of the charges and potential punishments; and the judge explained that he would be treated the same at trial regardless of whether he had an attorney. The trial court's colloquies at the calendar call and before trial, coupled with the defendant's repeated assertion that he wished to represent himself, demonstrate that the defendant clearly and unequivocally expressed his desire to proceed *pro se* and that such expression was made knowingly, intelligently, and voluntarily.

Pleadings

Superseding indictment not void where court failed to dismiss original one

State v. Twitty, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). The trial court's failure to dismiss the original indictment after a superseding indictment was filed did not render the superseding indictment void or defective.

Warrant charging failure to confine dangerous dog could not support conviction for attack by dangerous dog

State v. Burge, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). Because an arrest warrant charged the defendant with a violation of G.S. 67-4.2 (failing to confine a dangerous dog), it could not support a conviction for a violation of G.S. 67-4.3 (attack by a dangerous dog). Even though the warrant cited G.S. 67-4.2, it would have been adequate if it had alleged all of the elements of a G.S. 67-4.3 offense. However, it failed to do so as it did not allege that the injuries required medical treatment costing more than \$100.

Reversible error to allow State to amend indictment to specify the amount of cocaine in conspiracy to engage in trafficking case

State v. Cobos, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). The trial court committed reversible error by allowing the State to amend an indictment charging conspiracy to engage in "trafficking to deliver Cocaine" to add the following language: "to deliver 28 grams or more but less than 200 grams of cocaine." To allege all of the essential elements, an indictment for conspiracy to traffic in cocaine must allege that the defendant facilitated the transfer of 28 grams or more of cocaine. Here, the indictment failed to specify the amount of cocaine. The court also concluded that a defendant cannot consent to an amendment that cures a fatal defect; the issue is jurisdictional and a party cannot consent to subject matter jurisdiction.

Indictment for larceny failed to allege ownership

State v. McNeil, __ N.C. App. __, 707 S.E.2d 674 (Mar. 1, 2011). An indictment for felonious larceny that

failed to allege ownership in the stolen handgun was fatally defective.

Variance in date of offense was not fatal where juvenile failed to show it impeded his defense

In Re A.W., __ N.C. App. __, 706 S.E.2d 305 (Feb. 15, 2011). There was no fatal variance between a juvenile delinquency petition for indecent liberties alleging an offense date of November 14, 2008, and the evidence which showed an offense date of November 7-9, 2008. The juvenile failed to show that his ability to present an adequate defense was prejudiced by the variance.

Where indictment alleged maintaining a dwelling for “keeping *and* selling,” State was not required to prove both theories

State v. Garnett, __ N.C. App. __, 706 S.E.2d 280 (Feb. 15, 2011). Theories included in the trial judge’s jury instructions were supported by the indictment. The indictment charged the defendant with maintaining a dwelling “for keeping *and* selling a controlled substance.” The trial court instructed the jury on maintaining a dwelling “for keeping *or* selling marijuana.” The use of the conjunctive “and” in the indictment did not require the State to prove both theories alleged.

Indictment properly charged a felony where it alleged that the act was done with “deceit and intent to interfere with justice” rather than with “deceit and intent to defraud”

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011). (1) A defendant may challenge the sufficiency of an indictment even after pleading guilty to the charge at issue. (2) An obstruction of justice indictment properly charged a felony when it alleged that the act was done “with deceit and intent to interfere with justice.” G.S. 14-3(b) provides that a misdemeanor receives elevated punishment when done with “deceit and intent to defraud.” The language “deceit and intent to interfere with justice” adequately put the defendant on notice that the State intended to seek a felony conviction. Additionally, the indictment alleged that the defendant acted “feloniously.”

Indictment charging accessory after the fact to first-degree murder was sufficient to support a conviction of accessory after the fact to second-degree murder

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011). An indictment charging accessory after the fact to first-degree murder was sufficient to support a conviction of accessory after the fact to second-degree murder. The indictment alleged that a felony was committed, that the defendant knew that the person he assisted committed that felony, and that he rendered personal assistance to the felon; it thus provided adequate notice to prepare a defense and protect against double jeopardy.

Indictment for breaking or entering vehicle properly alleged ownership in “D.L. Peterson Trust”; State was bound by language of indictment to prove defendant intended to commit larceny therein

State v. Chillo, __ N.C. App. __, 705 S.E.2d 394 (Dec. 21, 2010). (1) An indictment for breaking or entering a motor vehicle alleging that the vehicle was the personal property of “D.L. Peterson Trust” was not defective for failing to allege that the victim was a legal entity capable of owning property. The indictment alleged ownership in a trust, a legal entity capable of owning property. (2) Because the State indicted the defendant for breaking or entering a motor vehicle with intent to commit larceny therein, it was bound by that allegation and had to prove that the defendant intended to commit larceny.

In an indictment for breaking or entering a vehicle, where State elects to allege the felony the defendant intended to commit, State is bound to prove that felony; indictment properly alleged that defendant intended to steal the same motor vehicle

State v. Clark, __ N.C. App. __, 702 S.E.2d 324 (Dec. 7, 2010). (1) Although the State is not required to allege the felony or larceny intended in an indictment charging breaking or entering a vehicle, if it does so, it will be bound by that allegation. (2) An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Motions Practice

Trial court erred in failing to make written findings of fact when denying motion to suppress where there were material conflicts in the evidence

State v. Neal, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). By orally denying the defendant's motion to suppress, the trial court failed to comply with G.S. 15A-977(f)'s requirement that it enter a written order with findings of fact resolving material conflicts in the evidence. The statute mandates a written order unless the trial court provides its rationale from the bench and there are no material conflicts in the evidence. Although the trial court provided its rationale from the bench, there were material conflicts in the evidence as to whether the defendant's consent to search was voluntary. The court remanded for the trial court to make the necessary findings of fact and for reconsideration of its conclusions of law in light of those findings.

Trial court erred in granting motion to dismiss on grounds that statute was unconstitutional without hearing evidence or making findings

State v. Buddington, __ N.C. App. __, 707 S.E.2d 655 (Mar. 1, 2011). The trial court erred by granting the defendant's motion to dismiss a charge of felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence allowing the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

Trial court erred in failing to make written findings of fact and conclusions of law when denying motion to suppress where there was material conflict in the evidence

State v. Baker, __ N.C. App. __, 702 S.E.2d 825 (Dec. 7, 2010). The trial court erred by failing to make findings of fact and conclusions of law in connection with its denial of the defendant's motion to suppress. When a trial court's failure to make findings of fact and conclusions of law is assigned as error, the trial court's ruling on a motion to suppress is fully reviewable for a determination as to whether (1) the trial court provided the rationale for its ruling from the bench; and (2) there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress and

will be binding on appeal, if supported by competent evidence. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law is reversible error. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected. Turning to the case at hand, the court held that the defendant had presented evidence that controverts the State's evidence as to whether a seizure occurred. Because there was a material conflict in the evidence, the trial court's failure to make findings of fact and conclusions of law is fatal to the validity of its ruling. The court reversed and remanded for findings of fact and conclusions of law. The court noted that even when there is no material conflict in the evidence, the better practice is for the trial court to make findings of fact.

Jury Instructions

No error in failing to give requested jury instruction on commitment process where defendant asserted insanity defense

State v. Hartley, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). (1) In a triple murder case in which the defendant asserted an insanity defense, the trial court did not err by failing to give the defendant's requested jury instruction on the commitment process and instead instructing the jury on the issue pursuant to N.C.P.J.I.—Crim. 304.10. The pattern instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity. (2) The trial court's instruction to the jury did not lower the State's burden of proving specific intent to kill.

Trial court's refusal to instruct on involuntary manslaughter in murder case was reversible error

State v. Dibiase, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). In a case in which the defendant was convicted of second-degree murder, the trial court committed reversible error by denying the defendant's request for a jury instruction on involuntary manslaughter. The evidence tended to show that the defendant did not intend to kill or seriously injure the victim: the victim became angry at the defendant when the defendant offered drugs to the victim's girlfriend; after the victim punched or shoved the defendant, others separated the men; the victim then charged at the defendant, who struck him on the head or neck with a beer bottle, shattering the bottle; the defendant and the victim struggled and fell; and the defendant did not stab the victim. Cause of death was a large laceration to the neck. The court rejected the State's argument that the defendant's admission that he intentionally hit the victim with the bottle supported the trial court's refusal to instruct on involuntary manslaughter. Although the intentional use of a deadly weapon causing death creates a presumption of malice, if the defendant adduces evidence or relies on a portion of the State's evidence raising an issue on the existence of malice and unlawfulness, the presumption disappears, leaving only a permissible inference which the jury may accept or reject. Here, the defendant's evidence sufficed to so convert the presumption.

Penalty phase instruction was not invalid under *Beck*

Bobby v. Mitts, 563 U.S. __ (May 2, 2011). In a per curiam opinion, the Court reversed a Sixth Circuit decision granting relief to a defendant on grounds that the jury instructions used in his capital trial ran afoul of *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that the death penalty may not be imposed when the jury was not permitted to consider a verdict of guilt of a lesser-included non-capital offense, and

when the evidence would have supported such a verdict). The Court concluded that the penalty phase instruction at issue was not invalid under *Beck*, which dealt with guilt-innocence phase instructions.

Trial court did not err by denying the defendant's request for a jury instruction where the defendant failed to submit his requested instruction in writing; trial judge properly exercised discretion in instructing jurors to rely on their recollection of the evidence in response to their request to review testimony

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011). In an assault on a firefighter with a firearm case, the trial court did not err by denying the defendant's request for a jury instruction on the elements of assault where the defendant failed to submit his requested instruction in writing. Although the trial judge did not explicitly state that he was denying, in his discretion, the jury's request to review testimony, the judge instructed the jurors to rely on their recollection of the evidence that they heard and therefore properly exercised its discretion in denying the request. When defense counsel consents to the trial court's communication with the jury in a manner other than in the courtroom, the defendant waives his right to appeal the issue. Here, although the trial judge failed to bring the jurors to the courtroom in response to their request to review testimony and instead instructed them from the jury room door, prior to doing so he asked for and received counsel's permission to instruct at the jury room door.

Error but not plain error where trial court failed to give final not guilty mandate

State v. Wright, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). Although the trial court erred by failing to give the final not guilty mandate, under the circumstances presented the error did not rise to the level of plain error.

Jury Instructions were supported by the indictment although they provided an evidentiary basis for the charge that was not in the indictment

State v. Carter, __ N.C. App. __, 707 S.E.2d 700 (Mar. 1, 2011). In an indecent liberties case, the trial judge's jury instructions were supported by the indictment. The indictment tracked the statute and did not allege an evidentiary basis for the charge. The jury instructions, which identified the defendant's conduct as placing his penis between the child's feet, was a clarification of the evidence for the jury.

Other Procedural Issues

No violation of constitutional or statutory right to speedy trial

State v. Twitty, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). The court rejected the defendant's constitutional speedy trial claim. The defendant made no argument that the delay was caused by the neglect or willfulness of the prosecution; he did not properly assert his speedy trial right; and he failed to show actual prejudice. Further, G.S. 15A-711(c) could not support the defendant's statutory speedy trial claim where he had no other criminal charges pending against him at the time he was confined and awaiting trial.

Remand of trial court's order dismissing charges for violation of right to speedy trial; trial court did not err by considering defendant's speedy trial motion, filed pro se while defendant was represented

by counsel

State v. Howell, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). The court remanded for further action the trial court's order dismissing the charges based on a violation of the constitutional right to a speedy trial, finding that the trial court "reached its Sixth Amendment ruling under a misapprehension of the law and without conducting a complete analysis, including consideration of all the relevant facts and law in this case." The court noted that G.S. 15A-711 does not guarantee a defendant the right to have a matter tried within a specific period of time and is not a "speedy trial" statute. Additionally, the trial court did not err by considering the defendant's pro se speedy trial motion, filed when he was represented by counsel.

No abuse of discretion in denying mistrial motion where juror was approached at recess by a man who told him to quit

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). The trial court did not abuse its discretion by denying the defendant's mistrial motion. During a recess at trial, a juror was approached by a man who said, "Just quit, and I'll let you go home." Upon return to the courtroom, the trial court inquired and determined that six jurors witnessed the incident. The trial court examined each juror individually and each indicated that the incident would not affect his or her ability to follow the trial court's instructions or review of the evidence. Given the trial court's response and the lack of evidence showing that the jurors were incapable of impartially rendering their verdict, the trial court did not abuse its discretion by denying the motion.

Defendant failed to properly enter notice of appeal

State v. Hughes, __ N.C. App. __ (Mar. 15, 2011). The court lacked jurisdiction over the appeal because the defendant failed to note an appeal in compliance with N.C.R. App. P. 4. Although the record included a copy of form AOC-CR-350 (Appellate Entries), this does not suffice to show that the defendant properly appealed from the trial court's judgment.

Trial court did not err by denying the defendant's motion to withdraw his guilty plea which was consistent with a plea agreement where the defendant failed to make a showing of manifest injustice

State v. Shropshire, __ N.C. App. __, 708 S.E.2d 181 (Mar. 15, 2011). The trial court did not err by denying the defendant's motion to withdraw his guilty plea. When a defendant seeks to withdraw a guilty plea after being sentenced consistent with a plea agreement, the defendant is entitled to withdraw his plea only upon a showing of manifest injustice. Factors relevant to the analysis include whether the defendant was represented by competent counsel and is asserting innocence, and whether the plea was made knowingly and voluntarily or was the result of misunderstanding, haste, coercion, or confusion. None of these factors were present here. The defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement.

No right to challenge trial court's acceptance of guilty plea as knowing and voluntary absent motion to withdraw the plea and denial of motion; defendant's argument that trial court pressured him to accept a plea was without merit

State v. Santos, __ N.C. App. __, 708 S.E.2d 208 (Mar. 15, 2011). (1) Although the court treated the

defendant's brief challenging his guilty plea as a writ of certiorari and addressed his contentions, it reviewed the law on the right to appeal after a plea, stating: A defendant who has entered a guilty plea is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. Thus, the court concluded, a defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea as knowing and voluntary absent a denial of a motion to withdraw that plea. (2) The court rejected the defendant's argument that his guilty plea was not knowing and voluntary because it was the result of unreasonable and excessive pressure by the State and the trial court. The defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him the time he needed to reflect on the decision. However, the plea offer was made some days earlier and the trial judge engaged in an extensive colloquy with the defendant, beyond statutory mandates, to ensure that the plea was knowing and voluntary.

Trial court committed error by taking a partial verdict for first-degree murder

State v. Sargeant, 365 N.C. 58 (Mar. 11, 2011). The court agreed with the court of appeals' decision in *State v. Sargeant*, __ N.C. App. __, 696 S.E.2d 786 (Aug. 3, 2010), which had held, over a dissent, that the trial court erred by taking a partial verdict. However, because the court concluded that a new trial was warranted on account of a prejudicial ruling on an unrelated evidence issue, it did not analyze whether the verdict error was prejudicial. The court of appeals' decision described the verdict issue as follows. The defendant was convicted of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. At the end of the first day of deliberations, the jury had not reached a unanimous decision as to each of the charges. The trial court asked the jury to submit verdict sheets for any of the charges for which it had unanimously found the defendant guilty. The trial court then received the jury's verdicts finding the defendant guilty of first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first-degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet asking only whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day. The court of appeals concluded that the trial court erred by taking a verdict as to lying in wait and felony murder when the jury had not yet agreed on premeditation and deliberation. It reasoned that premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather theories of first-degree murder and the trial court cannot take a verdict on a theory. Therefore, the court of appeals concluded, the trial court erred by taking partial verdicts on theories of first-degree murder. As noted above, the supreme court agreed that error occurred but declined to assess whether it was prejudicial.

Trial court did not improperly limit defendant's voir dire questioning

State v. Johnson, __ N.C. App. __, 706 S.E.2d 790 (Mar. 1, 2011). The trial court did not improperly limit the defendant's voir dire questioning with respect to assessing the credibility of witnesses and the jurors' ability to follow the law on reasonable doubt. Because the trial judge properly sustained the State's objections to the defendant's questions, no abuse of discretion occurred. Even if any error occurred, the defendant suffered no prejudice.

Denial of motion to continue did not violate defendant's rights to due process and effective assistance of counsel

State v. Banks, __ N.C. App. __, 706 S.E.2d 807 (Mar. 1, 2011). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to due process and effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

Trial court did not abuse discretion in denying defendant's motion to continue to seek an independent test of evidence where defendant filed motion on day of trial

State v. Wright, __ N.C. App. __, 708 S.E.2d 112 (Mar. 1, 2011). The trial court did not abuse its discretion by denying the defendant's motion to continue to test certain hair and fiber lifts from an item of clothing. The defendant had six months to prepare for trial and obtain independent testing, but waited until the day of trial to file his motion, in violation of G.S. 15A-952(c). This failure to file the motion to continue within the required time period constituted a waiver of the motion. Also, because the item had already been DNA tested by the State, the lifts were not the only physical evidence obtained.

Trial court did not err in making remarks to the jury regarding the defendant's absence at trial

State v. McNeil, __ N.C. App. __, 707 S.E.2d 674 (Mar. 1, 2011). The trial judge did not err when, after the defendant failed to appear during trial, he explained to the jury that the trial would proceed in the defendant's absence. The trial judge instructed the jury that the defendant's absence was of no concern with regard to its job of hearing the evidence and rendering a fair and impartial verdict.

The trial court erred by failing to inquire into the defendant's competency where a bona fide doubt existed; trial court did not err by failing to instruct the jury about the defendant's absence from portions of the trial or by accepting the defendant's oral waiver of right to be present at trial

State v. Whitted, __ N.C. App. __, 705 S.E.2d 787 (Feb. 15, 2011). The trial court erred by failing to sua sponte inquire into the defendant's competency. In light of the defendant's history of mental illness, including paranoid schizophrenia and bipolar disorder, her remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence and created a bona fide doubt as to competency. The court rejected the State's argument that the trial court did in fact inquire into competency when, after defense counsel mentioned that she had recently undergone surgery and was taking pain medication, the trial court asked the defendant and counsel whether the medication was impairing her ability to understand the proceedings or her decision to reject the plea bargain offered by the State. Both replied in the negative. The trial court also asked the defendant about her ability to read

and write and whether she understood the charges against her. However, this inquiry pertained only to effects of the pain medication. More importantly, it was not timely given that the defendant's refusal to return to the courtroom and resulting outbursts occurred two days later. The court remanded for a determination of whether a meaningful retrospective competency hearing could be held. Additionally, the trial court did not err by failing to instruct the jury about the defendant's absence from the habitual felon phase of the trial. Because the trial court did not order the defendant removed from the courtroom, G.S. 15A-1032 did not apply. Rather, the defendant asked to be removed. Finally, the trial court did not err by accepting the defendant's oral waiver of her right to be present during portions of her trial.

No appeal of right to challenge procedures for accepting a plea arrangement

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011). A defendant seeking review of a trial court's compliance with G.S. 15A-1024 (withdrawal of guilty plea when sentence not in accord with plea arrangement) must obtain grant of a writ of certiorari; a challenge to the procedures for taking a plea does not come within the scope of G.S. 15A-1444, which specifies the grounds for appeals as of right.

Written order was not invalid for failure to announce the order's details in open court

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011). In a criminal case, entry of judgment occurs when a judge announces the ruling in open court or signs the judgment containing the ruling and files it with the clerk. A trial judge is not required to announce all of the findings and details of its judgment in open court, provided they are included in the signed judgment filed with the clerk. Based on these rules, a written order on form AOC-CR-317 (Forfeiture of Licensing Privileges Felony Probation Revocation) was not invalid for failure to announce the order's details in open court.

The defendant failed to demonstrate grounds for recusal of trial judge

State v. Oakes, __ N.C. App. __, 703 S.E.2d 476 (Jan. 4, 2011). The defendant argued that recusal was warranted based on the trial judge's comments at various hearings and on the fact that "the trial court was often dismissive of defense counsel's efforts and made a number of rulings unfavorable to the Defendant." The court held that the defendant failed to demonstrate grounds for recusal, but cautioned the trial court with respect to the following statement made at trial: "The other thing I want to do is put on the record that I leave to the appellate courts whether or not any recommendation as to discipline should be made to any of the responses or conduct of the attorneys based upon the record in this case as to whether any of the Rules of Practice or Rules of Conduct have been violated." The court concluded that although it was unclear what issue the trial court meant to address with this statement, "it is the trial court's responsibility initially to pass on these concerns if the court has them, especially in view of the fact that the trial court is in a better position than a Court of the Appellate Division both to observe and control the trial proceedings. . . . It is not for the trial court to abdicate its role in managing the conduct of trial to an appellate court whose task is to review the cold record" (citation omitted).

Defendant waived appellate review of denial of motion to dismiss by failing to renew

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010). Although the defendant moved to dismiss the charges at the close of the State's evidence, he failed to renew the motion at the close of all evidence and therefore waived appellate review of the trial court's denial of his motion to dismiss.

Evidence

Confrontation Clause

No confrontation clause violation where medical examiner was allowed to testify in place of pathologist who performed autopsies regarding type of wounds victims' sustained, pain inflicted, and cause of death; autopsy photographs properly admitted as basis of testifying expert's opinion

State v. Hartley, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). (1) In a triple murder case, no confrontation clause violation occurred when the State's expert medical examiner was allowed to testify in place of the pathologist who performed the autopsies. The medical examiner provided her own expert opinion and did not simply regurgitate the non-testifying examiner's reports. The testifying expert made minimal references to the autopsy reports, which were never introduced into evidence, and her testimony primarily consisted of describing the victims' injuries as depicted in 28 autopsy photographs. She described the type of wounds, the pain they would have inflicted, whether they would have been fatal, and testified to each victim's cause of death. With regard to one victim who had been sexually assaulted, the expert explained, through use of photographs, that the victim had been asphyxiated, how long it would have taken for her to lose consciousness, and that the blood seen in her vagina could have been menstrual blood or the result of attempted penetration. The expert's testimony as to the impact of the various trauma suffered by the victims was based primarily on her inspection of the photographs that were admitted into evidence and her independent experience as a pathologist. Although the expert referred to the non-testifying pathologist's reports, she did not recite findings from them. To the extent that she did, no prejudice resulted given her extensive testimony based strictly on her own personal knowledge as a pathologist, including the effect of the victims' various injuries and their cause of death. Finally, the court concluded, even if any error occurred, it was harmless beyond a reasonable doubt. (2) The court noted in a footnote that the autopsy photographs were properly admitted as the basis of the testifying expert's opinion and therefore admission of them did not violate the defendant's confrontation rights.

Co-defendant's statement that did not mention defendant did not implicate Confrontation Clause or *Bruton*

State v. Boozer, __ N.C. App. __, 707 S.E.2d 756 (Mar. 15, 2011). No *Bruton* issue occurred when the trial court admitted a co-defendant's admission to police that "I only hit that man twice." A co-defendant's statement which does not mention or refer to the defendant does not implicate the Confrontation Clause or *Bruton*. Here, the co-defendant's statement did not mention the defendant and thus its admission did not implicate his constitutional rights.

Mortally wounded shooting victim's statements to first-responding officers were non-testimonial where officers' primary purpose was meeting ongoing emergency

Michigan v. Bryant, 562 U.S. __ (Feb. 28, 2011). Justice Sotomayor, writing for the Court, held that a mortally wounded shooting victim's statements to first-responding officers were non-testimonial under *Crawford*. In the early morning, Detroit police officers responded to a radio dispatch that a man had been shot. When they arrived at the scene, the victim was lying on the ground at a gas station. He had a gunshot wound to his abdomen, appeared to be in great pain, and had difficulty speaking. The officers asked the victim what happened, who had shot him, and where the shooting occurred. The victim said

that the defendant shot him about 25 minutes earlier at the defendant's house. The officers' 5-10 minute conversation with the victim ended when emergency medical personnel arrived. The victim died within hours. At trial, the victim's statements to the responding officers were admitted and the defendant was found guilty of, among other things, murder. The Court held that because the statements were non-testimonial, no violation of confrontation rights occurred. The Court noted that unlike its previous decisions in *Davis* and *Hammon*, the present case involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. Thus, it indicated, "we confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large." Slip Op. at 12. This new scenario, the Court noted, "requires us to provide additional clarification . . . to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* It concluded that when determining whether this is the primary purpose of an interrogation, a court must objectively evaluate the circumstances in which the encounter occurs and the parties' statements and actions. *Id.* It explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 14. As to the statements and actions of those involved, the Court concluded that the inquiry must focus on both the declarant and the interrogator. Applying this analysis to the case at hand, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis* and *Hammon*, encompassing a threat to the police and the public. *Id.* at 27. The Court also found it significant that a gun was involved. *Id.* "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." *Id.* The Court continued, determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution. *Id.* at 29. As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency. *Id.* at 30. Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim's statements were non-testimonial. Justice Thomas concurred in the judgment, agreeing that the statements were non-testimonial but resting his conclusion on the lack of formality that attended them. Justices Scalia and Ginsburg dissented. Justice Kagan took no part in the consideration or decision of the case.

Error where substitute analyst testified about a non-testifying expert's report identifying a substance as a controlled substance, but error was not prejudicial in light of overwhelming evidence of guilt

State v. Garnett, __ N.C. App. __, 706 S.E.2d 280 (Feb. 15, 2011). Holding, in a drug case, that although the trial court erred by allowing the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" where the expert's testimony was based on analysis performed by a non-testifying forensic analyst, the error was not prejudicial in light of the overwhelming evidence of guilt. With regard to the *Crawford* substitute analyst issue, the court found the case indistinguishable from *State v. Williams*, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010), *temporary stay allowed*, __ N.C. __, 705 S.E.2d 382 (Dec. 20, 2010).

Plain error to admit report of non-testifying analyst

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010). In a drug case, the trial court committed

plain error by admitting a report of a non-testifying crime lab technician, detailing the chemical analysis performed and the technician's conclusion that the substance was cocaine.

Reversible error where substitute analyst testified about a non-testifying expert's report identifying a substance as a controlled substance

State v. Williams, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010), *temporary stay allowed*, __ N.C. __, 705 S.E.2d 382 (Dec. 20, 2010). The defendant's confrontation clause rights were violated when a substitute analyst testified about a non-testifying expert's report identifying a substance as a controlled substance. Forensic chemist Ann Charlesworth detailed lab processes for testing substances. Specifically, analysts conduct a preliminary color test and then extract a small amount of the substance to put with a solvent in a GC Mass Spec instrument. Charlesworth testified that in this case a color test was done twice and a GC Mass Spec test was done once. She testified that these are the same tests that she and other experts in her field reasonably rely upon when forming an opinion as to the weight and nature of substances. Charlesworth explained that the GC Mass Spec generates a graphical result which a forensic chemist must interpret. Chemists look at retention time, which is specific for each chemical substance, and the graphical result from the GC Mass Spec, to see how well the graph matches the known standard for the substance. Once a chemist completes an analysis, the case is peer reviewed. Explaining peer review, Charlesworth indicated that she looks at the worksheet, the description of the item, its weight, and the tests conducted; she looks at the printouts from the GC Mass Spec and interprets them to see if she agrees with the chemist's results; and she examines the report to make sure it appears correct. Charlesworth conducted the same type of review on the substance at issue that she would have done for a peer review. She agreed with the original forensic chemist, DeeAnne Johnson, "that from the printouts from the GC Mass Spec that the cocaine did come out, and it chemically matche[d] with the cocaine standard . . . in [the] library." On cross-examination, she acknowledged that she did not analyze the substance, was not present when the tests were run, and did not generate her own report. Rather, she explained that it was her role to assure that Johnson followed the protocol and procedures to correctly analyze the substance. On this record, the court concluded that Charlesworth did not offer an independent opinion but rather merely summarized Johnson's report; admission of this testimony was reversible error.

Crawford applies to non-capital sentencing proceedings

State v. Hurt, __ N.C. App. __, 702 S.E.2d 82 (Nov. 16, 2010). *Crawford* and the confrontation clause applies to all "*Blakely*" sentencing proceedings in which a jury makes the determination of a fact or facts that, if found, increase the defendant's sentence beyond the statutory maximum. Because the trial court's admission of testimonial hearsay evidence during the defendant's non-capital sentencing proceeding violated the defendant's confrontation rights. The defendant pleaded guilty to second-degree murder. At the sentencing hearing, the jury found the aggravating factor that the murder was especially heinous, atrocious, or cruel and the trial judge sentenced the defendant in the aggravated range. The court distinguished *State v. Sings*, 182 N.C. App. 162 (2007) (declining to apply the confrontation clause in a non-capital sentencing hearing), on the basis that it involved a sentencing based on the defendant's stipulation to aggravating factors not a *Blakely* sentencing hearing and limited that decision's holding to its facts. The court explained that its rationale for applying *Crawford* to non-capital *Blakely* sentencing proceedings "mirrors the justification for securing the right to confrontation in the capital sentencing context," a right already recognized by the North Carolina Supreme Court. It stated: both the penalty phase of a capital case and a *Blakely* sentencing hearing in a non-capital case require the State to prove an element to a jury beyond a reasonable doubt, and without a finding of an

aggravating factor by the trier of fact, the presumptive sentence is the maximum sentence that can be imposed for the crime. It continued: “Where confrontation rights apply in one context, they should apply equally to the other.” Noting that other cases have held that the confrontation clause does not apply in non-capital sentencing, the court followed *State v. Rodriguez*, 754 N.W.2d 672 (Minn. 2008), to hold otherwise. The court also noted that its opinion “has no effect on the established inapplicability of other evidence rules at sentencing.” Applying *Crawford*, the court held that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts. The evidence at issue came from Special Agent Barker, an expert forensic biologist and serologist with the State Bureau of Investigation (SBI) and Special Agent Freeman with the SBI DNA unit. Barker testified that Special Agent Todd tested the evidence for the presence of blood and other bodily fluids and prepared a lab report of his results. Barker testified that Todd identified blood on the defendant’s clothing and on a cigarette butt. Freeman testified that former SBI Special Agent Spittle performed DNA testing on several items and testified to the results of Spittle’s analysis, including his conclusion that DNA on the defendant’s clothing matched the victim’s DNA profile. Freeman also testified that the saliva-end of the cigarette found at the crime scene matched the defendant’s DNA. The court held that the reports at issue were testimonial under *Melendez-Diaz*. Noting that *Melendez-Diaz* would not bar admissibility if the reports merely provided a basis for the testifying experts’ independent opinions, the court concluded that the reports were not limited to this permissible function. Although both Barker and Freeman performed peer review of the reports at issue, neither took part in any testing nor performed any independent analysis. In a footnote, the court distinguished this evidence from the testimony of Dr. Lantz, a forensic pathologist. Lantz testified regarding an autopsy done by former forensic pathologist Dr. Winston. Lantz testified to the wounds described in the final autopsy diagnosis and to his opinion that six of the wounds hit vital organs and could have been fatal. He opined that because of the nature of the wounds, it might have taken several minutes for the victim to lose consciousness and several more minutes to die. The court noted that Lantz’s opinion regarding the wounds’ impact and the time for loss of consciousness “was clearly based, not on the report at all, but on his own independent experience as a pathologist.”

Opinion Testimony

Trial court did not err in failing to dismiss drug trafficking case where the State did not present a chemical analysis of the pills; State established the identity of the controlled substance beyond a reasonable doubt by other methods

State v. Woodard, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). In a case arising from a pharmacy break-in, the court rejected the defendant’s argument that the trial court erred by failing to dismiss trafficking in opium charges because the State did not present a chemical analysis of the pills. Citing *State v. Ward*, 364 N.C. 133 (2010), and *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), the court determined that State is not required to conduct a chemical analysis on a controlled substance in order to sustain a conviction under G.S. 90-95(h)(4), provided it has established the identity of the controlled substance beyond a reasonable doubt by another method of identification. In the case at hand, the State’s evidence did that. The drug store’s pharmacist manager testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept “a perpetual inventory” of all drug items. Using that inventory, he could account for the type and quantity of every item in inventory throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with a sticker identifying the item, the date it was purchased and a partial of the pharmacy’s account number. These stickers, which were on every pill bottle delivered to the pharmacy, aided the

pharmacist in determining that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen 2,691 pill tablets was approximately 1,472 grams. Based on his 35 years of experience dispensing the same drugs that were stolen and his unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, the pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* and *Llamas-Hernandez*.

Trial court did not abuse its discretion by excluding expert testimony by a scientist who studies the effects of drugs and alcohol on the brain where the defendant failed to comply with discovery rules

State v. Lane, 365 N.C. 7 (Mar. 11, 2011). In a capital murder case, the trial court did not abuse its discretion by excluding expert testimony by a neuropharmacologist and research scientist who studies the effects of drugs and alcohol on the brain, proffered by the defense as relevant to the jury's determination of the reliability of the defendant's confession. The trial court barred the expert's testimony on grounds that the expert's report provided to the State was insufficient to satisfy the discovery rules; repeated requests were made by the State for the report and the trial court had ordered production. Relevant to the court's finding of no abuse of discretion was its separate conclusion that the expert's testimony was not relevant.

Store clerk's testimony that he thought the defendant had a gun was not inadmissible speculation where defendant had his arm under his jacket

State v. Elkins, __ N.C. App. __, 707 S.E.2d 744 (Mar. 1, 2011). In an armed robbery case, a store clerk's testimony that he thought the defendant had a gun was not inadmissible speculation or conjecture. Based on his observations, the clerk believed that the defendant had a gun because the defendant was hiding his arm under his jacket. The clerk's perception was rationally based on his firsthand observation of the defendant and was more than mere speculation or conjecture.

No plain error where SBI agent overstated the results of the SBI Crime Lab phenolphthalein blood tests

State v. Wright, __ N.C. App. __, 708 S.E.2d 112 (Mar. 1, 2011). The court rejected the defendant's argument that plain error occurred when an SBI agent overstated the results of the SBI Crime Lab phenolphthalein blood tests. The defendant argued that the agent's testimony was improper because he stated that the defendant's clothes tested positive for blood, rather than stating that a positive phenolphthalein test result means "chemical indications for the presence of blood." The agent explained that a positive result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. As such, the testimony was proper.

Expert testimony allowable that substance was marijuana based on in-court visual identification

State v. Garnett, __ N.C. App. __, 706 S.E.2d 280 (Feb. 15, 2011). Relying on *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), the court held that an expert may offer testimony that a substance is marijuana based on a visual, in-court identification. [Editor's note: This holding may be inconsistent with the Supreme Court's ruling in *State v. Ward*, 364 N.C. 133, 142-43 (2010).]

No abuse of discretion where defendant was not allowed to give lay opinion about whether he could have stopped the vehicle if it had working brakes where defendant was intoxicated at time of collision

State v. Ziglar, __ N.C. App. __, 705 S.E.2d 417 (Feb. 1, 2011). In a felony death by vehicle case, the trial court did not abuse its discretion by sustaining the State's objection when defense counsel asked the defendant whether he would have been able to stop the vehicle if it had working brakes. Because a lay opinion must be rationally based on the witness's perception, for the defendant's opinion to be admissible, some foundational evidence was required to show that he had, at some point, perceived his ability, while highly intoxicated, to slow down the vehicle as it went through the curve at an excessive speed. However, there was no evidence that the defendant ever had perceived his ability to stop the car under the hypothetical circumstances.

Plain error to allow officer to identify a substance as crack cocaine using visual identification

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010). The trial court committed plain error by allowing an officer to identify a substance, using visual identification, as crack cocaine. Citing *State v. Ward*, 364 N.C. 133, 142-43 (2010), and other cases, the court concluded that visual identification, even by a trained police officer with four years of experience, is insufficient to establish that a substance is a controlled substance.

Trial court did not abuse discretion in allowing officer to give lay opinion testimony about bullet calibers; trial court did not commit plain error in allowing SBI agent to give expert testimony on bullet identification

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. The detective testified that as a result of officer training, he was able to recognize the calibers of weapons and ammunition. The detective's testimony was based upon on his own personal experience and observations relating to various calibers of weapons, and was admissible under Rule 701. Additionally, the trial court did not commit plain error by allowing a Special Agent with the State Bureau of Investigation to testify as an expert in the field of bullet identification, when his testimony was based on sufficiently reliable methods of proof in the area of bullet identification, he was qualified as an expert in that area, and the testimony was relevant. The trial court was not required to make a formal finding as to a witness' qualification to testify as an expert because such a finding is implicit in the court's admission of the testimony in question.

Lay testimony insufficient to identify a substance as crack cocaine

State v. Williams, __ N.C. App. __, 702 S.E.2d 233 (Dec. 7, 2010), *temporary stay allowed*, __ N.C. __, 705 S.E.2d 382 (Dec. 20, 2010). Lay testimony by an officer that a substance is crack cocaine is insufficient to establish that the substance is cocaine. "The State must . . . present evidence as to the chemical makeup of the substance."

Trial court did not err by denying defendant's motion to dismiss a charge of trafficking by sale or delivery; State's expert sufficiently identified the substance at issue as a controlled substance by testing one of the eight tablets where all were similar in appearance

State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349 (Dec. 7, 2010). The trial court did not err by denying the

defendant's motion to dismiss a charge of trafficking by sale or delivery in more than four grams and less than fourteen grams of Dihydrocodeinone when the State's expert sufficiently identified the substance at issue as a controlled substance. Special Agent Aharon testified as an expert in chemical analysis. She compared the eight tablets at issue with information contained in a pharmaceutical database and found that each was similar in coloration and had an identical pharmaceutical imprint; the pharmaceutical database indicated that the tablets consisted of hydrocodone and acetaminophen. Agent Aharon performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer. This test revealed that the tablet was an opiate derivative. The tablets weighed a total of 8.5 grams. Relying on *State v. Ward*, 364 N.C. 133 (2010), the defendant argued that because the State cannot rely upon a visual inspection to identify a substance as a controlled substance, the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense. The court concluded that even if the issue had been properly preserved, the defendant's argument was without merit, citing *State v. Myers*, 61 N.C. App. 554, 556 (1983) (a chemical analysis test of a portion of pills, coupled with a visual inspection of the rest for consistency, supported a conviction for trafficking in 10,000 or more tablets of methaqualone).

404(b) Evidence

404(b) evidence properly admitted although it took place after the incident for which defendant charged; trial court did not err by failing to intervene ex mero motu when the prosecutor referred to defendant as a con man, liar, and parasite

State v. Twitty, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). In a case in which the defendant was charged with obtaining property by false pretenses by lying to church members about his situation, the trial court did not abuse its discretion by admitting 404(b) evidence of the defendant's similar conduct with regard to other churches, occurring after the incident in question. The evidence was properly admitting to show common scheme or plan and was admissible even though it occurred after the incident in question. The trial court did not err by failing to intervene ex mero motu when the prosecutor referred to the defendant as a con man, liar, and parasite. The defendant was charged with obtaining property by false pretenses, an offense committed by deceiving or lying to win the confidence of victims. Given that the defendant lied to a church congregation in order to convince them to give him money, there was no impropriety in the State's reference to the defendant as a liar and con man; the terms accurately characterize the charged offense and the evidence presented at trial. As for the term "parasite," the court concluded: "this name-calling by the State was unnecessary and unprofessional, but does not rise to the level of gross impropriety."

Evidence that defendant charged with sexually assaulting his minor child possessed pornographic materials properly admitted to show motive and intent

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011) In a case in which the defendant was charged with sexually assaulting his minor child, the court rejected, over a dissent, the defendant's argument that the trial court erred by admitting evidence that he possessed pornographic materials ("Family Letters," a publication purporting to contain letters regarding individuals' sexual exploits with family members). The defendant argued that the evidence was inadmissible under Rule 404(b) absent a showing that he used the materials during the crimes or showed them to the victim at or near the time of the crimes. The court concluded that the evidence was properly admitted to show motive and intent. As to motive, it stated: "evidence of a defendant's incestuous pornography collection sheds light on that

defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act – engaging in sexual intercourse with the victim/defendant's child – constituting the offense charged." As to intent, it concluded that the defendant's desire to engage in incestuous sexual relations may reasonably be inferred from his possession of the incestuous pornography, a fact relevant to the attempted rape charge. The court also found the evidence relevant to show a purpose of arousing or gratifying sexual desire in connection with an indecent liberties charge. Finally, the court concluded that the evidence passed the Rule 403 balancing test, noting that it was admitted with a limiting instruction.

Trial judge committed reversible error in a child sexual assault case by admitting 404(b) evidence of prior consensual sex acts that took place when defendant was a minor

State v. Beckelheimer, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). In a child sexual assault case, the trial judge committed reversible error by admitting 404(b) evidence. The defendant was charged with first-degree sexual offense and indecent liberties. At the time of the alleged offense, the defendant was 27 and the male victim was 11. The trial judge allowed the victim's half-brother, Mr. Branson, to testify about sexual activity between himself and the defendant. The court found that the 404(b) evidence lacked sufficient similarity to the events charged. The acts involving Branson occurred when Branson was less than 13 years old and the defendant only was 3-4 years older. When Branson spent the night at the defendant's house they played, looked at pornography, and then got into the defendant's bed at night. The defendant rubbed Branson's private parts, performed oral sex on Branson, and attempted to put his fingers in Branson's rectum. Branson performed oral sex on defendant. In the case at hand, however, the defendant was 27 and the victim was 11. The defendant invited the victim to his room to play a video game and onto his bed during the daytime. The defendant then got on top of the victim, at first pretending to be asleep but then holding the victim down, while kissing his penis. The defendant also put his hand on the victim's penis, while they both had their clothes on. The court found the acts to be dissimilar, noting the 16-year age difference between the adult defendant and the minor victim and the fact that the defendant and Branson were both minors and only 3-4 years apart in age. The court also noted the consensual nature of the contact with Branson compared to the forcible conduct at issue. Other differences included the lack of reciprocal sexual contact by the victim, that the defendant did not attempt to put his fingers in the victim's rectum, and that no pornography was used in the acts at issue.

Trial judge committed prejudicial error in a sexual offense and indecent liberties case by admitting 404(b) evidence of a prior sexual assault that took place 18 years earlier where the nature of the assaults differed

State v. Gray, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). In a case in which the defendant was charged with committing a sexual offense and indecent liberties against a five-year-old female victim, the trial court committed prejudicial error by admitting evidence that the defendant had anal intercourse with a four-year-old male 18 years earlier. The evidence was admitted to show identity, intent, and common scheme or plan. Noting confusion in the N.C. cases, the court concluded that temporal proximity continues to be relevant to the issue of admissibility of 404(b) evidence; the court rejected the notion that temporal proximity goes only to weight of the evidence. Turning to admission of the evidence for purposes of identity, the court found the 18-year gap between the incidents significant. It rejected the State's argument that the time period should be tolled during the defendant's incarceration on grounds that the State failed to offer competent evidence as to the length of his incarceration. Although the incidents both involved very young children and occurred at a caretaker's house where the defendant was a frequent visitor, the nature of the alleged assaults was very different. In light of these differences

and “the great length of time” between them, the State failed to show sufficient unusual facts present in both or particularly similar acts which would indicate that the same person committed both crimes. The court went on to reach similar conclusions as to admissibility for the purposes of intent and prior scheme or plan.

No plain error where the trial court admitted evidence of defendant’s prior sex acts against two teenaged females in a case in which defendant was charged with sexual offense, indecent liberties and crime against nature against a ten-year-old female

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). (1) In a case in which the defendant was charged with sexual offense, indecent liberties and crime against nature against a ten-year-old female victim, no plain error occurred when the trial court admitted evidence of the defendant’s prior bad acts against two other teenaged females. The evidence was introduced to show common scheme or plan, identity, lack of mistake, motive and intent. The defendant’s acts with respect to the victim and the first female were similar: the defendant had a strong personal relationship with one of their parents, used the threat of parental disbelief and disapproval to coerce submission and silence, initiated sexual conduct after wrestling or roughhousing, digitally penetrated her vagina, and forced her to masturbate him. Only two years separated the incidents and both involved a similar escalation of sexual acts. As to the evidence of the prior bad acts with the second female — that the defendant kissed her when she was thirteen — the court held that admission of that testimony was not plain error. (2) No plain error occurred when the trial court instructed the jury on the 404(b) evidence using N.C. Pattern Jury Instruction – Crim. 104.15 but declined to instruct that the evidence could not be used to prove defendant’s character or that he acted in conformity therewith. (3) The trial court did not commit plain error by allowing the State to question two witnesses on rebuttal about whether they received money from the victim in exchange for making up statements when the defendant raised the issue of the victim’s veracity on his cross examination.

No abuse of discretion in admitting 404(b) testimony from an accomplice regarding prior break-in

State v. Woodard, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). In a case involving charges arising out of a drug store break-in in which controlled substances were stolen, the trial court did not abuse its discretion by admitting 404(b) testimony from an accomplice that a few days before the break-in at issue, the same perpetrators broke into a different pharmacy but did not obtain any narcotics. The incidents were sufficiently similar, occurred only a few days apart, and involved the same accomplices.

Court admonished trial court on remand to examine materiality of each purpose for which 404(b) evidence offered

State v. Towe, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011). Remanding for other reasons, the court admonished the trial court to carefully determine the materiality of *each* purpose for which 404(b) evidence is offered. The trial court had remarked that the incidents could show motive, identity, and common plan or scheme. The court noted: “admission of this evidence was clearly problematic in at least one respect: the trial court failed to determine whether the purposes for which the evidence was offered were at issue.” The court clarified that the defendant’s identity is not at issue when the case hinges on whether the alleged crime occurred, but it may be at issue when the defendant contends someone else committed the alleged crime. Motive is at issue, it explained, when a defendant denies committing the crime charged.

404(b) evidence of a similar robbery several hours earlier was relevant

State v. Hill, __ N.C. App. __, 706 S.E.2d 799 (Mar. 1, 2011). In a robbery case in which there was a dissenting opinion, the court held that 404(b) evidence of a similar robbery that occurred several hours earlier was relevant, given the connection between the incidents.

Error but not plain error to admit evidence of defendant's criminal record; no plain error where detective testified that he determined a robbery and resulting homicide occurred based on his evaluation of the scene

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011). Although it was error under Rule 404(b) to admit evidence regarding the defendant's criminal record, no plain error occurred. The evidence at issue included (1) disclosures made during a police interrogation DVD, admitted into evidence and shown to the jury, and (2) an accomplice's testimony that he knew the defendant "ever since he came home from prison." No plain error occurred when a detective testified that after his evaluation of the scene, he determined that the case involved a robbery and resulting homicide. The court rejected the defendant's argument that the trial court improperly allowed the detective to give a legal opinion, concluding that the detective merely was testifying about police procedure.

Trial court committed prejudicial error by admitting defendant's remote prior impaired driving convictions to show malice in second-degree murder case

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010). The trial court committed prejudicial error by admitting, under rule 404(b), the defendant's prior impaired driving convictions to show malice for purposes of a second-degree murder charge. Three of the defendant's four prior impaired driving convictions occurred eighteen or nineteen years prior to the accident at issue and one occurred two years prior. Given the sixteen-year gap between the older convictions and the more recent one, the court held that there was not a clear and consistent pattern of criminality and that the older convictions were too remote to be admissible under rule 404(b).

Other Evidence Issues

Rectal swab properly authenticated; trial court did not err by failing to intervene ex mero motu in prosecutor's closing argument

State v. Hartley, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). A rectal swab taken from the victim was properly authenticated. An officer processed evidence at the crime scene, was present for the victim's autopsy, and obtained evidence from the doctor who performed the autopsy, including the rectal swabs, on 24 June 2004. The swabs were then placed in the custody of the Sheriff's Office. They were submitted to the SBI for analysis and later returned to the Sheriff's Office where they were kept until the time of trial. The court rejected the defendant's argument that the chain of custody was insufficient because the swabs were taken on 19 June 2004, but were not picked up by the officer until 24 June 2004, concluding that there was no reason to believe that the evidence was altered and the possibility that it was tampered with is remote. Additionally, the trial court did not err by failing to intervene ex mero motu when, in a triple homicide case, the prosecutor argued, among other things, "If that . . . isn't murder, I don't know what is" and "I know when to ask for the death penalty and when not to. This isn't the first case, it's the ten thousandth for me."

Photo of defendant with revolver properly admitted; no abuse of discretion to deny jury request for transcript of a witness's testimony

State v. Stevenson, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). (1) In a case involving murder and other charges, the trial court properly admitted a picture of the defendant with a silver revolver to illustrate a witness's testimony that she saw the defendant at her apartment with a silver gun with a black handle. Before being received into evidence, the witness testified that the gun depicted appeared to be the same gun that the defendant had at her apartment. (2) The trial court did not abuse its discretion by concluding that the prejudice caused by the photograph did not substantially outweigh probative value. Additionally, the trial court did not abuse its discretion by denying the jury's request, made during deliberations, for a transcript of a witness's testimony. The trial court expressly denied the request in its discretion; there is no requirement that the trial judge provide any further explanation to demonstrate that he or she is in fact exercising discretion.

Proper foundation was laid to admit information from NCIC database

State v. Sneed, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). In a case in which the defendant was charged with, among other things, armed robbery and possession of a stolen handgun, no plain error occurred when the trial court admitted, under Rule 803(6) (records of regularly conducted activity) testimony that the National Crime Information Center ("NCIC") database indicated a gun with the same serial number as the one possessed by the defendant had been reported stolen in South Miami, Florida. The court rejected the defendant's argument that the State failed to lay the necessary foundation for admission of the evidence. The defendant had argued that the State was required to present testimony from a custodian of records for NCIC that the information was regularly kept in the course of NCIC's business and that NCIC routinely makes such records in the course of conducting its business. The proper foundation was laid through the testimony of a local police officer who used the database in his regular course of business.

Trial court committed prejudicial error by excluding defense evidence of hearsay statements offered under residual exception

State v. Sargeant, 365 N.C. 58 (Mar. 11, 2011). Modifying and affirming *State v. Sargeant*, __ N.C. App. __, 696 S.E.2d 786 (Aug. 3, 2010), the court held that the trial court committed prejudicial error by excluding defense evidence of hearsay statements made by a participant in the murder, offered under the Rule 804(b)(5) residual exception. The court noted that the only factor in dispute under the six-factor residual exception test was circumstantial guarantees of trustworthiness. To evaluate that factor, a court must assess, among other things, (1) the declarant's personal knowledge of the event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. Because the record established that the declarant had personal knowledge and never recanted, the court focused its analysis on factors (2) and (4). The court found that the trial court's conclusions that these considerations had not been satisfied were made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law.

No error where SBI Crime Lab refused to test forensic evidence; no error or plain error where agent overstated and prosecutor misrepresented results of phenolphthalein blood tests

State v. Wright, __ N.C. App. __, 708 S.E.2d 112 (Mar. 1, 2011). The defendant was not entitled to a new trial on grounds that the SBI Crime Lab refused to test four hair and fiber lifts taken from an item of

clothing. The defendant did not argue that the prosecutor failed to make the lifts available to him for testing. In fact, one of the defendant's previous attorneys made a motion for independent testing of the clothing item and received the results of the testing. Because police do not have a constitutional duty to perform particular tests on crime scene evidence, no error occurred. Additionally, the court rejected the defendant's argument that plain error occurred when the agent overstated and the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. At trial, a SBI agent explained that a positive test result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. The defendant argued that the prosecutor misrepresented the results of the phenolphthalein blood tests during closing argument by stating that the agent tested the clothes and they tested positive for blood. Based on the agent's testimony, this argument was not error or plain error.

No error in allowing State to impeach witness with prior inconsistent statement where witness admitted having made it; witness' response to officer's question about whether she knew what happened to murder weapon was not offered for the truth of the matter asserted; defendant failed to show prejudice from his attorney's failure to object to cross-examination of defense witnesses

State v. Banks, __ N.C. App. __, 706 S.E.2d 807 (Mar. 1, 2011). Because the witness admitted having made a prior statement to the police, it was not error to allow the State to impeach her with the prior inconsistent statement when she claimed not to remember what she had said and the trial court gave a limiting instruction. The court distinguished the case from one in which the witness denies having made the prior statement. Even if use of the prior inconsistent statement was error, no prejudice resulted. Additionally, an officer's testimony as to a witness' response when asked if she knew what had happened to the murder weapon was not hearsay. The statement was not offered for the truth of the matter asserted but rather to explain what actions the officer took next (contacting his supervisor and locating the gun). Although other hearsay evidence was erroneously admitted, no prejudice resulted. Finally, while the defendant asserted that his attorney was ineffective by failing to object to the State's cross-examination of defense witnesses, the defendant failed to show prejudice. The same evidence was received into evidence, without objection, through the defendant's own, more extensive testimony on the issue.

Written statement, admitted to corroborate witness's trial testimony, was not hearsay

State v. Johnson, __ N.C. App. __, 706 S.E.2d 790 (Mar. 1, 2011). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

Statements offered to explain witness's subsequent actions were not offered for truth of the matter asserted; error to allow State to introduce photographs that were not properly authenticated

State v. Elkins, __ N.C. App. __, 707 S.E.2d 744 (Mar. 1, 2011). Statements offered to explain a witness's subsequent actions were not offered for the truth of the matter asserted and not hearsay. The trial court erred by allowing the State to introduce three photographs, which were part of a surveillance video, when the photographs were not properly authenticated. However, given the evidence of guilt, no plain error occurred.

No abuse of discretion to admit a recording of phone calls in Spanish where there was one Spanish-speaking juror

State v. Gomez, __ N.C. App. __, 705 S.E.2d 421 (Feb. 15, 2011). The trial court did not abuse its discretion under Rule 403 by admitting a recording of phone calls between the defendant and other persons that were entirely in Spanish. The defendant argued that because there was one Spanish-speaking juror, the jurors should have been required to consider only the certified English translation of the recording.

Defendant failed to demonstrate that trial counsel was ineffective; defendant opened door to inadmissible videotape of defendant's interrogation by referencing it in his own testimony

State v. Boyd, __ N.C. App. __, 705 S.E.2d 774 (Feb. 1, 2011). Although some portion of a videotape of the defendant's interrogation was inadmissible, the defendant opened the door to the evidence by, among other things, referencing the content of the interview in his own testimony. The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation was properly considered on appeal. Although the defendant asked the court to dismiss his claim without prejudice to raise it in a motion for appropriate relief, he failed to identify how the record on appeal was insufficient to resolve the claim. The ineffective assistance claim fails because even if counsel had objected, the objection would have been overruled when the defendant opened the door to the evidence through his own trial testimony. The defendant failed to demonstrate that counsel's performance was deficient. As noted, the defendant's own testimony opened the door to admission of the videotape. Trial counsel made a strategic decision to have the defendant testify to offer an alibi. On appeal, the defendant did not challenge this strategy, which the jury rejected, and thus did not overcome the presumption that counsel's trial strategy was reasonable.

Prosecutor's comparison of defendant to a tiger was not grossly improper argument

State v. Oakes, __ N.C. App. __, 703 S.E.2d 476 (Jan. 4, 2011). The prosecutor's statements during closing argument were not so grossly improper as to require the trial court to intervene ex mero motu. Although disapproving a prosecutor's comparisons between criminal defendants and animals, the court concluded that the prosecutor's statements equating the defendant's actions to a hunting tiger were not grossly improper; the statements helped to explain the State's theory of premeditated and deliberate murder.

Trial court properly admitted defendant's implicit admission, victim's statement identifying defendant, and testimony that defendant was shackled when arrested

State v. Capers, __ N.C. App. __, 704 S.E.2d 39 (Dec. 21, 2010). The defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again," was relevant as an implicit admission of guilt. The trial court did not abuse its discretion under Rule 403 by admitting the statement. A victim's statement to his mother, made in the emergency room approximately 50 minutes after a shooting and identifying the defendant as the shooter, was a present sense impression under Rule 803(1). The time period between the shooting and the statement was sufficiently brief. The court noted that the focus of events during the gap in time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation. The trial court properly admitted testimony that the defendant was handcuffed and shackled when he was arrested. The court declined to extend *State v. Tolley*, 290 N.C. 349, 365 (1976) ("a defendant in a

criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances”), concluding that *Tolley* applies when the jury sees the defendant shackled at trial, not to prohibit the jury from hearing evidence that a defendant was previously handcuffed and shackled. The defendant had asserted that the relevant testimony violated his due process rights.

Trial court did not err in admitting twenty photos of victim’s body, even where defendant offered to stipulate to cause of death

State v. Bedford, __ N.C. App. __, 702 S.E.2d 522 (Dec. 7, 2010). In a murder case in which the victim suffered many distinct injuries to different parts of her body, the trial court did not abuse its discretion by admitting photographs of the victim’s body, even though the defendant offered to stipulate to cause of death. Two of the photos were taken of the victim’s body just after being removed from a grave and were used to illustrate the testimony of officers who unearthed the body. Eighteen color photographs of the victim’s decomposing body were used to illustrate the testimony of the pathologist who did the autopsy and were projected onto a six-foot by eight-foot screen.

Crimes

Generally

Sufficient evidence of constructive possession of marijuana and drug paraphernalia

State v. Slaughter, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). (1) Over a dissent, the court held that there was sufficient evidence of constructive possession of marijuana. The defendant did not have exclusive control over the place where the contraband was found and there was no evidence that he owned any items found in proximity to the contraband, was the only person who could have placed the contraband where it was found, acted nervously, resided in or regularly visited the premises where the contraband was found, or possessed a large amount of cash. The primary evidence was his proximity to the contraband. Specifically, he was in a 150-square-foot room surrounded by bags of marijuana, marijuana residue, stacks of cash, bags of cash, handguns, blunts, rolling papers, a grinder, and packaging paraphernalia. Many of these items were in plain view of officers when they entered the room, including several baggies of marijuana, marijuana residue, several stacks of cash, at least one handgun, and plastic baggies. In addition, almost all of the officers testified that a strong smell of marijuana pervaded the premises. (2) Over a dissent, the court held that for the same reasons, there was sufficient evidence that the defendant constructively possessed drug paraphernalia (officers recovered scales, Ziploc-style baggies, cigars, cigar wrappers, and a grinder in close proximity to a substantial amount of marijuana and to each other).

Sufficient evidence that defendant drove recklessly in felony speeding to elude case

State v. Jackson, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). In a felony speeding to elude case there was sufficient evidence that the defendant drove recklessly. An officer testified that the defendant drove 82 mph in a 55 mph zone and that he was weaving around traffic; also a jury could infer from his testimony that the defendant crossed the solid double yellow line.

Possession with intent to manufacture cocaine is not a lesser-included offense of trafficking by possession of cocaine

State v. McCain, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). The trial court erred by submitting to the jury the charge of possession with intent to manufacture cocaine because it is not a lesser-included offense of the charged crime of trafficking by possession of cocaine. However, possession of cocaine is a lesser of the charged offense; because the jury convicted on possession with intent to manufacture, the court remanded for entry of judgment on possession of cocaine.

Sufficient evidence to support obtaining property by false pretenses

State v. Twitty, __ N.C. App. __, __ S.E.2d __ (May 17, 2011). There was sufficient evidence to support a false pretenses conviction when the defendant falsely told a church congregation that his wife had died and that he was broke to elicit sympathy and obtain property.

Sufficient evidence of serious injury where victim had holes in leg from shotgun pellets; no error where trial court failed to give instruction 120.12 defining serious injury; State was not required to prove specific intent to shoot into vehicle for the crime of discharging a firearm into occupied property and jury was properly charged as to the required mental state

State v. McLean, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). (1) There was sufficient evidence that the victim suffered serious injury. The defendant shot the victim with a shotgun, causing injuries to the victim's calf and 18-20 pellets to lodge in his leg, which did not fully work themselves out for six months. One witness testified that the victim had holes in his leg from the ankle up and another observed blood on his leg and noted that the wounds looked like little holes from birdshot from a shotgun. (2) When the trial judge used N.C.P.J.I.—Crim. 208.15 to instruct the jury on the offense of assault with a deadly weapon with intent to kill inflicting serious injury, it did not err by failing to also give instruction 120.12, defining serious injury. (3) Discharging a barreled weapon or firearm into occupied property is a general intent crime; it does not require the State to prove any specific intent to shoot into the vehicle but only that the defendant intentionally fire a weapon under such circumstances where he or she had reason to believe the conveyance that ended up being shot was occupied. (4) N.C.P.J.I.—Crim. 208.90D, which was used in this case, properly charged the jury as to the required mental state.

No plain error where trial court peremptorily instructed jury that multiple gunshot wounds to the upper body would constitute serious injury

State v. Smith, __ N.C. App. __, 707 S.E.2d 779 (Mar. 15, 2011). Trial court did not commit plain error by peremptorily instructing the jury that multiple gunshot wounds to the upper body would constitute serious injury. The victim required emergency surgery, was left with scars on his chest, shoulder, back and neck, and a bullet remained in his neck, causing him continuing pain.

Evidence was sufficient to establish an intent to cause bodily harm or terrorize where defendants severely beat victim, attempted to stuff him into a garbage can, and threw him into a ditch filled with rocks and water; trial court did not commit plain error by failing to instruct on lesser-included offense of false imprisonment

State v. Boozer, __ N.C. App. __, 707 S.E.2d 756 (Mar. 15, 2011). (1) The evidence was sufficient to establish an intent to cause bodily harm or terrorize where the facts showed that after severely beating

the victim, the defendants first attempted to stuff him into a garbage can and then threw him into a 10 or 12-foot-deep ditch filled with rocks and water; one defendant had been to the location several times and could have seen the ditch; and the victim could not recall anything after the assault began and was not struggling or moving during this process. This evidence supports a reasonable inference that the defendants intended to cause the victim serious bodily injury if they believed he was unconscious and unable to protect himself as he was thrown into the ditch, landing on rocks and possibly drowning. Alternatively, it supports a reasonable inference that the defendants intended to terrorize the victim if they believed him to be conscious and aware of being stuffed into a garbage can and then flung into a deep, rocky, water-filled ditch. (2) The trial court did not commit plain error by failing to instruct on the lesser-included offense of false imprisonment where, for the reasons discussed above, the evidence was sufficient to establish an intent to cause bodily harm or terrorize. (3) The trial court erred by instructing the jury that it need only find that the restraint or removal aspect of the kidnapping “was a separate, complete act independent of and apart from the injury or terror to the victim.” As such, it did not distinguish between the restraint as a part of the kidnapping and any restraint or removal that was part of the assault or robbery of the victim. However, because the evidence indicates that the assault stopped before the victim’s removal, the court determined that this error was not prejudicial.

First Amendment shields individuals from tort liability for picketing near a soldier’s funeral; Court does not reach issue of whether criminal statutes such as G.S. 14-288.4(a)(8), which criminalizes disorderly conduct at funerals, are constitutional

Snyder v. Phelps, 562 U.S. ___ (Mar. 2, 2010). The First Amendment shields members of a church from tort liability for picketing near a soldier’s funeral. A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier’s funeral service. The picket signs reflected the church’s view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The picketing occurred in Maryland. Although that state now has a criminal statute in effect restricting picketing at funerals, the statute was not in effect at the time the conduct at issue arose. Noting that statute and that other jurisdictions have enacted similar provisions, the Court stated: “To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland’s law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional.” Slip Op. at 11. [Author’s note: In North Carolina, G.S. 14-288.4(a)(8), criminalizes disorderly conduct at funerals, including military funerals. In a prosecution for conduct prohibited by that statute, the issue that the U.S. Supreme Court did not have occasion to address may be presented for decision].

Sufficient evidence existed that defendant perpetrated murder

State v. Banks, ___ N.C. App. ___, 706 S.E.2d 807 (Mar. 1, 2011). Evidence was sufficient to establish that the defendant perpetrated the murder. The defendant was jealous of the victim and made numerous threats toward him; four spent casings found in his bedroom were fired from the murder weapon; on the day of the murder, the victim got into a vehicle that matched a description of the defendant’s vehicle; and a fiber consistent with the victim’s jacket was recovered from the defendant’s vehicle.

Sufficient evidence existed that defendant acted in concert to commit robbery

State v. Hill, ___ N.C. App. ___, 706 S.E.2d 799 (Mar. 1, 2011). Over a dissent, the court held that the evidence was sufficient to establish that the defendant acted in concert with another to commit

robbery. After robbing Mr. Jones at an ATM, the robber ran to a two-toned maroon and silver or purple and white GMC pickup truck driven by another person. After robbing Mr. Cole four hours later at an ATM, the robber ran towards a parking lot where Cole found a maroon and silver GMC truck. Mr. Cole asked the driver if he had seen a man running from the ATM. The driver gave inconsistent responses and told Cole that he had an appointment at 10:40 p.m. Cole obtained the truck's license plate number and the defendant was found driving the vehicle near where Cole was robbed. The vehicle was owned by Mr. Webb, a suspect in the Jones robbery. This is substantial evidence that the defendant was waiting for an accomplice and that the two acted in concert to commit the robberies.

Sufficient evidence existed that defendant committed breaking or entering

State v. McNeil, __ N.C. App. __, 707 S.E.2d 674 (Mar. 1, 2011). The State presented sufficient evidence that the defendant perpetrated a breaking and entering. The resident saw the defendant break into her home, the getaway vehicle was registered to the defendant, the resident knew the defendant from prior interactions, a gun was taken from the home, and the defendant knew that the resident possessed the gun.

No error in failing to instruct on second-degree murder

State v. Wiggins, __ N.C. App. __, 707 S.E.2d 664 (Mar. 1, 2011). In a murder case, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of second-degree murder. For reasons discussed in the opinion, the evidence showed that the defendant acted with premeditation and deliberation.

Evidence was sufficient to warrant instruction on flight; evidence was sufficient to prove attempted kidnapping; evidence was insufficient to support two charges of conspiracy to commit armed robbery; trial judge committed plain error by failing to instruct jury on all elements of conspiracy to commit armed robbery

State v. Lawrence, __ N.C. App. __, 706 S.E.2d 822 (Mar. 1, 2011). (1) The evidence was sufficient to warrant an instruction on flight. During the first robbery attempt, the defendant and a co-conspirator fled from a deputy sheriff. During the second attempt, the defendant fled from an armed neighbor. After learning of the defendant's name and address, an officer canvassed the neighborhood, looking for the defendant. The defendant was later arrested in another state. (2) The evidence was sufficient to prove attempted kidnapping. To prove an overt act for that crime, the State need not prove that the defendant was in the presence of his intended victim. In this case, the defendant and his accomplices stole get-away cars and acquired cell phones, jump suits, masks, zip ties, gasoline, and guns. Additionally, the defendant hid in the woods behind the home of his intended victim, waiting for her to appear, fleeing only upon the arrival of officers and armed neighbors. The court rejected the defendant's argument that the evidence of attempted kidnapping was insufficient because the restraint he intended to use on his victim was inherent to his intended robbery of her. The defendant planned to intercept the victim outside of her home and force her back into the house at gunpoint, bind her hands so that she could not move, and threaten to douse her with gasoline if she did not cooperate. These additional acts of restraint by force and threat provided substantial evidence that the defendant's intended actions would have exposed the victim to greater danger than that inherent in the armed robbery itself. The court rejected the defendant's argument that to prove an overt act for attempted robbery the State had to prove that the defendant was in the presence of his intended victim. The court found that there was sufficient evidence of an overt act. (3) The evidence was insufficient to support

two charges of conspiracy to commit armed robbery. Having failed to achieve the objective of the conspiracy on their first attempt, the defendant and his co-conspirators returned the next day to try again. When the State charges separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate. There is no bright-line test for whether multiple conspiracies exist. The essential question is the nature of the agreement(s), but factors such as time intervals, participants, objectives, and number of meetings must be considered. Applying this analysis, the court concluded that only one agreement existed. In both attempts, the intended victim and participants were the same; the time interval between the two attempts was approximately 36 hours; on the second attempt the group did not agree to a new plan; and while the co-conspirators considered robbing a different victim, that only was a back-up plan. The court rejected the State's argument that because the co-conspirators met after the first attempt, acquired additional materials, made slight modifications on how to execute their plan, and briefly considered robbing a different victim, they abandoned their first conspiracy and formed a second one. (4) The trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery. The judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm. The judge failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim.

Insufficient evidence of secret assault where victim jumped on intruder before assault began; trial court did not err by failing to instruct on lesser-included offenses of assault with a deadly weapon with intent to kill inflicting serious injury

State v. Wright, __ N.C. App. __, 708 S.E.2d 112 (Mar. 1, 2011). (1) The evidence was insufficient to establish that a secret assault occurred. In the middle of the night, the victim heard a noise and looked up to see someone standing in the bedroom doorway. The victim jumped on the person and hit him with a chair. The victim was aware of the defendant's presence and purpose before the assault began. In fact, he started defending himself before the defendant's assault was initiated. (2) The trial court did not err by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant broke into a trailer in the middle of the night and used an iron pipe to repeatedly beat in the head an unarmed, naked victim, who had just woken up. (3) The trial court did not err by failing to instruct on the lesser-included offense of assault with a deadly weapon to the charge on assault with a deadly weapon inflicting serious injury. After a beating by the defendant, the victim received hospital treatment, had contusions and bruises on her knee, could not walk for about a week and a half, and her knee still hurt at the time of trial.

Evidence was sufficient to establish that the defendant took money from a store clerk by means of violence or fear for crime of common law robbery

State v. Elkins, __ N.C. App. __, 707 S.E.2d 744 (Mar. 1, 2011). The evidence was sufficient to establish that the defendant took money from a store clerk by means of violence or fear. The defendant hid his arm underneath his jacket in a manner suggesting that he had a gun; the clerk knew the defendant was "serious" because his eyes were "evil looking"; and the clerk was afraid and therefore gave the defendant the money. The court distinguished *State v. Parker*, 322 N.C. 559 (1988), on grounds that in that case, there was no weapon in sight and the victim was not afraid. Instead, the court found the case analogous to *State v. White*, 142 N.C. App. 201 (2001), which concluded that there was sufficient evidence of violence or fear when the defendant handed a threatening note to the store clerks implying the he had a gun, even though none of them saw a firearm in his possession.

Only one felon in possession conviction could stand on facts although defendant used multiple firearms

State v. Wiggins, __ N.C. App. __, 707 S.E.2d 664 (Mar. 1, 2011). The felon in possession statute does not authorize multiple convictions and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he or she used during the commission of multiple substantive criminal offenses during the course of the same transaction or series of transactions. The court clarified that the extent to which a defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. In the case at hand, the weapons came into the defendant's possession simultaneously and were used over a two-hour period within a relatively limited part of town in connection with the commission of a series of similar offenses. Based on these facts, only one felon in possession conviction could stand.

Sufficient evidence existed that defendant constructively possessed firearm

State v. McNeil, __ N.C. App. __, 707 S.E.2d 674 (Mar. 1, 2011). There was sufficient evidence that the defendant constructively possessed the firearm. The defendant was identified as having broken into a house from which a gun was stolen. The gun was found in a clothes hamper at the home of the defendant's ex-girlfriend's mother. The defendant had arrived at the home shortly after the breaking and entering, entering through the back door and walking past the hamper. When the defendant was told that police were "around the house," he fled to the front porch, where officers found him. A vehicle matching the description of the getaway car was parked outside.

Evidence was sufficient to warrant instruction on flight; sufficient evidence existed of premeditation, deliberation, and intent to kill; evidence was sufficient to establish that defendant confined and restrained the victims for the purposes of terrorizing them and doing them serious bodily harm; trial court properly instructed on "terrorizing" and "serious bodily harm"

State v. Bonilla, __ N.C. App. __, 706 S.E.2d 288 (Feb. 15, 2011). (1) In a kidnapping, sexual assault, and murder case, the trial court did not err by instructing the jury on flight. The defendant and an accomplice left the victims bound, placed a two-by-four across the inside of the apartment door, hindering access from the outside, and exited through a window. Despite the fact that the defendant lived at the apartment, there was no indication he ever returned. Although a warrant for the defendant's arrest was issued immediately, ten years passed before the defendant was extradited. (2) There was sufficient evidence of premeditation, deliberation, and intent to kill for first-degree murder. After the defendant and an accomplice beat and kicked the victim, they hog-tied him so severely that his spine was fractured, and put tissue in his mouth. Due to the severe arching of his back, the victim suffered a fracture in his thoracic spine and died from a combination of suffocation and strangulation. (3) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine

was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine. (4) The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering." (3) A person who is killed in the course of a kidnapping is not left in a safe place. Alternatively, if the victim still was alive when left by the defendant and his accomplice, he was not left in a safe place given that he was bound so tightly that he suffered a fracture to his spine and ultimately suffocated.

Sufficient evidence existed of obtaining property by false pretenses

State v. Moore, __ N.C. App. __, 705 S.E.2d 797 (Feb. 15, 2011). There was sufficient evidence of obtaining property by false pretenses when the defendant received money for rental of a house that the defendant did not own or have the right to rent.

Substantial evidence existed that defendant was perpetrator of robbery and entered into a conspiracy to commit robbery

State v. Boyd, __ N.C. App. __, 705 S.E.2d 774 (Feb. 1, 2011). In a robbery case, the trial court did not err by denying the defendant's motion to dismiss where there was substantial evidence that the defendant was the perpetrator. The victim, who knew the defendant well, identified the defendant's voice as that of his assailant; identified his assailant as a black man with a lazy eye, two characteristics consistent with the defendant's appearance; consistently identified the defendant as his assailant; and had a high level of certainty with regard to this identification. In a conspiracy to commit robbery case, the evidence was sufficient to establish a mutual, implied understanding between the defendant and another man to rob the victim. The other man drove the defendant to intercept the victim; the defendant wore a ski mask and had a gun; after the defendant hesitated to act, the other person assaulted the victim and took his money; and the two got into the car and departed.

Sufficient evidence existed of accessory after the fact to second-degree murder and armed robbery; mere presence instruction is not proper for accessory after the fact

State v. Cole, __ N.C. App. __, 703 S.E.2d 842 (Jan. 4, 2011). (1) The State presented sufficient evidence of accessory after the fact to a second-degree murder perpetrated by Stevens. After Stevens shot the victim, the defendant drove Stevens away from the scene. The victim later died. The court rejected the defendant's argument that because he gave aid after the victim had been wounded but before the victim died, he did not know that Stevens had committed murder. It concluded that because the defendant knew that Stevens shot the victim at close range, a jury could reasonably infer that the defendant knew that the shot was fatal. (2) The State presented sufficient evidence of accessory after the fact to armed robbery when it showed both that an armed robbery occurred and that the defendant rendered aid after the crime was completed. The court rejected the defendant's argument that the robbery was not complete until the defendant arrived at a safe place, concluding that a taking is complete once the thief succeeds in removing the stolen property from the victim's possession. (3) Although a mere presence instruction may be appropriate for aiding and abetting or accessory before

the fact, such an instruction is not proper for accessory after the fact and thus the trial judge did not err by declining to give this instruction.

Sufficient evidence of second-degree murder existed for proximately causing a murder by unlawful distribution and ingestion of Oxymorphone; second-degree murder was not the same offense as sale or delivery of a controlled or possession with intent to sell or deliver a controlled substance for double jeopardy purposes

State v. Parlee, __ N.C. App. __, 703 S.E.2d 866 (Jan. 4, 2011). (1) There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. (a) There was sufficient evidence of malice where the victim and a friend approached the defendant to purchase prescription medication, the defendant sold them an Oxymorphone pill for \$20.00, telling them that it was “pretty strong pain medication[,]” and not to take a whole pill or “do anything destructive with it.” The defendant also told a friend that he liked Oxymorphone because it “messe[d]” him up. The jury could have reasonably inferred that the defendant knew Oxymorphone was an inherently dangerous drug and that he acted with malice when he supplied the pill. (b) There was sufficient evidence that the defendant’s sale of the pill was a proximate cause of death where the defendant unlawfully sold the pill to the two friends, who later split it in half and consumed it; the victim was pronounced dead the next morning, and cause of death was acute Oxymorphone overdose. (c) There was sufficient evidence that the victim ingested the pill where toxicology reports showed lethal amounts of Oxymorphone in his blood and the cause of death was acute Oxymorphone overdose. (2) For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

It is an assault to fire a gun at or in the direction of another without regard to the aggressor's intention or victim's fear

State v. Starr, __ N.C. App. __, 703 S.E.2d 876 (Jan. 4, 2011). In a case involving assault on a firefighter with a firearm, there was sufficient evidence that the defendant committed an assault. To constitute an assault, it is not necessary that the victim be placed in fear; it is enough if the act was sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. “It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing.” Here, the defendant shot twice at his door while firefighters were attempting to force it open and fired again in the direction of the firefighters after they forced entry. The defendant knew that people were outside the door and shot the door to send a warning.

Trial court did not err by instructing that in order to constitute an aggravating factor elevating speeding to elude arrest to a felony, driving while license revoked could occur on a public vehicular area

State v. Dewalt, __ N.C. App. __, 703 S.E.2d 872 (Jan. 4, 2011). The trial court did not err by instructing the jury that in order to constitute an aggravating factor elevating speeding to elude arrest to a felony, driving while license revoked could occur on a public vehicular area. Although the offense of driving while license revoked under G.S. 20-28 requires that the defendant drive on a highway, driving while license revoked can aggravate speeding to elude even if it occurs on a public vehicular area. While the felony speeding to elude arrest statute lists several other aggravating factors with express reference to

the motor vehicle statutes proscribing those crimes (e.g., passing a stopped school bus as proscribed by G.S. 20-217), the aggravating factor of driving while license revoked does not reference G.S. 20-28.

Sufficient evidence that defendant was perpetrator and of malice in murder case

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010). There was sufficient evidence that the defendant perpetrated a murder when, among other things, cuts on the defendant's hands were visible more than 10 days after the murder; neither the defendant's nor the victim's DNA could be excluded from a DNA sample from the scene; DNA from blood stains on the defendant's jeans matched the victim's DNA; and 22 shoe prints found in blood in the victim's residence were consistent with the defendant's shoes. There was sufficient evidence of malice in a first-degree murder case. The intentional use of a deadly weapon which proximately results in death gives rise to the presumption of malice. Here, the victim was stabbed in the torso with a golf club shaft, which entered the body from the back near the base of her neck downward and forward toward the center of her chest to a depth of eight inches, where it perforated her aorta just above her heart; she was stabbed with a knife to a depth of three inches; her face sustained blunt force trauma consistent with being struck with a clothes iron; and there was evidence she was strangled. The perforation by the golf club shaft was fatal.

Insufficient evidence that defendant intended to commit a larceny in the vehicle

State v. Chillo, __ N.C. App. __, 705 S.E.2d 394 (Dec. 21, 2010). The evidence was insufficient to establish that the defendant intended to commit a larceny in the vehicle. The evidence suggested that the defendant's only intent was to show another how to break glass using a spark plug and that the two left without taking anything once the vehicle's glass was broken.

Insufficient evidence of intent to sell or deliver on facts

State v. Wilkins, __ N.C. App. __, 703 S.E.2d 807 (Dec. 21, 2010). The trial court erred by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. Evidence that an officer found 1.89 grams of marijuana on the defendant separated into three smaller packages, worth about \$30, and that the defendant was carrying \$1,264.00 in cash was insufficient to establish the requisite intent.

Sufficient evidence of intent to sell or deliver on facts

State v. Jones, __ N.C. App. __, 703 S.E.2d 772 (Dec. 21, 2010). An officer's testimony that a substance's packaging was indicative of it being held for sale was sufficient evidence of an intent to sell to survive a motion to dismiss.

Error but not plain error where defendant was convicted of the mutually exclusive offenses of first-degree murder or accessory after the fact to murder

State v. Melvin, __ N.C. __, __ S.E.2d __ (Dec. 20, 2010). Reversing the court of appeals in 199 N.C. App. 469, 682 S.E.2d 238 (2009) (the trial court committed plain error by failing to instruct the jury that it could convict the defendant of either first-degree murder or accessory after the fact to murder, but not both), the court held that although the trial court erred by failing to give the instruction at issue, no plain error occurred. Citing its recent decision in *State v. Mumford*, 364 N.C. 394, 398-402 (2010), the court held that because guilty verdicts of first-degree murder and accessory after the fact to that

murder would be legally inconsistent and contradictory, a defendant may not be punished for both. The court went on to explain that mutually exclusive offenses may be joined for trial; if substantial evidence supports each offense, both should be submitted to the jury with an instruction that the defendant only may be convicted of one of the offenses, but not both. Having found error, the court went on to conclude that no plain error occurred in light of the overwhelming evidence of guilt, the fact that the jury found the defendant guilty of both offenses, suggesting that it would have convicted him of the more serious offense, had it been required to choose between charges, and that the trial judge arrested judgment on the accessory after the fact conviction.

Sufficient evidence of felony breaking or entering and larceny where computer tower left outside victim's house; verdicts of guilty of felonious larceny after a breaking or entering and being a habitual felon but deadlocked on breaking or entering were merely inconsistent and not mutually exclusive

State v. Blackmon, __ N.C. App. __, 702 S.E.2d 833 (Dec. 7, 2010). Evidence of felonious larceny and breaking or entering was sufficient to survive a motion to dismiss. The victim's computer tower was left outside the victim's house after a break-in. A fingerprint from the tower matched the defendant's print. The tower was in full view of the victim's back door and anyone inspecting the equipment would be able to see broken glass in the back door. There was no path behind the house and the victim did not know defendant or give him permission to be at her house. The trial court properly denied the defendant's motion for judgment notwithstanding the verdict based on inconsistent verdicts. The jury found the defendant guilty of felonious larceny after a breaking or entering and of being a habitual felon but deadlocked on a breaking or entering charge. Citing, *State v. Mumford*, __ N.C. __, __ S.E.2d __ (Oct. 8, 2010), the court held that the verdicts were merely inconsistent and not mutually exclusive.

Trial court did not err by declining to instruct on second-degree murder where the defendant argued that evidence showed he killed the victim in a "frenzied, crack-fueled explosion" of a long-simmering "rage of jealousy"

State v. Bedford, __ N.C. App. __, 702 S.E.2d 522 (Dec. 7, 2010). The trial court did not err by declining to instruct the jury on second-degree murder when no evidence negated the State's evidence of first-degree murder. The defendant argued that the evidence showed that he killed the victim in a "frenzied, crack-fueled explosion" of a long-simmering "rage of jealousy." However, the court noted, premeditation and deliberation do not imply a lack of passion, anger or emotion. Nor, the court noted, does the defendant's possible drug intoxication support an inference that he did not premeditate and deliberate. The State presented evidence of the defendant's conduct and statements before the killing, including threats towards the victim; ill-will and previous difficulties between the parties; lethal blows rendered after the victim had been felled and rendered helpless; the brutality of the killing; and the extreme nature and number of the victim's wounds.

Guilty verdicts of breaking or entering and discharging a firearm into occupied property were not mutually exclusive; trial court erred in failing to dismiss charges of attempted armed robbery and breaking or entering based on intent to commit armed robbery

State v. Johnson, __ N.C. App. __, 702 S.E.2d 547 (Dec. 7, 2010). Guilty verdicts of breaking or entering and discharging a firearm into occupied property were not mutually exclusive. The defendant argued that he could not both be in the building and shooting into the building at the same time. The court rejected this argument noting that the offenses occurred in succession, the defendant would be guilty of the discharging offense regardless of whether or not he was standing on a screened-in porch at the

time, and that in any event the defendant was not in the building when he was standing on the porch. The trial court erred by denying the defendant's motion to dismiss a charge of attempted armed robbery when there was no evidence that the defendant attempted to take the victim's personal property. Because the defendant's conviction for felony breaking or entering was based on an intent to commit armed robbery, the trial court also erred by failing to dismiss that charge.

Trial court erred by making a determination that the offenses involved criminal street gang activity without giving defendant an opportunity to be heard; sufficient evidence existed of conspiracy to discharge a firearm into occupied property

State v. Dubose, __ N.C. App. __, 702 S.E.2d 330 (Dec. 7, 2010). (1) The trial court erred by making a determination under G.S. 14-50.25 that the offenses involved criminal street gang activity outside of defendant's presence and without giving him an opportunity to be heard; vacating and remanding for a new sentencing hearing. A finding of criminal street gang activity was a "substantive change" in the judgments that must be made in defendant's presence and with an opportunity to be heard. (2) The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to discharge a firearm into occupied property. The defendant, Ray, Johnson, and Phelps left a high school basketball game because of the presence of rival gang members. As they left, the defendant suggested that he was going to kill someone. A gun was retrieved from underneath the driver's side seat of Johnson's vehicle and Johnson let Ray drive and the defendant to sit in the front because the two "were about to do something." Ray and the defendant argued over who was going to shoot the victim but in the end Ray drove by the gym and the defendant fired twice at the victim, who was standing in front of the gym. The court rejected the defendant's argument that the evidence failed to show an agreement to discharge the firearm into occupied property, noting that the group understood and impliedly agreed that the defendant would shoot the victim as they drove by, the victim was standing by the gym doors, and there was a substantial likelihood that the bullets would enter or hit the gym.

Sufficient evidence of premeditation and deliberation under doctrine of transferred intent

State v. Crandell, __ N.C. App. __, 702 S.E.2d 352 (Dec. 7, 2010). There was sufficient evidence of premeditation and deliberation when, after having a confrontation with an individual named Thomas, the defendant happened upon Thomas and without provocation began firing at him, resulting in the death of the victim, an innocent bystander. Citing the doctrine of transferred intent, the court noted that "malice or intent follows the bullet."

Sufficient evidence of conspiracy to assault

State v. Sanders, __ N.C. App. __, 701 S.E.2d 380 (Nov. 16, 2010). Evidence of the words and actions of the defendant and others, when viewed collectively, provided sufficient evidence of an implied agreement to assault the victim. The court noted that the spontaneity of the plan did not defeat the conspiracy and that a meeting of the minds can occur when a party accepts an offer by actions.

Unauthorized use of a motor propelled conveyance is a lesser included offense of possession of stolen goods

State v. Nickerson, __ N.C. App. __, 701 S.E.2d 685 (Nov. 16, 2010). Unauthorized use of a motor propelled conveyance is a lesser included offense of possession of stolen goods and on the facts presented, the trial court erred by failing to instruct the jury on the lesser included offense.

Impaired Driving

No error in allowing State's witness to testify as expert in pharmacology and physiology and to testify regarding defendant's post-driving consumption; no error in allowing testimony on retrograde extrapolation; no *Blakely* error where court imposed level four punishment

State v. Green, __ N.C. App. __, 707 S.E.2d 715 (Mar. 1, 2011). (1) In an impaired driving case, the trial court did not abuse its discretion by allowing the State's witness to testify as an expert in pharmacology and physiology. Based on his knowledge, skill, experience, training, and education, the witness was better informed than the jury about the subject of alcohol as it relates to human physiology and pharmacology. (2) The court rejected the defendant's argument that the trial court erred by allowing the expert to give opinion testimony regarding the defendant's post-driving consumption of alcohol on grounds that such testimony was an opinion about the truthfulness of the defendant's statement that he consumed wine after returning home. The court concluded that because the expert's testimony was not opinion testimony concerning credibility, the trial court did not err by allowing the expert to testify as to how the defendant's calculated blood alcohol content would have been altered by the defendant's stated post-driving consumption; the expert's statements assisted the jury in determining whether the defendant's blood alcohol content at the time of the accident was in excess of the legal limit. (3) The trial court did abuse its discretion by admitting the expert's opinion testimony regarding retrograde extrapolation in a case where the defendant asserted that he consumed alcohol after driving. The defendant's assertions of post-driving alcohol consumption went to the weight of the expert's testimony, not its admissibility. (4) No *Blakely* error occurred in the defendant's sentence for impaired driving. The trial court found two aggravating factors, two factors in mitigation, and imposed a level four punishment. The level four punishment was tantamount to a sentence within the presumptive range, so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Therefore, *Blakely* is not implicated.

No error in admitting analysis of blood sample taken about three hours after accident; sufficient evidence of second-degree murder, felony serious injury by vehicle, and impaired driving

State v. Patterson, __ N.C. App. __, 708 S.E.2d 133 (Mar. 1, 2011). (1) In a second-degree murder case based on impaired driving, the trial court did not commit plain error under Rule 403 by admitting the results of a chemical analysis of the defendant's blood. The defendant had argued that because the blood sample was taken approximately three hours after the accident, it was not taken "at any relevant time after the driving" as required by G.S. 20-138.1(a)(2). The court noted that the evidence suggested that the defendant did not consume any alcohol between the time of the accident and when the blood sample was drawn and that he did not allege that the test was improperly administered. The time interval between the defendant's operation of the vehicle and the taking of the sample goes to weight, not admissibility. (2) The trial court did not err by denying the defendant's motion to dismiss charges of second-degree murder, felony serious injury by vehicle, and impaired driving. The evidence showed that the defendant was under the influence of an impairing substance at the time of the accident. A chemical analysis of blood taken from the defendant after the accident showed a BAC of 0.14 and the State's expert estimated that his BAC was 0.19 at the time of the accident. The defendant admitted having consumed 5 or 6 beers that day. Four witnesses testified that they detected a strong odor of alcohol emanating from the defendant immediately after the accident. The defendant had bloodshot eyes and was combative with emergency personnel immediately after the accident. Finally, the defendant's speed exceeded 100 miles per hour and he failed to use his brakes or make any attempt to avoid the collision.

Primary programmatic purpose of vehicle checkpoint held constitutional

State v. Nolan, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). The trial court did not err by concluding that the vehicle checkpoint passed constitutional muster. The trial court properly concluded that the primary programmatic purpose of the checkpoint was the detection of drivers operating a motor vehicle while impaired and that the procedure was not merely to further general crime control and that this primary programmatic purpose was constitutionally permissible. Applying the three-pronged test of *Brown v. Texas*, 443 U.S. 47, 50 (1979), the trial court properly determined that the checkpoint was reasonable.

No error in denying *Knoll* motion

State v. Daniel, __ N.C. App. __, 702 S.E.2d 306 (Dec. 7, 2010). Over a dissent, the court held that the trial court did not err by denying the defendant's *Knoll* motion in an impaired driving case in which the defendant was detained for almost 24 hours. The court upheld the trial court's finding that an individual who appeared to take responsibility for the defendant was not a sober responsible adult; a police officer smelled alcohol on the individual's breath and the individual indicated that he had been drinking. The only statutory violation alleged was a failure to release to a sober, responsible adult, but the individual who appeared was not a sober, responsible adult. The trial court's conclusions that no violation occurred or alternatively that the defendant failed to show irreparable prejudice was supported by the evidence. The defendant was advised that she could request an attorney or other witness to observe her Intoxilyzer test but she declined to request a witness. Also, the individual who appeared was allowed to see the defendant within 25 minutes of her exiting the magistrate's office, to meet personally with the defendant, and to talk with and observe the defendant for approximately eight minutes.

Retrograde extrapolation using odor analysis as a baseline is not sufficiently reliable and is therefore inadmissible as evidence of impairment

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010). The trial court committed reversible error by allowing the State's expert to use "odor analysis" as a baseline for his opinion as to the defendant's blood-alcohol level (BAC) at the time of the accident, formed using retrograde extrapolation. When the defendant reported to the police department more than ten hours after the accident, she was met by an officer. Although the officer did not perform any tests on the defendant, he detected an odor of alcohol on her breath. The expert based his retrograde extrapolation analysis on the officer's report of smelling alcohol on the defendant's breath. He testified that based on "look[ing] at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured[,] the lowest BAC that is detectable by odor alone is 0.02. He used this baseline for his retrograde extrapolation and opined that at the time of the accident, the defendant had a BAC of 0.18. The court noted that because odor analysis is a novel scientific theory, an unestablished technique, or a compelling new perspective on otherwise settled theories or techniques, it must be accompanied by sufficient indices of reliability. Although the expert testified that "there are published values for the concentrations of alcohol that humans . . . can detect with their nose," he did not specify which texts provided this information, nor were those texts presented at trial. Furthermore, there was no evidence that the expert performed any independent verification of an odor analysis or that he had ever submitted his methodology for peer review. Thus, the court concluded, the method of proof lacked the required indices of reliability. The court also noted that while G.S. 20-139.1 sets out a thorough set of procedures governing chemical analyses of breath, blood, and urine, the odor analysis lacked any of the rigorous standards applied under that provision. It concluded that the expert's retrograde extrapolation

was not supported by a reliable method of proof, that the odor analysis was so unreliable that the trial court's decision was manifestly unsupported by reason, and that the trial court abused its discretion in admitting this testimony. The evidence was insufficient to show that the defendant drove while impaired, even though it showed that she had been drinking before driving. The accident at issue occurred when the defendant collided with someone or something extending over the double yellow line and into her lane of traffic. Under these circumstances, the fact of the collision itself did not establish faulty or irregular driving indicating impairment.

Sexual Offenses

Insufficient evidence of mental disability to support second-degree sexual offense; crime against nature conviction reversed due to insufficient evidence of lack of consent

State v. Hunt, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). (1) The court reversed the defendant's second-degree sexual offense conviction where there was insufficient evidence as to the victim's mental disability. Even if the State presented sufficient evidence of mental retardation, it did not present sufficient evidence that the condition rendered her incapable of resistance. The victim was in the top range of achievement in high school, she babysat, she planned to get her driver's license and attend community college, at the time of trial she was living with her boyfriend and his mother, and there was some indication that she was pregnant but there had been no DSS intervention or charges filed against the boyfriend. On the other hand, the victim was described as "childlike", she attended classes for children with learning disabilities and was classified as intellectually disabled in the mild category, with an I.Q. of 61, DSS paid her bills, and it would be difficult for her to get a community college associate's degree. The court held: "where the victim's IQ falls within the range considered to be 'mental retardation[...]' but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by [G.S.] 14-27.5." (2) Reversing the defendant's conviction for crime against nature (based on private conduct with a 17-year-old female, not for money), the court concluded that there was insufficient evidence of lack of consent.

Plain error in admitting testimony that child was sexually abused in absence of physical evidence

State v. Towe, __ N.C. App. __, 707 S.E.2d 770 (Mar. 15, 2011). The trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused, when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." This amounted to impermissible testimony that the victim was sexually abused.

No abuse of discretion in finding four-year-old competent to testify; sufficient evidence of indecent liberties; trial counsel was not deficient for failure to strike testimony of forensic interviewer; objection to question waived by failure to move to strike answer; defendant invited any error that occurred on cross-examination

State v. Carter, __ N.C. App. __, 707 S.E.2d 700 (Mar. 1, 2011). (1) The trial court did not abuse its discretion in determining that a four-year-old child sexual assault victim was competent to testify. The child was 2½ years old at the time the incident occurred. At trial, the child was non-responsive to some

questions and gave contradictory responses to others. (2) The evidence was sufficient to establish indecent liberties. The child reported being touched in her genital and rectal area by a male. The victim's mother testified that she found the victim alone with the defendant on several occasions, and the victim's testimony was corroborated by her consistent statements to others. (3) In a child sexual assault case, defense counsel's failure to move to strike testimony of a forensic interviewer that the fact that a young child had extensive sexual knowledge suggested that "something happened," did not constitute deficient performance. (4) When the defendant failed to object to a question until after the witness responded, the objection was waived by the defendant's failure to move to strike the answer. (5) Any error in connection with the admission of statements elicited from a witness on cross-examination was invited. The defendant, having invited error, waived all right to appellate review, including plain error review.

Evidence was insufficient to establish second-degree sexual offense but sufficient to establish indecent liberties

In Re A.W., __ N.C. App. __, 706 S.E.2d 305 (Feb. 15, 2011). (1) The evidence was insufficient to sustain an adjudication of delinquency based on a violation of G.S. 14-27.5 (second-degree sexual offense). On appeal, the State conceded that there was no evidence that the victim was mentally disabled, mentally incapacitated, or physically helpless. (2) The court rejected the juvenile's argument that the evidence was insufficient to establish indecent liberties in that it failed to show that he acted with a purpose to arouse or gratify his sexual desires. The facts showed that: the juvenile was thirteen and the victim was ten years younger; the juvenile told the victim that the juvenile's private parts "taste like candy," and had the victim lick his penis; approximately eleven months prior, the juvenile admitted to having performed fellatio on a four-year-old male relative. The court concluded that the juvenile's age and maturity, the age disparity between him and the victim, coupled with the inducement he employed to convince the victim to perform the act and the suggestion of his prior sexual activity before this event, was sufficient evidence of maturity and intent to show the required element of "for the purpose of arousing or gratifying sexual desire."

No plain error to instruct the jury that it could consider whether a bottle constituted a deadly weapon during the commission of a sexual offense

State v. Bonilla, __ N.C. App. __, 706 S.E.2d 288 (Feb. 15, 2011). The trial court did not commit plain error by instructing the jury that it could consider whether or not the use of a bottle constituted a deadly weapon during the commission of a sexual offense. The defendant and his accomplice, after tying the victim's hands and feet, shoved a rag into his mouth, pulled his pants down, and inserted a bottle into his rectum. The victim thought that he was going to die and an emergency room nurse found a tear in the victim's anal wall accompanied by "serious drainage."

Trial court did not err by allowing State's experts to testify: (1) that any tear in victim's hymen would probably have healed by time of examination, and (2) about practices that people use to conceal criminal activity that could account for the lack of incriminating material on defendant's computer equipment

State v. Jennings, __ N.C. App. __, 704 S.E.2d 556 (Jan. 18, 2011). (1) The trial court did not err by allowing the State's expert in family medicine to testify that if there had been a tear in the victim's hymen, it probably would have healed by the time the expert saw the victim. The testimony explained that the lack of physical findings indicative of sexual abuse did not negate the victim's allegations of

abuse and was not an impermissible opinion as to the victim's credibility. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt. (2) The trial court did not err by allowing the State's expert in forensic computer examination to testify that individuals normally try to hide proof of their criminal activity, do not normally save incriminating computer conversations, the defendant would have had time to dispose of incriminating material, and that someone who sets up a site for improper purposes typically would not include their real statistics. Law enforcement officers may testify as experts about the practices criminals use in concealing their identity or criminal activity. The testimony properly explained why, despite the victim's testimony that she and defendant routinely communicated through instant messaging and a web page and that defendant took digital photographs of her during sex, no evidence of these communications or photographs were recovered from defendant's computer equipment, camera, or storage devices. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt.

No error in failing to instruct jury that it could only find defendant guilty if the State proved the sex act alleged in the indictment; no error to admit victim's hearsay statements where they corroborated her trial testimony; error, but not plain error, to allow State's expert to testify to diagnosis of sexual abuse in the absence of physical evidence consistent with abuse

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010). (1) In a child sexual offense case in which the indictment specified digital penetration and the evidence supported that allegation, the trial court was not required to instruct the jury that it only could find the defendant guilty if the State proved the specific sex act stated in the indictment. (1) The trial court did not commit plain error by allowing a witness to testify about her step-granddaughter's statements. The evidence was properly admitted for the non-hearsay purpose of explaining the witness's subsequent conduct of relaying the information to the victim's parents so that medical treatment could be obtained. Also, the victim's statements corroborated her trial testimony. (3) The trial court did not commit plain error by allowing an expert in clinical social work to relate the victim's statements to her when the statements corroborated the victim's trial testimony. (4) The defendant could not complain of the victim's hearsay statements related by an expert witness in the area of child mental health when the defendant elicited these statements on cross-examination. (5) The trial court erred when it allowed the State's expert in clinical social work to testify that she had diagnosed the victim with sexual abuse when there was no physical evidence consistent with abuse. However, the error did not constitute plain error given other evidence in the case.

Defenses

No error in failing to instruct on withdrawal

State v. Wright, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). The trial court did not err by denying the defendant's request to instruct the jury on the defense of withdrawal where the evidence showed that the defendant completed his assigned task in the home invasion (kicking in the door) and failed to renounce the common purpose or indicate that he did not intend to participate in the crime any further.

Sex Offender Registration and Satellite-Based Monitoring

G.S. 14-202(l) is not unconstitutionally vague; trial court erred in requiring defendant to register where there was no competent evidence that he was a danger to community

State v. Pell, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). (1) G.S. 14-202(l) (requiring sex offender registration for certain peeping offenses when a judge finds, in part, that the defendant is —a danger to the community) is not unconstitutionally vague. (2) The trial court erred by requiring the defendant to register as a sex offender when there was no competent evidence to support a finding that he was a danger to the community. —A danger to the community refers to those defendants who pose a risk of engaging in sex offenses following release from incarceration. Here, the State’s expert determined that the defendant represented a low to moderate risk of re-offending and acknowledged that his likelihood of re-offending may be even lower after considering a revised risk assessment scale. The trial court also reviewed letters from the defendant’s psychiatrist and counselor opining that the defendant’s prior diagnoses of major depression, alcohol abuse, and paraphilia were in remission.

Rape of child under 13 is aggravated offense requiring lifetime SBM

State v. Brown, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). Citing *State v. Clark*, __ N.C. App. __, __ S.E.2d __ (2011), the court held that because rape of a child under the age of 13 necessarily involves the use of force or threat of serious violence, the offense is an aggravated offense requiring lifetime SBM. In dicta, it concluded: “Under the test created by this Court . . . there are no offenses that ‘fit within’ the second definition of ‘aggravated offense,’ i.e., an offense that includes ‘engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.’”

First-degree rape is an aggravated offense; defendant cannot assert ineffective assistance of counsel claim in connection with SBM hearing

State v. Clark, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). (1) Applying an elemental analysis, the court determined that first-degree rape under G.S. 14-27.2(a)(1) fits within the definition of an aggravated offense in G.S. 14-208.6(1a). An aggravated offense includes engaging in a sexual act involving vaginal, anal, or oral penetration with a victim (1) of any age through the use of force or the threat of serious violence or (2) who is less than 12 years old. Rape under G.S. 14-27.2(a)(1) cannot satisfy the second prong because it occurs when a person engages in vaginal intercourse with a child under the age of 13, not 12. However, the offense does fall within the first prong of the aggravated offense definition. Such a rape requires proof that a defendant engaged in vaginal intercourse with the victim. This contrasts with G.S. 14-27.4(a)(1), which allows a defendant to be convicted of first-degree sexual offense on the basis of cunnilingus, an act that does not require penetration. Also, vaginal intercourse with a person under the age of 13 necessarily involves the use of force or the threat of serious violence. (2) Because a SBM hearing is not a criminal proceeding to which the right to counsel applies, the defendant cannot assert an ineffective assistance of counsel claim as to counsel’s performance at such a hearing.

First-degree sexual offense and indecent liberties are not aggravated offenses

State v. Oliver, __ N.C. App. __, __ S.E.2d __ (April 5, 2011). First-degree sexual offense under G.S. 14-27.4(a)(1) and indecent liberties with a minor under G.S. 14-202.1 are not aggravated offenses as defined by G.S. 14-208.6(1a) requiring lifetime satellite-based monitoring.

Trial court erred by finding that first-degree sexual offense with a child under 13 is an aggravated offense

State v. Santos, __ N.C. App. __, 708 S.E.2d 208 (Mar. 15, 2011). The trial court erred by finding that first-degree sexual offense with a child under 13 is an aggravated offense for purposes of ordering lifetime satellite-based monitoring (SBM). As the State conceded, when making the relevant determination, the trial court only is to consider the elements of the offense of conviction, not the underlying facts giving rise to the conviction. In a footnote, the court noted that although the record contains several judgments imposing SBM with respect to indecent liberties, courts have held that indecent liberties is not an aggravated offense. The court declined to rule on this issue because it was not raised on appeal.

District court lacked jurisdiction to order SBM; superior court lacked jurisdiction to hold de novo hearing on district court's order

State v. Miller, __ N.C. App. __, 706 S.E.2d 260 (Feb. 1, 2011). (1) The district court lacked subject matter jurisdiction to order the defendant to enroll in satellite-based monitoring (SBM) after a district court conviction for misdemeanor attempted sexual battery. G.S. 14-208.40B(b) requires that SBM hearings be held in superior court for the county in which the offender resides. (2) The superior court lacked subject matter jurisdiction to order the defendant to enroll in SBM after a de novo hearing on the district court's order than the defendant enroll. Hearings on SBM eligibility are civil proceedings. Pursuant to G.S. 7A-27(c), an appeal from a final judgment in a civil action in district court lies in the court of appeals, not in the superior court.

First-degree sexual offense under G.S. 14-27.4(a)(1) (child victim under 13) is not an aggravated offense; to be an aggravated offense, the child must be less than 12

State v. Treadway, __ N.C. App. __, 702 S.E.2d 335 (Dec. 7, 2010). (1) On the judicial findings and order for sex offender form, the trial court erroneously indicated that the defendant had been convicted of an offense against a minor under G.S. 14-208.6(1i) when in fact he was convicted of a sexually violent offense under G.S. 14-208.6(5). The court remanded for correction of the clerical error. (2) Following *State v. Phillips*, __ N.C. App. __, 691 S.E.2d 104 (2010), the court held that first-degree sexual offense under G.S. 14-27.4(a)(1) (child victim under 13) is not an aggravated offense for purposes of SBM. To be an aggravated offense, the child must be less than 12 years old; "a child under the age of 13 is not necessarily also a child less than 12 years old." The court reversed and remanded for consideration of whether the defendant is a sexually violent predator, a recidivist, or whether his conviction involved the physical, mental, or sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, defendant requires the highest possible level of supervision and monitoring.

Trial court did not err by requiring defendant to enroll in SBM for five years after finding that he required the highest possible level of supervision

State v. Green, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). Although one of its factual findings was erroneous, the trial court did not err by requiring the defendant to enroll in SBM for five years after finding that he required the highest possible level of supervision. The trial court based its conclusion on a DOC risk assessment of "moderate-low" and on three additional findings: (1) the victims were especially young, neither was able to advocate for herself, and one was possibly too young to speak; therefore the risk to similarly situated individuals is substantial; (2) the defendant has committed

multiple acts of domestic violence; and (3) the defendant obtained no sex offender treatment. Distinguishing the determination at issue from the “aggravated offense” determination and the determination as to whether an offense involves the physical, mental, or sexual abuse of a minor, the court rejected the defendant’s argument that the first additional finding was erroneous because it relied on the underlying facts of the conviction. The court concluded that this finding was supported by competent evidence, specifically, the defendant’s stipulation to the prosecutor’s summary of facts provided at the defendant’s *Alford* plea. The court concluded that additional finding two was not supported by competent evidence. The only relevant evidence was the State’s representation that the defendant pled guilty to an assault charge involving the victim’s mother and a list of priors on his Prior Record Level worksheet, containing the following entry: “AWDWIKI G/L AWDW AND CT”. The court concluded that additional finding three was supported by the defendant’s admission that he had not completed the treatment. Finally, the court determined that the risk assessment and additional findings one and three supported the trial court’s order.

Sentencing and Probation

State officials ordered to reduce prison overcrowding or release some prisoners

Brown v. California, 563 U.S. ___ (May 23, 2011). In a 5-to-4 decision, the Court affirmed a remedial order issued by a three-judge court directing California to remedy ongoing constitutional violations involving prisoners with serious mental disorders and medical conditions primarily caused by prison overcrowding. The order below leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—California will be required to release some number of prisoners before their full sentences have been served. The Court held that the Prison Litigation Reform Act of 1995 authorizes the relief afforded and that the court-mandated population limit is necessary to remedy the violation of prisoners’ constitutional rights.

Prosecutor’s unsworn statements and restitution worksheet were not competent evidence to support the restitution; court erred in considering this restitution amount in deciding probation length

State v. Smith, ___ N.C. App. ___, 707 S.E.2d 779 (Mar. 15, 2011). (1) The trial court committed plain error by ordering the defendant to pay restitution when no evidence supported the amount ordered. The court noted that no objection is required to preserve for appellate review issues concerning restitution. It held that the prosecutor’s unsworn statements and the State’s restitution worksheet were not competent evidence to support the restitution ordered. The court rejected the notion that the defendant’s silence or lack of objection to the restitution amount constituted a stipulation. (2) The trial court erred by considering improper factors when imposing a period of probation. According to the defendant, the trial court erred by requiring 48 months of supervised probation pursuant to G.S. 15A-1343.2(d) based upon the restitution to be paid and nature of the offense. Because the court separately reversed and remanded the trial court’s restitution order, it concluded that it must remand on this issue as well, instructing the trial court to reconsider the length of probation in light of new evidence concerning the amount of restitution, if any, presented on rehearing.

A defendant may be sentenced as a habitual felon for an underlying felony of drug trafficking.

State v. Eaton, ___ N.C. App. ___, 707 S.E.2d 642 (Mar. 1, 2011).

Court may sentence in aggravated range on finding one aggravating factor outweighs multiple mitigating factors

State v. Gillespie, __ N.C. App. __, __ S.E.2d __ (Mar. 1, 2011). Where the trial court determined that one aggravating factor (heinous, atrocious or cruel) outweighed multiple mitigating factors, it acted within its discretion in sentencing the defendant in the aggravated range.

Trial court failed to determine whether out-of-state convictions were substantially similar to North Carolina offenses

State v. Wright, __ N.C. App. __, 708 S.E.2d 112 (Mar. 1, 2011). Since the State failed to demonstrate the substantial similarity of out-of-state New York and Connecticut convictions to North Carolina crimes and the trial court failed to determine whether the out-of-state convictions were substantially similar to North Carolina offenses, a resentencing was required. The State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina. Also, the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses.

No evidence supported restitution

State v. McNeil, __ N.C. App. __, 707 S.E.2d 674 (Mar. 1, 2011). The trial court committed reversible error by ordering the defendant to pay restitution when the State presented no evidence to support the award. Although there was evidence that the victim's home was damaged during the breaking and entering, there was no evidence as to the cost of the damage.

Trial court did not abuse discretion by refusing to enter mitigated sentence despite uncontroverted evidence of mitigating circumstances

State v. Garnett, __ N.C. App. __, 706 S.E.2d 280 (Feb. 15, 2011). The trial court did not abuse its discretion by refusing the defendant's request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances. The defendant offered uncontroverted evidence of mitigating factors and the trial court considered this evidence during the sentencing hearing. That the trial court did not, however, find any mitigating factors and chose to sentence the defendant in the presumptive range was within its discretion.

Victim need not be identified in indictment for obtaining property by false pretenses case to receive restitution; defendant's acts were direct and proximate cause of harm to support restitution award; insufficient evidence existed to support amount of award

State v. Moore, __ N.C. App. __, 705 S.E.2d 797 (Feb. 15, 2011). (1) In an obtaining property by false pretenses case, the victim need not be identified in the indictment in order to receive restitution. (2) In a case in which the defendant obtained property by false pretenses when he received money for rental of a house that he did not own or have the right to rent, the homeowner was harmed as a direct and proximate cause of the defendant's actions. (3) Over a dissent, the court held that the evidence was insufficient to support an award of restitution in the amount of \$39,332.49. Although the victim had testified that a "repair person" estimated that repairs would cost "[t]hirty-something thousand dollars," this was merely a guess or conjecture. The only record mention of \$39,332.49 is on the restitution worksheet, which cannot support the award of restitution.

Reversing Court of Appeals, Court held trial court did not impermissibly consider defendant's exercise of right to jury trial in sentencing

State v. Pinkerton, __ N.C. __, __ S.E.2d __ (Feb. 4, 2011). In a per curiam opinion, the court reversed, for the reasons stated in the dissenting opinion below, the decision of the court of appeals in *State v. Pinkerton*, __ N.C. App. __, 697 S.E.2d 1 (July 20, 2010). The court of appeals had held, over a dissent, that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared—if you had one ounce of care in your heart about that child—you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The trial court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty." The dissenting judge found no indication of improper motivation by the trial court judge in imposing the defendant's sentence.

No appeal of right from presumptive range sentence

State v. Ziglar, __ N.C. App. __, 705 S.E.2d 417 (Feb. 1, 2011). Because the defendant was sentenced in the presumptive range, he was not entitled to an appeal as a matter of right on the issue whether his sentence was supported by the evidence. Furthermore, the defendant did not petition for review by way of a writ of certiorari.

Restitution is preserved for appellate review in absence of objection at trial; plea agreement did not unambiguously state that defendant would receive a mitigated sentence; error in calculating prior record level points was harmless; no evidence supported restitution award

State v. Blount, __ N.C. App. __, 703 S.E.2d 921 (Jan. 18, 2011). (1) The issue of restitution is preserved for appellate review even when there was no objection at trial. (2) The trial court did not violate G.S. 15A-1024 (withdrawal of guilty plea when sentence not in accord with plea arrangement) by sentencing the defendant in the presumptive range. Under G.S. 15A-1024, if the trial court decides to impose a sentence other than that provided in a plea agreement, the court must inform the defendant of its decision and that he or she may withdraw the plea; if the defendant chooses to withdraw, the court must grant a continuance until the next court session. Although the defendant characterized the agreement as requiring sentencing in the mitigated range, the court found that his interpretation was not supported by the plain language of the plea arrangement, which stated only that the State "shall not object to punishment in the mitigated range." (3) Although the trial court incorrectly determined that the defendant had a total of 8 prior record level points rather than six, the error was harmless. The defendant was assigned to prior record level III, which requires 5-8 points. A correct calculation of defendant's points would have placed him in the same level. (4) Because no evidence was presented in support of restitution and the defendant did not stipulate to the amount, the trial court erred by ordering restitution. During sentencing, the prosecutor presented a restitution worksheet requesting restitution for the victim to compensate for stolen items. The victim did not testify, no additional documentation was submitted, and there was no stipulation to the worksheet.

State failed to give notice of intent to present aggravating factors

State v. Mackey, __ N.C. App. __, __ S.E.2d __ (Jan. 4, 2011). The defendant was improperly sentenced in the aggravated range when the State did not provide proper notice of its intent to present evidence

of aggravating factors as required by G.S. 15A-1340.16(a6). The court rejected the State's argument that a letter regarding plea negotiations sent by the State to the defendant provided timely and sufficient notice of its intent to prove aggravating factors.

Trial court improperly imposed license forfeiture during term of probation

State v. Kerrin, __ N.C. App. __, 703 S.E.2d 816 (Jan. 4, 2011). (1) The trial court improperly ordered a forfeiture of the defendant's licensing privileges without making a finding of fact required by G.S. 15A-1331A that the defendant failed to make reasonable efforts to comply with the conditions of her probation. The court noted that form AOC-CR-317 does not contain a section specifically designated for the required finding and encouraged revision of the form to add this required finding. (2) The term of the forfeiture exceeded statutory limits. A trial court revoking probation may order a license forfeiture under G.S. 15A-1331A(b)(2) at any time during the probation term, but the term of forfeiture cannot exceed the original probation term set by the sentencing court at the time of conviction. The defendant was placed on 24 months probation by the sentencing court, to end on December 15, 2009. His probation was revoked on April 1, 2009, eight months before his probation was set to expire, and the trial court ordered the forfeiture for 24 months from the date of revocation. Because the forfeiture term extended beyond the defendant's original probation, it was invalid. The court encouraged further revision of AOC-CR-317 (specifically the following note: "*The 'Beginning Date' is the date of the entry of this judgment, and the 'Ending Date' is the date of the end of the full probationary term imposed at the time of conviction.*") "to clarify this issue and perhaps avoid future errors based upon misinterpretation of the form." (3) The trial court committed a clerical error when, in a written order revoking probation, it found that the conditions violated and the facts of each violation were set forth in a violation report dated October 20, 2008, which was the date of a probation violation hearing, not a violation report.

Sufficient evidence of especially heinous, atrocious, or cruel

State v. Hunter, __ N.C. App. __, 703 S.E.2d 776 (Dec. 21, 2010). The evidence was sufficient to support the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. The defendant assaulted his 72-year-old grandmother, stabbing her, striking her in the head, strangling her, and impaling her with a golf club shaft eight inches into her back and chest.

Condition of probation "not reside in household with minor child" not violated where defendant was only visiting with child; trial court improperly found defendant in violation of conditions not included in written judgments

State v. Crowder, __ N.C. App. __, 704 S.E.2d 13 (Dec. 21, 2010). (1) The trial court abused its discretion by revoking the defendant's probation when the State failed to present evidence that he violated the condition of probation that he "not reside in a household with a minor child." Although the trial court interpreted the term "reside" to mean that the defendant could not have children anywhere around him, *State v. Strickland*, 169 N.C. App. 193 (2005), construed that term much more narrowly, establishing that the condition is not violated simply when a defendant sees or visits with a child. Because the evidence showed only that the defendant was visiting with his fiancée's child, it was insufficient to establish a violation. (2) The trial court improperly revoked the defendant's probation for violating conditions that he not (a) socialize or communicate with minors unless accompanied by an approved adult; or (b) be alone with a minor without approval. The conditions were not included in the written judgments and there was no evidence that the defendant ever was provided written notice of them. As such, they were not valid conditions of probation.

Court did not use evidence necessary to prove assault with deadly weapon by submitting aggravating factor: “knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person”

State v. Davis, __ N.C. App. __, 702 S.E.2d 507 (Nov. 16, 2010). The trial court did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation) by submitting, in connection with assault with a deadly weapon charges, the aggravating factor that the defendant “knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person.” The court reasoned that for the assault charges the State was not required to prove that the defendant used a weapon or device which would normally be hazardous to the lives of more than one person.

Post-Conviction

Trial court lawfully imposed two consecutive life sentences after two death sentences were vacated

State v. Goode, __ N.C. App. __, __ S.E.2d __ (May 3, 2011). Citing, *State v. Oliver*, 155 N.C. App 209 (2002), the court held that no violation of G.S. 15A-1335 occurred when, after the defendant’s two death sentences for murder were vacated, the trial judge imposed two consecutive life sentences. [Author’s note: for a detailed discussion of G.S. 15A-1335, see the publication posted here: <http://www.sog.unc.edu/programs/crimlaw/aoj200303.pdf>].

Defense counsel did not commit *Harbison* error; *Harbison* does not apply to habitual felon proceedings

State v. Womak, __ N.C. App. __, __ S.E.2d __ (April 19, 2011). (1) Defense counsel did not commit a *Harbison* error during the habitual felon proceeding by admitting that the defendant had pled guilty to three felonies. Although defense counsel admitted the defendant’s prior convictions, he never argued that the jury should find that the defendant had attained habitual felon status and in fact suggested that the jury take certain mitigating factors into account. (2) Even if such an admission occurred, the defendant would not be entitled to relief because *Harbison* does not apply to a habitual felon proceeding.

Ninth Circuit Court of Appeals improperly granted habeas relief on claim of penalty-phase ineffective assistance of counsel; trial court did not err in not holding evidentiary hearing on denying defendant’s motion to withdraw plea

Cullen v. Pinholster, 563 U.S. __ (April 4, 2011). In a capital case, the Ninth Circuit Court of Appeals improperly granted the defendant habeas relief on his claim of penalty-phase ineffective assistance of counsel. The defendant and two accomplices broke into a house at night, killing two men who interrupted the burglary. A jury convicted the defendant of first-degree murder, and he was sentenced to death. After the California Supreme Court twice denied the defendant habeas relief, a federal district court held an evidentiary hearing and granted the defendant relief under 28 U.S.C. § 2254 on grounds of “inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing.” Sitting en banc, the Ninth Circuit affirmed, holding that the California Supreme Court unreasonably applied *Strickland v. Washington*, 466 U. S. 668 (1984), in denying the defendant’s claim of penalty-phase ineffective assistance of counsel. The U.S. Supreme Court reversed, concluding that the defendant

failed to show that the state court unreasonably concluded that defense counsel's penalty phase "family sympathy" strategy (that consisted principally of the testimony of the defendant's mother) was appropriate. Likewise, the defendant failed to show that the state court unreasonably concluded and that even if counsel's conduct was deficient, no prejudice occurred, given that the new evidence largely duplicated the mitigation evidence presented at trial and the extensive aggravating evidence. Trial court did not err in not holding evidentiary hearing on denying defendant's motion to withdraw plea.

Defendant failed to prove district attorney was liable under 42 U.S.C. § 1983 for failure to train prosecutors based on a single *Brady* violation

Connick v. Thompson, 563 U.S. __ (Mar. 29, 2011). A district attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train based on a single *Brady* violation. The Orleans Parish District Attorney's Office conceded that, in prosecuting the defendant for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over under *Brady*. The defendant was convicted. Because of that conviction, the defendant chose not to testify in his own defense in his later murder trial. He was again convicted and spent 18 years in prison. Shortly before his scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory and both convictions were vacated. The defendant then sued the district attorney's office for damages under § 1983, alleging that the district attorney failed to train prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure at issue. The jury awarded the defendant \$14 million, and Fifth Circuit affirmed. Reversing, the Court, in an opinion authored by Justice Thomas, clarified that the failure-to-train claim required the defendant to prove both that (1) the district attorney, the policymaker for the district attorney's office, was deliberately indifferent to the need to train prosecutors about their *Brady* disclosure obligation with respect to the type of evidence at issue and (2) the lack of training actually caused the *Brady* violation at issue. The Court determined that the defendant failed to prove that the district attorney was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. The Court noted that a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Here, however, no such pattern existed; the Court declined to adopt a theory of "single-incident liability." Justice Scalia concurred, joined by Justice Alito, writing separately only to address several issues raised by the dissent. Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan.

No error in denying defendant's post-sentencing motion for appropriate relief to withdraw a plea without holding an evidentiary hearing

State v. Shropshire, __ N.C. App. __, 708 S.E.2d 181 (Mar. 15, 2011). The trial court did not err by denying the defendant's post-sentencing motion to withdraw a plea without an evidentiary hearing. The defendant's motion was a motion for appropriate relief. Evidentiary hearings are required on such motions only to resolve issues of fact. In this case, no issue of fact was presented. The defendant's statement that he did not understand the trial court's decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that "the court will determine whether the sentences will be served concurrently or consecutively." Furthermore, nothing in the record indicates that the defendant's plea was not the product of free and intelligent choice. Rather, it appears that his only reason for moving to withdraw was his dissatisfaction with his sentence.

State prisoner seeking DNA testing of crime-scene evidence may assert claim under 42 U.S.C. § 1983

Skinner v. Switzer, 562 U.S. ___ (Mar. 7, 2011). In a 6-to-3 decision, the Court held that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert a claim under 42 U.S.C. § 1983. However, the Court noted that *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. ___ (2009), severely limits the federal action a state prisoner may bring for DNA testing. It stated: "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." Slip Op. at 2 (citation omitted).

Court affirmed denial of defendant's motion for appropriate relief stemming from discovery abuses

State v. Long, ___ N.C. ___, 705 S.E.2d 735 (Feb. 4, 2011). With one justice taking no part in consideration of the case and with the other members of the court equally divided, the court affirmed, without opinion, a ruling by the trial court on the defendant's motion for appropriate relief. The case was before the court on writ of certiorari to review the trial court's order. The question presented, as stated in the defendant's appellate brief, was: "Whether the trial court erred in finding in a capitally-charged case that failing to disclose exculpatory SBI reports, testifying falsely as to what evidence was brought to the SBI and failing to preserve irreplaceable biological evidence did not violate due process?"

Court reversed Ninth Circuit holding that counsel was deficient for failing to present expert testimony on forensic evidence

Harrington v. Richter, 562 U.S. ___ (Jan. 19, 2011). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that his counsel was deficient by failing to present expert testimony on serology, pathology, and blood spatter patterns; the defendant had asserted that this testimony would have confirmed his version of how the events in question occurred. The Court concluded that it was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence under the circumstances, which included, among other things, the fact that counsel had reason to question the truth of the defendant's version of the events. The Court also rejected the Ninth Circuit's conclusion that counsel was deficient because he had not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in response. The Court concluded that although counsel was mistaken in thinking the prosecution would not present forensic testimony, the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, the Court concluded, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt. Finally, the Court concluded that it would not have been unreasonable for the state court to conclude that the defendant failed to establish prejudice.

Court reversed Ninth Circuit holding that counsel was ineffective by failing to file a motion to suppress the defendant's confession

Premo v. Moore, 562 U.S. ___ (Jan. 19, 2011). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that counsel was ineffective by failing to file a motion to suppress the defendant's confession to police before advising him to accept a plea offer. Counsel had explained that he discussed the plea bargain with the defendant without first challenging the confession to the police because suppression would serve little purpose given that the defendant had made full and admissible confessions to two other private individuals, both of whom could testify. The state court would not have been unreasonable to accept this explanation.

Furthermore, the Court held, the state court reasonably could have determined that the defendant would have accepted the plea agreement even if his confession had been ruled inadmissible. Justice Kagan did not participate in the consideration or decision of the case.

Clerical error where trial court designated wrong offense class on judgment

State v. Dobbs, __ N.C. App. __, 702 S.E.2d 349 (Dec. 7, 2010). The court treated as a clerical error the trial court's mistake on the judgment designating an offense as Class G felony when it in fact was a Class H felony. The court remanded for correction of the clerical error.

**2011 Legislation Affecting Criminal Law and Procedure
for**

Summer 2011 Judicial and Criminal Justice Conferences

Includes legislation through June 4, 2011

Below is a summary of enacted legislation affecting criminal law and procedure. To obtain the text of the legislation, click on the link provided or go to the North Carolina General Assembly's website, www.ncleg.net. (Once there, click on session laws on the right side of the page and then 2011-2012 Session under Browse Session Laws.) Be careful to note the effective date of all new legislation.

1. **S.L. 2011-2 (H 18): Clarification of effective date of law authorizing restoration of firearms rights.**
The act amends the effective date of [S.L. 2010-108](#) (H 126), which allows people convicted of nonviolent felonies to apply for restoration of the right to possess firearms and creates an exception from firearms restrictions for white collar felony convictions. See John Rubin & Jim Drennan, *2010 Legislation Affecting Criminal Law and Procedure* (Aug. 2010), available at <http://dailybulletin.unc.edu/summaries10/documents/Criminal%20Law%20and%20Procedure%20Legislation%202010.pdf>. The 2010 act contained a standard effective-date clause used in criminal law legislation—that is, that the act applied to offenses committed on or after a particular date, in this instance February 1, 2011. This wording created some question whether the restoration procedure and exception applied to a person who committed an offense before that date. The 2011 amendment clarifies that the restoration procedure and exception takes effect February 1, 2011. Thus, whether the offense date is before or after February 1, a person is eligible for restoration of firearm rights if he or she was convicted of a nonviolent felony as defined in G.S. 14-415.4, completed his or her sentence at least twenty years ago, and otherwise meets the requirements for restoration. The act is effective March 5, 2011.
2. **S.L. 2011-6 (H 3): Good faith exception to exclusionary rule for violations of state law.** Effective for trials and hearings commencing on or after July 1, 2011, the act amends G.S. 15A-974 to provide a good-faith exception to the exclusionary rule for violations of Chapter 15A of the North Carolina General Statutes. G.S. 15A-974 has provided that evidence must be suppressed if it is obtained as result of a substantial violation of Chapter 15A. The amended statute states that evidence shall not be suppressed for such a violation if the person committing the violation acted under the “objectively reasonable, good faith belief” that the actions were lawful. Amended G.S. 15A-974 requires the court, in determining whether evidence must be suppressed for a violation of the U.S. Constitution, N.C. Constitution, or Chapter 15A, to make findings of fact and conclusions of law.

In a section of the act not incorporated into the General Statutes, the General Assembly also requested that the N.C. Supreme Court reconsider and overrule its decision in *State v. Carter*, 322 N.C. 709 (1988). In that decision, our court held that the good faith exception to the exclusionary rule adopted by the U.S. Supreme Court for certain constitutional violations does not exist under

our state constitution.

For a more detailed analysis of both the act's application to violations of G.S. Chapter 15A and the scope of the good-faith exception to the exclusionary rule for constitutional violations, see Bob Farb, [New North Carolina Legislation on Good Faith Exception to Exclusionary Rules](http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2058f), posting to North Carolina Criminal Law: UNC School of Government Blog (Mar. 23, 2011), available at <http://sogweb.sog.unc.edu/blogs/ncclaw/?p=2058f>.

3. **S.L. 2011-12 (S 7): New controlled substance offenses.** Effective for offenses committed on or after June 1, 2011 (note that the effective date is earlier than the customary December 1 effective date for new offenses), the act adds four substances to the controlled substance schedules and creates new controlled substance offenses based on those substances, including trafficking offenses.

Additional controlled substances. Amended G.S. 90-89(5) includes three new substances as Schedule I controlled substances, which generally carry the most serious criminal penalties: 4-methylmethcathinone (also known as mephedrone); 3,4-Methylenedioxypropylvalerone (also known as MDPV); and a compound, other than bupropion, that is structurally derived from 2-amino-1-phenyl-1-propanone by modification in one of the specified ways. Amended G.S. 90-94 adds synthetic cannabinoids (as defined in new subsection (3) of G.S. 90-94) as a Schedule VI controlled substance.

New controlled substance offenses. Possession of any Schedule I controlled substance, including the above-described controlled substances, remains a Class I felony under G.S. 90-95(a)(3) and 90-95(d)(1), except that possession of one gram or less of MDPV is a Class 1 misdemeanor. Possession of synthetic cannabinoids or any mixture containing that substance are classified as follows under G.S. 90-95(a)(3) and 90-95(d)(4): a Class 3 misdemeanor for seven grams or less; a Class 1 misdemeanor for more than seven and up to 21 grams or less; and a Class I felony for more than 21 grams. Under G.S. 90-95(a)(1) and 90-95(b)(2), sale of synthetic cannabinoids is a Class H felony, and manufacture, delivery, or possession with intent to manufacture, sell, or deliver synthetic cannabinoids is a Class I felony, except the transfer of less than 2.5 grams of that substance or any mixture containing that substance for no remuneration does not constitute delivery.

New trafficking offenses. New G.S. 90-95(h)(3d) creates the offense of trafficking in MDPV, classified and punishable as follows: for 28 or more and less than 200 grams, a Class F felony with a mandatory prison term of 70 to 84 months and a minimum \$50,000 fine; for 200 or more and less than 400 grams, a Class E felony with a mandatory prison term of 90 to 117 months and a minimum \$100,000 fine; and for 400 grams or more, a Class C felony with a mandatory prison term of 225 to 279 months and a minimum \$250,000 fine. New G.S. 90-95(h)(3e) creates the offense of trafficking in mephedrone, with the same classes and punishments for the same quantities as for MDPV. New G.S. 90-95(h)(1a) creates the offense of trafficking in synthetic cannabinoids, classified and punishable as follows based on dosage units (defined as three grams of the substance or any mixture of the substance): for more than 50 and less than 250 dosage units, a Class H felony with a mandatory prison term of 25 to 30 months and a minimum \$5,000 fine; for 250 or more and less than 1250 dosage units, a Class G felony with a mandatory prison

term of 35 to 42 months and a minimum \$25,000 fine; for 1250 or more dosage units and less than 3750 dosage units, a Class F felony with a mandatory prison term of 70 to 84 months and a minimum \$50,000 fine; and for more than 3750 dosage units, a Class D felony with a mandatory prison term of 175 to 219 months and a minimum \$200,000 fine.

4. [S.L. 2011-19](#) (H 27): **SBI crime lab and related changes.** Effective March 31, 2011 except as noted below, the act adds and modifies several statutes regarding the State Bureau of Investigation (SBI) Laboratory and forensic testing. The laboratory remains a part of the SBI, but it is renamed the State Crime Laboratory (State Crime Lab) and G.S. 114-16 is revised to direct the SBI to employ a sufficient number of skilled people to render a reasonable service to the “public and criminal justice system” (was, “prosecuting officers of the State”).

Advisory board. New G.S. 114-16.1 establishes a sixteen-member North Carolina Forensic Science Advisory Board within the Department of Justice, which consists of the State Crime Lab Director and fifteen members appointed by the Attorney General. The appointments must conform to the requirements in the new statute—for example, one member must be the Chief Medical Examiner, another must be a scientist with an advanced degree and experience in forensic chemistry, and the like. The new advisory board may review State Crime Lab operations, make recommendations and, on request of the Lab Director, review analytical work, reports, and conclusions of scientists employed by the Lab. This last category of review is confidential as provided in new G.S. 114-16.1(f).

Studies and protocols on bias and error. An uncodified section of the act (that is, a provision that will not appear in the General Statutes but still has the force of law) directs the SBI to seek collaborative opportunities and grant funds for research programs on human observer bias and sources of human error in forensic examinations and directs the State Crime Lab to develop standard operating procedures to minimize potential bias and human error.

Professional certification. An uncodified section of the act requires forensic science professionals at the State Crime Lab to obtain individual certification consistent with international and ISO standards no later than June 1, 2012, unless no certification is available.

Ombudsman. An uncodified section of the act, effective July 11, 2011, creates the position of ombudsman in the State Crime Lab within the North Carolina Department of Justice. The act states that the primary purpose of the position is to work with defense counsel, prosecutorial agencies, criminal justice system stakeholders, law enforcement officers, and the general public to ensure that State Crime Lab practices and procedures are consistent with state and federal law, best forensic practices, and the interests of justice. The ombudsman must mediate complaints between the SBI and others and regularly attend meetings of the district attorneys, district and superior court judges, public defenders, Advocates for Justice, and Bar criminal law sections.

Admissibility of forensic analysis and chemical analysis of blood or urine. G.S. 8-58.20 has allowed a lab report of a written forensic analysis to be admitted without the testimony of the analyst if certain procedures are followed. The act amends the statute to add that for a forensic analysis to be admissible under that statute, it must be performed by a lab that is accredited as specified in the amended statute. The act makes similar changes to G.S. 20-139.1(c2) on the admissibility of a chemical analysis of blood or urine without the testimony of the analyst.

Discovery. Amended G.S. 15A-903(a)(1), which requires the State to make available to the defendant its complete files as defined in the statute, states that “[w]hen any matter or evidence is submitted for testing or examination, in addition to any test or examination results, all other data, calculations, or writings of any kind shall be made available to the defendant, including, but not limited to, preliminary test or screening results and bench notes.” Amended G.S. 15A-903(c) requires all public and private entities that obtain information related to the investigation of the crimes committed or the prosecution of the defendant to disclose such information to the referring prosecutorial agency for disclosure to the defendant. New G.S. 15A-903(d) makes it a Class H felony for a person to willfully omit or misrepresent evidence or information required to be disclosed under G.S. 15A-903(a)(1) or required to be provided to the State under G.S. 15A-903(c); and makes it a Class 1 misdemeanor to willfully omit or misrepresent evidence or information required to be disclosed pursuant to any other provision of “this section” (meaning G.S. 15A-903).

5. [S.L. 2011-21](#) (S 20): **Proprietary schools.** Effective July 1, 2011, the act amends several provisions regulating proprietary schools, including the definition of proprietary schools in G.S. 115D-87. Amended G.S. 115D-96 continues to make it a Class 3 misdemeanor to operate a proprietary school, under the amended definition, without a license or bond.
6. [S.L. 2011-22](#) (H 29): **Retrieval of killed or wounded big game animal.** Effective October 1, 2011, the act amends G.S. 113-291.1, which regulates the taking of wild animals and birds, to permit the retrieval of a killed or wounded big animal if done with (1) a portable light source, (2) a single dog on a leash, (3) a .22 caliber rimfire pistol, archery equipment, or handgun otherwise lawful for that hunting season, (4) from one-half hour after sunset until 11 p.m. if necessary, and (5) without use of a motorized vehicle.
7. [S.L. 2011-29](#) (S 248): **Update of archaic disability language.** Effective April 7, 2011, the act updates several provisions to update language describing disabilities (for example, the term “incompetent person” replaces “lunatic,” a person “unable to speak” replaces “dumb,” and “physically disabled” replaces “physically defective”). Affected provisions that involve criminal law and procedure are North Carolina Rule of Evidence 601 (competency of witnesses) and G.S. 14-113 (obtaining money by false representation of physical disability).
8. [S.L. 2011-37](#) (H 59): **No EMS credentials for sex offenders.** Effective April 12, 2011, the act adds G.S. 131E-159(h) providing that a person who is required to register as a sex offender under G.S. Chapter 14, Article 27A, may not be granted emergency medical services (EMS) credentials. The new statute does not require revocation of credentials for a person who currently has them, but it prohibits renewal of credentials. The new statute states that it applies to a person required to register and to a person “who was convicted of an offense which would have required registration if committed at a time when such registration would have been required by law.”
9. [S.L. 2011-42](#) (H 234): **Prospective jurors who are hearing-impaired or have other disabilities.** Effective July 1, 2011, the act revises G.S. 9-3, which describes the qualifications of prospective

jurors, to delete the requirement that a juror must be able to hear the English language; the statute continues to require that a juror understand English. The act also adds G.S. 9-6.1(b) to allow a person summoned as a juror who has a disability and wishes to be excused, deferred, or exempted to make the request without appearing in person by filing a signed statement of the ground for the request. The request must be submitted to the chief district court judge of the district, or the district court judge or trial court administrator designated by the chief district court judge, at least five business days before the date on which the person has been summoned to appear. Revised G.S. 9.6.1(a), which allows a person who is 72 years or older to make a similar request, requires submission of the request at least five business days, instead of five days, before the person's scheduled appearance.

10. **S.L. 2011-56 (S 406): Repeal of requirement of permit for crossbow.** Effective April, 28, 2011, the act revises G.S. 14-402 to eliminate the prohibition on selling, giving away, transferring, purchasing, or receiving a crossbow without a permit. The act also repeals G.S. 14-406.1, which set forth the procedure for manufacturers, wholesale dealers, and retailers to obtain a permit for the purchase and receipt of crossbows. The act does not change the permit requirements and procedures for pistols, contained in Article 52A of G.S. Ch. 14.
11. **S.L. 2011-60 (H 215): "The Unborn Victims of Violence Act/Ethen's Law."** Effective for offenses committed on or after December 1, 2011, the act adds a new Article 6A, "Unborn Victims" (G.S. 14-23.1 through 14-23.8) to G.S. Chapter 14, creating several new criminal offenses. The act repeals G.S. 14-18.2 (injury to pregnant woman). An "unborn child" is defined in new G.S. 14-23.1 as "a member of the species homo sapiens, at any stage of development, who is carried in the womb."

New G.S. 14-23.2 creates the offense of "murder of an unborn child," which can be committed in three ways. A person who unlawfully causes the death of an unborn child is guilty of a Class A felony, punishable by life without parole, if the person willfully and maliciously commits an act with the intent to cause the death of the unborn child or causes the death of the unborn child in the perpetration or attempted perpetration of any criminal offense in G.S. 14-17. A person who unlawfully causes the death of an unborn child is guilty of an offense subject to the same punishment as second-degree murder if the person commits an act causing the death of the unborn child that is inherently dangerous to human life and is done so recklessly and wantonly that it reflects disregard of life. Under new G.S. 14-23.3, a person commits the offense of "voluntary manslaughter of an unborn child," a Class D felony, if the person unlawfully causes the death of an unborn child by an act that would be voluntary manslaughter if it resulted in the death of the mother. Under new G.S. 14-23.4, a person commits the offense of "involuntary manslaughter of an unborn child," a Class F felony, if the person unlawfully causes the death of an unborn child by an act that would be involuntary manslaughter if it resulted in the death of the mother. Under new G.S. 14-23.5, a person commits the offense of "assault inflicting serious bodily injury on an unborn child," a Class F felony, if the person commits a battery on the mother of the unborn child and the child is subsequently born alive and, as a result of the battery, suffered serious bodily injury as defined in new G.S. 14-23.5(b). Under new G.S. 14-23.6, a person commits

the offense of “battery on an unborn child,” a Class A1 misdemeanor and a lesser-included offense of G.S. 14-23.5, if the person commits a battery on a pregnant woman.

The above statutes state that each of these offenses is a separate offense. An uncodified provision in the act states that a prosecution for or conviction under the act is not a bar to conviction of or punishment for any other crime committed by the defendant as part of the same conduct. New G.S. 14-23.8 states that except for an offense under G.S. 14-23.2(a)(1), which requires an intent to cause the death of the unborn child, an offense under the new article does not require proof that the defendant knew or should have known “that the victim of the underlying offense was pregnant” or that the defendant intended to cause “the death of, or bodily injury, to the unborn child.”

New G.S. 14-23.7, “Exceptions,” states that the new article shall not be construed to permit prosecution of: a lawful abortion pursuant to G.S. 14-45.1; diagnostic testing or therapeutic treatment pursuant to usual and customary standards of medical practice; and acts by a pregnant woman, including acts resulting in a miscarriage or stillbirth as defined in new G.S. 14-23.7(3)a. and b. An uncodified provision in the act states that it shall not be construed to impose criminal liability on an expectant mother who is the victim of acts of domestic violence, as defined in G.S. Chapter 50B, that cause injury or death to her unborn child.

The act contains a severability clause, providing that a finding of invalidity of any provision in the act does not affect other provisions or applications of the act that can be given effect without the invalid provision or application.

12. S.L. 2011-61 (H 219): Name change by sex offender; venue for petition to terminate registration.

The act amends several statutes to track name changes by people required to register as sex offenders. On the initial registration form, a registrant must indicate his or her name and any aliases at the time of conviction. *See* G.S. 14-208.7(b)(1a). A registrant who changes his or her name must report the change to the registering sheriff within three business days of the change. *See* G.S. 14-208.9. And, when periodically re-verifying his or her registration information, a registrant must indicate any name change. *See* G.S. 14-208.9A(a)(3)c. New G.S. 14-208.14(4a) requires the Division of Criminal Statistics to maintain its public database so as to allow access to a registrant’s name, any aliases, and any legal name changes. These provisions apply to any person who continues to be required to register on or after December 1, 2011, whether the person’s registration obligation begins before or after that date; however, a registrant is not in violation of the new requirements if the person provides the required information at the first required verification on or after December 1, 2011. Effective May 3, 2011, the act also revises G.S. 101-5 to state explicitly that the clerk of court may not grant a name change to a person required to register as a sex offender. (In 2008, the General Assembly enacted G.S. 14-202.6 and G.S. 101.6(c) to prohibit a person required to register as a sex offender from obtaining a name change under G.S. Chapter 101. *See* G.S. 14-202.6, 101-6(c); *see also* John Rubin, [*2008 Legislation Affecting Criminal Law and Procedure*](#), ADMINISTRATION OF JUSTICE BULLETIN No. 2008/06, at p. 10 (Nov. 2008), available at <http://sogpubs.unc.edu/electronicversions/pdfs/aojb0806.pdf>.)

Effective for petitions filed on or after December 1, 2011, the act revises G.S. 14-208.12A(a) on the venue for the filing of a petition to terminate registration requirements. If the reportable conviction is for an offense that occurred in North Carolina, the petition is to be filed in the district where the person was convicted of the offense. If the reportable conviction is for an offense that occurred in another state, the petition is to be filed in the district where the person resides; for out-of-state convictions, the petitioner also must notify the sheriff of the county of conviction of the petition and include an affidavit attesting to such notice and containing the mailing address and contact information of the sheriff.

13. [S.L. 2011-62 \(H 270\): Changes to conditions of probation and repeal of tolling provision.](#) Effective for people placed on probation on or after December 1, 2011, the act makes the following changes to regular conditions of probation under G.S. 15A-1343(b):

- It deletes the requirement in G.S. 15A-1343(b)(1) that the probationer remain within the jurisdiction of the court and replaces it with a requirement that the probationer remain accessible to the probation officer by making his or her whereabouts known to the officer and not leaving the county of residence or the State of North Carolina without written permission by the court or probation officer.
- It repeals G.S. 15A-1343(b)(11), which provided that “[a]t a time to be designated by the probation officer, visit with his probation officer [at] a facility maintained by the Division of Prisons.”
- It revises G.S. 15A-1343(b)(13), which deals with warrantless searches, to eliminate reference to drug testing, and adds G.S. 15A-1343(b)(16), which requires the probationer to supply a breath, urine, or blood specimen for analysis of the possible presence of prohibited drugs or alcohol when requested by his or her probation officer for purposes directly related to the probation supervision. The new subdivision also provides that the probationer may be required to reimburse the Department of Correction for the costs of a positive test.

The act also authorizes additional special conditions of probation. New G.S. 15A-1343(b1)(9b) authorizes conditions that prohibit street gang activity; new G.S. 15A-1343(b1)(9c) authorizes a condition allowing the probation officer to require the probationer to participate in Project Safe Neighborhood activities.

Last, the act repeals G.S. 15A-1344(g), which was enacted in 2009 and addressed the tolling of probation if a probationer is charged with new crimes. See Jamie Markham, [Summary and Analysis of Session Law 2009-373 \(S 920\): Probation Reform](#) at p. 8 (Aug. 4, 2009), available at http://www.sog.unc.edu/sites/www.sog.unc.edu/files/Summary%20of%20Probation%20Reform%20S%20920_0.pdf. With the repeal of G.S. 15A-1344(g) this legislative session, and the deletion in 2009 of any reference to tolling in G.S. 15A-1344(d), the probation statutes no longer contain any tolling provision for probationers charged with new crimes. Thus, the period of probation continues to run during the pendency of new criminal charges. Because the act applies to people placed on probation on or after December 1, 2011, people placed on probation before then would appear to be subject to the current tolling procedures in G.S. 15A-1344(g) for any new criminal

charges during the period of their probation.

14. [S.L. 2011-63](#) (H 316): **Jurisdiction of General Assembly special police.** Effective May 3, 2011, the act amends G.S. 120-32.2 to give General Assembly special police additional statewide powers. For example, the amended statute authorizes them to conduct a criminal investigation throughout the state of a threat of physical violence against the General Assembly, a member or staff of the General Assembly, or their immediate family. The amended statute, along with amended G.S. 120-19.2(d), also gives General Assembly special police statewide jurisdiction to serve a subpoena issued by the General Assembly or committee of the General Assembly.
15. [S.L. 2011-64](#) (S 49): **Increased penalty for speeding in school zone.** Effective for offenses committed on or after August 25, 2011, the act increases the penalty to \$250 (was, a minimum of \$25) for the infraction of speeding in a school zone under G.S. 20-141.1 and 20-141(e1).
16. [S.L. 2011-68](#) (H 407): **Elimination of safety helmet requirement for off-road ATV use.** In 2005, the General Assembly adopted various safety measures for the operation of all-terrain vehicles (ATVs), including a requirement that riders wear safety helmets and eye protection. See [S.L. 2005-282](#) (S 189). Effective for offenses committed on or after October 1, 2011, the act revises G.S. 20-171.19 to require the wearing of a helmet and eye protection on public streets and highways and public vehicular areas only. The act adds a new subsection (a1) to G.S. 20-171.19 requiring a rider under age 18 to wear a helmet and eye protection while operating an ATV off a public street or highway or public vehicular area. Thus, riders 18 years of age or older are not required to wear this safety equipment during off-road use. G.S. 20-171.22(c) continues to allow riders 16 years of age or older to operate ATVs without wearing helmets or eye protection on ocean beach areas where ATVs are permitted.
17. [S.L. 2011-95](#) (H 222): **Electric vehicles in carpool lanes.** Effective May 26, 2011, the act amends G.S. 20-146.2 to allow a plug-in electric vehicle, as defined in new G.S. 20-4.01(28a), to travel in a high occupancy vehicle lane regardless of the number of passengers in the vehicle as long as the vehicle is able to travel at the posted speed limit.
18. [S.L. 2011-100](#) (H 280): **County law enforcement service district.** Effective May 31, 2011, the act amends G.S. 153A-301(a)(10) to authorize a board of county commissioners to establish a law enforcement service district if the population of the county is 900,000 or more (was, 500,000), less than 10% of the population of the county is in an unincorporated area, and the county has interlocal agreements with the municipalities in the county for the provision of law enforcement services in the unincorporated areas of the county. This statute has allowed for a single police department in Mecklenburg County, covering the county and the city of Charlotte. The changes in the population requirements continue to limit application of the statute to Mecklenburg County.