

**Criminal Law Case Update
N.C. Magistrate's Spring Conference
2021**

Cases covered include reported decisions from the North Carolina appellate courts and the Fourth Circuit Court of Appeals decided between June 5, 2020, and December 31, 2020. The summaries were prepared by School of Government faculty and staff. To view all of the summaries, go to the [Criminal Case Compendium](#) or the [North Carolina Criminal Law Blog](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

Investigatory Stops

Based on the facts of this case, an officer had reasonable suspicion to believe the defendant was using a cell phone while driving in a manner proscribed by law

State v. Dalton, ___ N.C. App. ___, 850 S.E.2d 560 (Oct. 20, 2020). A police officer stopped the defendant for suspected texting while driving. When the officer returned to his vehicle to check on the defendant's identity, the defendant fled. (1) Before his trial on charges of texting while driving and felony fleeing to elude, the defendant moved to suppress the evidence obtained during the stop. At the suppression hearing, the officer testified that he did not stop the defendant for merely using the phone, but rather for using it in a manner that he reasonably believed ran afoul of G.S. 20-137.4A(a), North Carolina's prohibition on texting and emailing while driving. The officer testified that the defendant was using and handling the phone in a manner more consistent with texting or reading text messages than with using a mapping system. The trial court denied the defendant's motion and the defendant was convicted of felonious fleeing to elude. On appeal, the defendant argued that the trial court committed plain error by concluding that the officer was justified in stopping his car solely based on his observation that the operator was using a cell phone while driving. The Court of Appeals disagreed, holding that under the specific facts of this case, which included additional indicia of criminal activity beyond mere phone use, the trial court did not err by finding that the officer had reasonable, articulable suspicion to believe that the defendant was using the phone in a manner proscribed by law. The Court emphasized that its holding should not be viewed as establishing a test for meeting the reasonable suspicion requirement in other texting while driving cases.

Law enforcement officers exceeded the scope of the implied license to conduct a knock and talk in violation of the Fourth Amendment and the defendant's motion to suppress should have been granted

State v. Fall, ___ N.C. App. ___ (Dec. 15, 2020). The trial court erred in denying the defendant's motion to suppress because the officers did not lawfully have a right of access to the contraband seized. The Court of Appeals considered the following factors to distinguish a knock and talk from a search: "how law enforcement approach[ed] the home, the hour at which they did so, and whether there were any indications that the occupant of the home welcomed uninvited guests on his or her property." Slip op. at

13. In short, the Court asks whether the behavior of law enforcement is in line with something a “reasonably respectful citizen” (or a Girl Scout) would do. *Id.* at 12, 16.

After receiving an anonymous drug complaint and obtaining information that the defendant was a felon in possession of a firearm, Gastonia police decided to conduct a knock and talk at the defendant’s residence to investigate. After considering the factors mentioned above, the Court held that the officers did not act like reasonable, respectful citizens. The officers here carried out the knock and talk at night, a time when members of society do not expect to be called upon at their homes unexpectedly and a practice not customary for the officers. Additionally, the officers parked their vehicles in an adjacent lot, approached the defendant’s home in the dark, dressed in dark clothing, and cut through trees, rather than parking in the driveway or street and proceeding towards the home along the paved path. The officers also passed directly by a “plainly visible no trespassing sign” which indicated the defendant’s yard was not open to public visitors. *Id.* at 20. Based on these factors, the Court of Appeals determined that the conduct of the officers implicated the Fourth Amendment because they “strayed beyond the bounds of a knock and talk; therefore, the seizure of evidence based on their trespassory invasion cannot be justified under the plain view doctrine.” *Id.* at 23. The motion to suppress therefore should have been granted.

Justice Berger dissented and would have affirmed the trial court’s ruling on the basis that the officers acted within the scope of their implied license to approach the defendant’s home.

Searches

Trial court did not adequately weigh factors necessary to determine whether the public interest in the checkpoint at which defendant was stopped outweighed its infringement on the defendant’s Fourth Amendment privacy interest.

State v. Cobb, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 31, 2020); *temp. stay allowed* ___ N.C. ___, 852 S.E.2d 347 (Jan. 19, 2021). The defendant was charged with driving while impaired after being stopped at a checkpoint on Highway 27 in Harnett County. She moved to suppress the evidence on the basis that the checkpoint violated her Fourth Amendment rights. The trial court denied the motion, and the defendant pled guilty preserving her right to appeal the denial of the motion to suppress.

The Court of Appeals, over a dissent, determined that the trial court did not adequately weigh the factors necessary to judge the reasonableness and hence, the constitutionality, of the checkpoint. Those factors are: (1) the gravity of the public concern served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional.

As for the first factor, the Court of Appeals determined that the trial court failed to make findings that assessed the importance of this particular checkpoint stop to the public. While the trial court made ample findings, in the Court’s view, that the checkpoint’s primary purpose (detecting violations of the state’s motor vehicle laws) was lawful, those findings did not substitute for findings that the checkpoint furthered the public concern. As for the second factor, the Court of Appeals noted that while the trial court made pertinent findings regarding the location of the checkpoint, the time it occurred and its duration, it failed to consider other relevant factors such as whether it “was set up on a whim,” had a

predetermined start and end time, why the time was chosen, and why its location was chosen (beyond the finding that it was a major thoroughfare that was heavily traveled at times). The Court of Appeals determined that the trial court thoroughly considered the final factor; nevertheless, the deficiencies related to the findings on the first two factors prevented it from meaningfully applying the three-prong test.

Finally, the appellate court declined to consider whether the trial court erred in concluding that the checkpoint complied with statutory requirements as that issue was not preserved for review.

Judge Stroud dissented from the majority's resolution of the constitutional issue, expressing her view that the trial court made findings of fact sufficient to permit appellate review and that it correctly addressed the three prongs of the balancing test. The dissent would have held that the trial court's findings supported the conclusion that the checkpoint was reasonable.

(1) Presence of pocketknife in center console did not support *Terry* frisk; (2) Defendant's act of fleeing during an illegal search was not an intervening circumstance supporting application of attenuation doctrine; denial of motion to suppress reversed

State v. Duncan, ___ N.C. App. ___, 846 S.E.2d 315 (July 7, 2020). The defendant was stopped by a Charlotte-Mecklenburg police officer for a broken taillight and a passenger seatbelt violation. A second officer arrived shortly after the stop. The stopping officer saw an approximately five-inch closed pocketknife in the center console between the driver and passenger. The officer then asked the defendant to step out of the car so the knife could be secured and to check the defendant for weapons. The defendant exited the car and stated that having the knife was not a crime. The officer agreed, stating he was acting out of officer safety. The defendant stated he was not armed and did not consent to a frisk. When the officer said he was "just going to pat [Defendant] down," the defendant said, "all right," and raised his arms. The officer felt a bulge the size of a "large grape" near the defendant's exterior coat pocket but could not locate the item within the pocket. The officer suspected the item was marijuana and asked the defendant about it. The defendant replied that it was an item he purchased from a store. When asked to remove the item, the defendant produced several items wrapped in plastic, telling the officer, "It's not illegal, man." The officer then grabbed the bulge from the outside, lifted the defendant's coat, and reached inside an interior pocket. The defendant repeatedly asked for a supervisor on scene and protested: "This is not a *Terry* frisk, man. You're illegally searching me." At one point the defendant pushed the officer's arm away. The officer did not remove his hands from the defendant's pockets and the defendant eventually fled, falling nearby. As the defendant got up from the fall, the officer observed the defendant "digging in his waistband." The defendant was then tased and arrested at gunpoint. A bag was found nearby containing crack and powder cocaine. More crack, marijuana, and cash were found on the defendant. The defendant stated the drugs were for personal use during arrest processing. He was charged with possession with intent to sell or deliver cocaine and possession of cocaine and moved to suppress.

The trial court denied the motion. It found the frisk was not based on reasonable suspicion and was therefore unconstitutional, but the defendant's act of fleeing sufficiently attenuated that violation from the discovery of evidence. The defendant was convicted of two counts of possession of cocaine at trial and appealed. A divided Court of Appeals reversed.

(1) The State argued that the frisk was justified by the presence of the knife in the center console—

since the defendant was armed, he was dangerous—and that the trial court erred in concluding otherwise. The majority disagreed. Two officers were present, the defendant was stopped for equipment violations only, and the stop occurred in the middle of the day in uptown Charlotte near the courthouse. The defendant was generally cooperative, did not attempt to conceal the knife, got out of the car (and away from the knife) upon request, and did not otherwise act suspiciously. These facts were “entirely inapposite” from cases where police had “reason to suspect the defendant possessed and concealed a dangerous weapon on their person, *coupled* with behavior giving rise to a suspicion the defendant may be dangerous.” Slip op. at 12-13 (emphasis in original) (distinguishing *State v. Malachi*, ___ N.C. App. ___, 825 S.E.2d 666 (2019)). The trial court therefore did not err in concluding the frisk was unconstitutional.

(2) Under the attenuation doctrine, evidence that would be subject to suppression via the exclusionary rule is nonetheless admissible when the connection between the illegal action of law enforcement and the evidence is “remote or has been interrupted by some intervening circumstance.” See *Utah v. Strieff*, ___ U.S. ___, 136 S. Ct. 2056 (2016). Courts must examine the closeness in time between the police illegality and the discovery of the evidence, any intervening circumstances, and the “purpose and flagrancy of the official misconduct” when deciding whether the attenuation exception applies. *Duncan* Slip op. at 16 (citation omitted). As to the first factor, *Strieff* held that only the passing of “substantial time” between the police misconduct and the discovery of evidence favors attenuation. Because the discovery of evidence here occurred within minutes of the illegal frisk, this factor weighed against attenuation. As to the second factor, the trial court found that the defendant committed the crime of resisting a public officer by fleeing the encounter—officers then had probable cause to arrest for that offense and to search incident to the arrest, which was a sufficient intervening circumstance. The Court of Appeals disagreed, finding that even if the frisk was within the mission of the stop, the officer’s search of the defendant’s pocket for suspected marijuana was not. “Because the traffic stop was unlawful at the point of [the officer’s] unconstitutional search, the defendant had ‘the right to resist [the] unlawful arrest.’” *Id.* at 21. The court rejected the State’s contention that the defendant could have resisted the search by lesser means, pointing out that the defendant repeatedly asked for a supervisor, repeatedly objected to the search, and tried to remove the officer’s hand from his pocket before fleeing. Thus, the defendant’s flight did not constitute a crime or intervening circumstance weighing in favor of attenuation. The court observed that the final factor, the purpose and flagrancy of law enforcement misconduct, was the most significant factor in the analysis. The trial court found the officers acted in good faith and that this supported application of the attenuation doctrine. The majority again disagreed. “Instead of taking the opportunity—indeed, at Defendant’s invitation—to deescalate the situation, [the officer] proceeded with the flagrantly unconstitutional search.” *Id.* at 26. These “extraordinary facts” weighed against attenuation and in favor of suppression. The trial court’s order denying the motion to suppress was therefore reversed and a new trial ordered.

Judge Tyson dissented. He would have found that the frisk was justified and that attenuation applied to the extent the search became illegal, as well as other grounds supporting the denial of the motion.

DPS policy of performing searches of the homes of post-release supervisees was not supported by statute; denial of motion to suppress reversed

State v. McCants, ___ N.C. App. ___ (Dec. 31, 2020). In this Guilford County case, the defendant was on post-release supervision (PRS) for a previous felony. The Department of Public Safety deemed him to be a “high-risk offender” and a “validated gang member,” and thus included him in a May 2017 search operation conducted jointly with other state and federal law enforcement agencies. During that

operation, officers searched the defendant's residence and found a firearm in his bedside table, which led to a new criminal charge for possession of firearm by a felon. In response to the new criminal charge the defendant moved to suppress the handgun as the fruit of an illegal warrantless search, arguing that a warrantless search of his residence was unconstitutional under the federal and state constitutions in that it was not authorized by statute or as a matter of consent.

The trial court denied the motion to suppress, but the Court of Appeals reversed, agreeing that a warrantless search of the defendant's home violated both the federal and state constitutions. The court distinguished *Samson v. California*, 547 U.S. 843 (2006), a case in which the Supreme Court upheld a warrantless search of a California parolee, limiting the reach of that case to situations in which the supervisee *chooses* supervision in the community (and its attendant conditions) over imprisonment. In North Carolina, defendants do not choose post-release supervision; to the contrary, by statute they may not refuse it. G.S. 15A-1368.2(b). Moreover, the statutory search condition applicable to post-release supervisees, G.S. 15A-1368.4(e)(10), allows searches only of the supervisee's person, not of his or her premises. The Court of Appeals next rejected the State's argument that the search was valid under the "catch-all" provision of G.S. 15A-1368.4(c), which allows the Post-Release Supervision and Parole Commission (the Commission) to impose conditions it believes reasonably necessary to ensure a supervisee will lead a law-abiding life. Applying the rule of statutory construction that the specific controls the general, the court took the existence of a specific statutory search condition for PRS limited to searches of the *person* as an indication that the General Assembly did not intend to grant the Commission general authority to allow other searches by way of the catch-all provision. The court also noted that related statutes applicable to searches of post-release supervisees who are sex offenders (G.S. 15A-1368.4(b1)), probationers (G.S. 15A-1343(b)(13)), and parolees (G.S. 15A-1374(b)(11)), expressly authorize searches of a defendant's *premises* in addition to his or her person. The court viewed the omission of any similar language related to the defendant's premises in the PRS condition as a demonstration of the General Assembly's intent to limit the scope of the PRS search condition to searches of a defendant's person.

Finally, the Court of Appeals agreed with the defendant that he did not voluntarily consent to the search of his residence. The officers who conducted the search informed the defendant that the search was permitted pursuant to the terms of his post-release supervision. However, as noted above, the Commission actually lacked the statutory authority to impose that condition. Under the logic of *Bumper v. North Carolina*, 391 U.S. 543 (1968), if "consent" to a search is based upon an officer's belief that the officer has legal authority to conduct the search, but that belief turns out to be mistaken, then the purported consent is not valid. Moreover, as also noted above, the defendant had no statutory right to refuse PRS. The Court of Appeals concluded that the law could not "prejudice Defendant for agreeing to something he had no legal right to refuse." Slip op. at 64.

In the absence of valid consent or an authorizing statute, the warrantless search was presumptively unreasonable and unconstitutional, and the trial court thus erred by denying the defendant's motion to suppress the firearm and other evidence found during the search. The Court of Appeals reversed the trial court's order denying the motion suppress, vacated the judgment entered pursuant to the defendant's plea, and remanded the matter for additional proceedings.

Search warrant affidavit was misleading and remaining portions of affidavit failed to establish probable cause; denial of motion to suppress reversed

State v. Moore, ___ N.C. App. ___ (Dec. 15, 2020). A Jones County deputy applied for a search warrant of defendant's residence. In his affidavit in support, the deputy represented that he had observed drug transactions at the defendant's residence. In fact, all the drug transactions had taken place away from the defendant's home. The defendant was charged with marijuana offenses following execution of the search warrant and moved to suppress. He alleged the warrant lacked probable cause and sought a *Franks* hearing to establish false and misleading statements in the affidavit. The trial court first held a hearing on probable cause and determined it existed based on the allegations in the affidavit that a drug transaction had been observed on the defendant's property. It then turned to the *Franks* issue and granted the defendant a hearing on the matter. The deputy-affiant testified that none of the buys occurred on the defendant's property and that he was aware of this at the time he wrote the affidavit. The trial court denied the *Franks* motion as well, finding that the deputy's statements were not false or misleading. The defendant pled guilty and appealed.

Where the defendant shows by a preponderance of evidence that false or misleading statements were intentionally made, or that such statements were made in reckless disregard of the truth, those portions of the affidavit must be excised from the affidavit. The affidavit will then be examined to determine whether the remaining portions establish probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). Here, the trial court's findings at the *Franks* hearing were not supported by the evidence. In its initial ruling on the probable cause issue, "the trial court itself was misled by the statements in the affidavit." *Moore* Slip op. at 16. In the words of the court:

Contrary to the trial court's conclusion, [the officer's] statements in his affidavit indicating that the alleged controlled drug buys and meetings between 'Matt' and the informant took place at 133 Harriet Ln. were false and his material omissions regarding the actual locations of the drug buys and meetings were misleading. *Id.* at 17.

Striking the false statements from the affidavit, the remainder of the allegations were insufficient to establish a nexus to the defendant's residence supporting a finding of probable cause. They failed to establish that drugs were sold on or from the defendant's residence and failed to allege any basis to believe the informant was reliable, among other deficiencies. The trial court's order denying the motion to suppress was therefore reversed, the defendant's plea vacated, and the matter remanded for further proceedings.

Judge Tyson dissented and would have affirmed the trial court.

Right to Counsel

The *Harbison* rule applies to situations where defense counsel makes an implied admission of the defendant's guilt to the jury

State v. McAllister, 375 N.C. 455 (Sept. 25, 2020). The rule of *State v. Harbison*, 315 N.C. 175 (1985) that a criminal defendant suffers a per se violation of the right to effective assistance of counsel when counsel concedes the defendant's guilt to the jury without the defendant's prior consent applies to situations involving an implied admission. The defendant was charged with habitual misdemeanor assault based on an underlying offense of assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. During a recorded interview with police that was played for the jury, the defendant made inculpatory statements indicating that he had "pushed [the victim]," was

in a “tussle” with her, had “backhanded” and “smacked” her, and that she was visibly injured as a result. During closing argument, defense counsel referenced these statements and referred to them as admissions while arguing that the jury should set aside its negative feelings about the defendant arising from that behavior to see that there was no basis for convicting him of rape, sexual offense, and assault by strangulation. The jury found the defendant guilty of assault on a female and not guilty of all other charged offenses. Following an extensive review of its precedent flowing from *Harbison*, the court explained that while this was not a case where defense counsel expressly asked the jury to find the defendant guilty of a specified offense, *Harbison* violations are not limited to such situations and also occur in situations where counsel “impliedly concedes his client’s guilt without prior authorization.” The court said that counsel’s argument to the jury in this case was “problematic for several reasons,” including his attestations to the accuracy of the defendant’s admissions, his reminder to the jury that the victim was “hurt,” and counsel’s own opinion that “God knows he did.” The court further noted that counsel specifically asked the jury to return a not guilty verdict for every charged offense except assault on a female, and characterized this conspicuous omission as implicitly conceding the defendant’s guilt on that charge in violation of *Harbison*. The court concluded by emphasizing “that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence,” and remanded the case for a determination of whether the defendant knowingly consented in advance to the admission.

(1) Trial court’s findings were insufficient to resolve ineffective assistance of counsel claim for failure to advise of immigration consequences and required remand for further hearing; (2) Where the trial court failed to analyze voluntariness of plea as instructed in earlier remand, the matter was again remanded for consideration of that issue

State v. Jeminez, ___ N.C. App. ___ (Dec. 15, 2020). In this Stokes County case, the defendant was an undocumented Mexican citizen living in North Carolina. In 2010, he was charged with felony drug offenses and pled guilty. Defense counsel advised the defendant that there “may” be immigration consequences as a result. In 2017, he was arrested by immigration authorities and filed a motion for appropriate relief (“MAR”), alleging ineffective assistance of plea counsel under *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that when immigration consequences stemming from a criminal conviction are clear, defense counsel must correctly advise the defendant of those consequences as a matter of effective assistance of counsel). The defendant argued that his drug conviction clearly made him ineligible for cancellation of removal proceedings, subject to mandatory detention, and permanently inadmissible to the United States under federal law. He asserted that he would have not pled guilty but for the erroneous advice of counsel.

The trial court initially denied the MAR without hearing. The Court of Appeals granted certiorari and unanimously reversed, directing the trial court to conduct a hearing and determine whether the defendant’s plea was knowing and voluntary and whether the defendant received ineffective assistance of counsel. On remand, the trial court again denied the MAR following an evidentiary hearing. It determined that while trial counsel’s advice was objectively unreasonable, the defendant (as a person eligible for deportation with or without a criminal conviction) could not demonstrate prejudice. The trial court did not address whether the plea was knowing and voluntary. The defendant again sought appellate review, and the Court of Appeals again reversed.

Regarding deportability based on the drug conviction, the relevant federal statute (8 U.S.C. § 1227(a)(2)(B)(i)) did not apply to the defendant. That statute covers people lawfully admitted into the county who are convicted of a drug crime, and the defendant was never lawfully admitted. As such,

there could be no deficient performance by trial counsel in failing to advise on the impact of this statute, and the trial court correctly determined that the defendant could not show prejudice.

The defendant also pointed to the federal statute imposing mandatory detention for aliens convicted of a drug offense (8 U.S.C. § 1226(c)(1)(A)) as basis for the ineffective assistance claim. That argument was not raised on appeal and was deemed abandoned.

However, the federal statute rendering one convicted of a drug offense ineligible for cancellation of removal (8 U.S.C. § 1229b(b)(1)) may have applied to the defendant. The matter was remanded to the trial court for it to consider the potential availability of cancellation of removal for the defendant. If the defendant can demonstrate that he would have qualified for cancellation of removal absent the conviction, then the application of that statute was “truly clear,” and trial counsel would have had a duty to correctly advise on its operation. If the trial court finds that such deficient performance occurred, it would then need to determine prejudice by analyzing whether the defendant would have refused to plead guilty and gone to trial but for the erroneous advice.

The drug conviction also clearly made the defendant permanently inadmissible to the county under 8 U.S.C. § 1182(a)(2)(A)(i)(II), and trial counsel’s failure to advise on this point was deficient. On remand, the trial court was instructed to consider prejudice by examining the impact of this erroneous advice on the defendant’s decision to plead guilty.

(2) The earlier remand by the Court of Appeals had directed the trial court to consider both whether the defendant’s plea was knowing and voluntary, and whether the defendant received ineffective assistance of counsel. The trial court failed to consider the voluntariness of the plea and was again directed to make findings and resolve that claim on remand.

Trial court erred in failing to adequately investigate potential conflict of interest; remand for hearing to determine whether actual conflict existed

State v. Lynch, ___ N.C. App. ___ (Dec. 15, 2020). In this Lincoln County case, the defendant’s trial counsel also represented the City of Lincolnton. Lincolnton police officers investigated and charged the defendant and testified at his trial. After the charge conference, the defendant expressed concerns about his attorney’s potential conflict of interest. Trial counsel responded that he had not communicated with the police department about the case and that he believed no conflict of interest existed. The defendant acknowledged he had been aware of this issue for at least one year. When asked by the trial court if he wished to question his attorney on the issue, the defendant declined. The trial court made no factual findings or legal conclusions on the matter. The jury returned guilty verdicts and the defendant appealed, alleging ineffective assistance of counsel based on his trial counsel’s conflict of interest.

The defendant’s right to counsel includes the right to conflict-free representation. Looking to the Rules of Professional Conduct for guidance, the court observed:

[A] conflict of interest that cannot be waived arises where law enforcement officers testify against a defendant and the defendant’s appointed counsel also advises the officers’ department or its members and, in effect, represents the officers who are prosecuting witnesses against the defendant. Slip op. at 8.

The trial court erred in failing to investigate the potential conflict of interest claim more thoroughly. While trial counsel represented to the court that he had no contact with the police department about this case, “the trial court failed to determine the extent to which [the defense attorney’s] role as city attorney required him to advise or represent the Lincoln Police Department or its individual officers.” *Id.* This information was necessary to determine whether a conflict existed. The trial court also erred in placing the burden on the defendant to ask questions about the potential conflict:

[W]hen a trial court is made aware of a possible conflict of interest prior to the conclusion of a trial, ‘the trial court must ‘take control of the situation.’ Where the trial court ‘knows or reasonably should know’ of ‘a particular conflict,’ that court must inquire ‘into the propriety of multiple representation.’ *Id.* at 5 (citations omitted).

The matter was therefore remanded for the trial court to conduct a proper inquiry into the potential conflict of interest. If the trial court determines that defense counsel actually represented or advised the police department or its officers “at any relevant time,” the defendant would be entitled to a new trial based on the non-waivable conflict of interest. If no conflict of interest is found to have existed, the defendant’s convictions will remain intact.

Speedy Trial

A six-year delay from the defendant’s arrest until his trial violated his right to a speedy trial when the State failed to present valid reasons for the delay.

State v. Farook, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 20, 2020), *temp. stay allowed* ___ N.C. ___, 849 S.E.2d 47 (Nov. 6, 2020). In June 2012, the defendant was driving a vehicle that collided with a motorcycle, killing two victims. He was initially charged in 2012 with felony death by vehicle, reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in death. His first appointed lawyer withdrew in 2012, and his second appointed lawyer withdrew in 2017. Shortly thereafter in 2017, he was indicted for two counts of second-degree murder and attaining the status of violent habitual felon. In 2018, the defendant’s third lawyer filed a motion to dismiss on speedy trial grounds. The trial court denied the motion and in October 2018 the defendant was tried, convicted, and sentenced to life without parole. On appeal, the defendant argued that the six-year delay between his initial charge and his trial violated his right to a speedy trial under the federal and state constitutions. Analyzing his claim under the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the Court of Appeals agreed. As to the first factor, the length of the delay, the Court held that the six-year delay here was clearly sufficient to create a presumption of prejudice to the defendant. As to the second factor, the reason for the delay, the Court first noted that the trial court did not properly recognize that in light of the presumption raised by the first factor, the burden shifted to the State to offer explanations for the delay. As to the substance of the information offered regarding the delay, the Court held that the trial judge plainly erred in allowing the defendant’s second lawyer to testify on behalf of the State to explain the delay when the defendant had not waived attorney-client privilege regarding his communications with that lawyer. Disregarding the evidence from that lawyer, the State offered no explanation or excuse for the delay, and thus failed to meet its burden. The Court declined to rely on factual findings from an earlier appellate case, *State v. Farmer*, ___ N.C. App. ___, 822 S.E.2d 556 (2018), regarding a “crowded docket” in Rowan County to support the State’s argument, as the record here lacked supporting evidence and in any event failed to account for more than two years of the six-year delay. As to the third factor, the defendant’s assertion of his right to a speedy trial,

the Court concluded that the factor carried little weight. And as to the final factor, prejudice, the Court concluded that the defendant's longtime imprisonment, lengthy delay before the most serious charges were even brought, and far greater sentence exposure supported his claim of prejudice, as he was unable to assist in his trial preparation and attempt to find potential witnesses and other information that would have been available earlier. Indeed, the court said, the delay was so substantial that its duration alone speaks to prejudice. The trial court erred in considering any alleged prejudice to the State due to the delay; the Sixth Amendment protects the defendant, not the State. Considering all of the *Barker* factors, the Court reversed the trial court's order denying the defendant's motion to dismiss and vacated the defendant's judgments due to a violation of his constitutional rights to a speedy trial.

Bond Forfeiture

A pretrial detainee subject to an ICE detainer who was held in custody until he was picked up by federal authorities and deported was not "released" from custody within the meaning of the bail statutes and the trial court therefore had no authority to enter a bail bond forfeiture based on the defendant's failure to appear at trial

State v. Lemus, ___ N.C. App. ___, 848 S.E.2d 239 (Aug. 18, 2020). The trial court had no statutory authority to enter a bail bond forfeiture where the defendant was not "released" from custody within the meaning of Article 26 of G.S. Chapter 15A because he was subject to an ICE detainer, was picked up by federal agents, and was deported to Mexico. In 2018, the defendant was charged with a felony and a \$100,000 secured bond was set as a condition of his pretrial release. The defendant and his surety posted the bond, but the defendant was not released. Instead, he was held for about 24 hours until ICE agents took him into custody directly from deputies from the Granville County Sheriff's Office and eventually deported him. Because he had been deported, the defendant failed to appear at trial and, consequently, the trial court entered a bond forfeiture order. The surety filed a petition for remission of forfeiture under the "extraordinary circumstances" provision of G.S. 15A-544.8(b)(2). The trial court denied the petition and the court of appeals reversed. Saying that the case was one of first impression, the court conducted plain-language statutory interpretation and summarized that analysis as follows:

The bond forfeiture statutes apply only to "a defendant who was released" under those statutes. Lemus was never released. Therefore, the trial court had no authority to conduct a forfeiture proceeding and should have granted the petition to set aside the forfeiture for that reason.

The court went on to reject various procedural and policy arguments advanced by the school board as to why the forfeiture was properly ordered.

Closing Argument

Remarks attacking the credibility of the defendant's expert witness were improper, but not so grossly improper as to impede defendant's right to a fair trial

State v. Bowman, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 3, 2020). The defendant was charged with first degree burglary after she was found inside the victims' home in the early morning hours, having taken items from their cars and placed them inside a purse belonging to one of the homeowners. The defendant appeared to be impaired at the time she was arrested. She claimed during the encounter

that, alternatively, she was an emergency medical worker, someone had chased her inside the house, and someone had invited her to the house. An expert in forensic psychology testified for the defendant that she had diagnosed the defendant with post-traumatic stress disorder, severe alcohol use disorder, severe amphetamine use disorder, and a personality disorder. The expert testified that the defendant admitted to using methamphetamine daily and that such use can result in a methamphetamine-associated psychosis which presents with delusions, paranoia, and hallucinations. The expert characterized the defendant's symptoms as congruent with this condition.

During closing argument, the prosecutor attacked the expert's credibility, stating that "psychosis is quite convenient as an excuse" and that the defendant "had Dr. James come and testify . . . with the end in mind." Slip op. at 14. The prosecutor argued to the jury that the expert was "paid by the defense, for the defense, to give good stuff for the defense" and that "[y]ou get what you put out. What you put in, you get out." *Id.* After questioning the utility of Dr. James's diagnoses of the defendant, the prosecutor remarked to the jury, "So I ask you to take that for what it is. At the end of the day, hired by the defense, for the defense, to say good things for the defense . . ." *Id.* The defendant did not object to the remarks. The court of appeals held that the prosecutor's remarks were improper because they went beyond arguing that the expert witness was potentially biased, which is permissible. Instead, the prosecution impermissibly suggested to the jury that the defendant's expert was paid to fabricate an excuse for her conduct and acts, regardless of the truth. The court explained:

By arguing that psychosis was an 'excuse,' Dr. James testified with an end in mind, Dr. James was paid "to give good stuff for the defense," and Dr. James was hired 'to say good things for the defense,' the prosecutor inappropriately suggested that Dr. James should not be believed because [s]he would give untruthful or inaccurate testimony in exchange for pay. Slip op. at 14 (citation omitted).

While these remarks were improper, the court of appeals held that in the absence of an objection by the defendant, they were not so grossly improper as to impede the defendant's right to a fair trial. The court noted that similar remarks had been held not to amount to prejudicial error. Moreover, the court said it could not conclude that the remarks were so prejudicial as to merit a new trial considering the substantial amount of evidence tending to show that the defendant had the requisite intent for first-degree burglary.

Jury Selection

Trial court's refusal to allow any questions during jury selection about issues of race, implicit bias, or police shootings of black men was prejudicial error

State v. Crump, __ N.C. __, 851 S.E.2d 904 (Dec. 18, 2020). The defendant was indicted for multiple charges of armed robbery, kidnapping, possession of firearm by a felon, assault with a deadly weapon with intent to kill, and assaulting a law enforcement officer with a firearm. The charges arose out of the robbery of an illegal poker game and the intended robbery of a second game. The second game was a set-up by one of the victims from the first game, who called 911 when the robbers arrived. Officers responding to the 911 call encountered the defendant in a car parked outside the office complex where the fake game was to be held, and a shootout ensued. The defendant was apprehended after a low-speed chase involving several law-enforcement agencies, and went to trial on all charges. Three of the charges were dismissed at trial by the court, and the jury acquitted the defendant of two others, but he

was convicted of the remaining charges and received thirteen consecutive judgments totaling 872 to 1,203 months incarceration. The defendant appealed his conviction. A more detailed summary of the facts of this case and a discussion of the Court of Appeals' holding regarding the application of the statutory felony disqualification provisions to the defendant's self-defense claims can be found here: John Rubin, [A Lose-Lose Situation for 'Felonious' Defendants Who Act in Self-Defense](#), N.C. Criminal Law Blog, May 1, 2018.

The Court of Appeals unanimously affirmed the conviction, but the state Supreme Court granted discretionary review to consider whether the trial court erred by restricting the defendant's voir dire of prospective jurors on issues of race, implicit bias, and police shootings of black men. Concluding that the "the trial court did abuse its discretion and that the trial court's improper restrictions on defendant's questioning during voir dire did prejudice defendant," the higher court reversed the conviction.

During voir dire, the trial court sustained objections to the defendant's attempts to ask prospective jurors about "the possibility that they harbored racial biases against African Americans" as well as "their awareness of a case that had recently occurred in Charlotte where a police officer shot and killed an unarmed black man." On appeal, the defense argued that the questions were relevant to determine whether jurors could be unbiased and fair, while the state argued that the questions were an improper attempt to "stake out" the jurors and secure a forecast of how they would vote. The Supreme Court acknowledged that trial courts have broad discretion to restrict the manner and extent of questioning prospective jurors but concluded that the trial court erred in this case when it "flatly prohibited" and "categorically denied" all questions about race, bias, and officer shootings of black men. The proposed questions were not an attempt to stake out the jurors, but rather an attempt to determine if any jurors had opinions or biases that would impact their ability to decide the facts of the case. Additionally, since the case involved a dispute over whether the defendant or the officers fired first, as well as what inferences to draw from the defendant's refusal to immediately surrender after the shooting, the error was prejudicial because it impacted the defendant's ability to identify and challenge any jurors who "might struggle to fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty." Because it held that the exclusion of these issues during voir dire was prejudicial error warranting reversal, the Supreme Court did not reach the remaining issue of whether there must be a causal nexus between the use of defensive force and the felonious conduct that would bar a self-defense claim under G.S. 14-51.4.

Justice Davis dissented, joined by Justices Newby and Morgan. The dissent would have held that the limited series of questions rejected by the trial court did not establish that all inquiry into issues of potential juror bias was prohibited, and also would have found that the only reason offered at trial for these questions was to gauge how jurors might assess the defendant's state of mind while fleeing the scene, rather than for the purpose of identifying potential bias on the part of the jurors as argued on appeal. The majority responded that both issues were addressed by viewing the questions in context and considering the entire record of the voir dire.

Defenses

Where the defendant presented substantial evidence of lawful possession of weapons of mass destruction, the trial court plainly erred in failing to instruct on that exception to the offense

State v. Carey, ___ N.C. App. ___, 849 S.E.2d 111 (Oct. 6, 2020). The defendant was convicted at trial of impersonating an officer and possession of a weapon of mass destruction (flashbang grenades) in Onslow County. On appeal, the Court of Appeals determined that flashbang grenades did not qualify as a weapon of mass destruction and vacated that conviction. The N.C. Supreme Court reversed on that point and remanded for the Court of Appeals to consider the defendant’s other arguments. The defendant filed a new brief with the court, arguing the trial court erred by failing to instruct the jury about the exception for lawful possession of weapons of mass destruction. See G.S. § 14-288.8(b)(3). The defendant contended that he presented evidence that he qualified for the exception as a person “under contract with the United States” and it was error to fail to instruct the jury on the exception. While the defendant challenged jury instructions in his original brief to the Court of Appeals, he did not raise this issue. He therefore asked the court to invoke Rule 2 of the Rules of Appellate Procedure to review this argument, and the court granted that request.

At trial, the defendant presented evidence that he was an active-duty U.S. Marine serving as a weapons technician, and that he came into possession of the grenades as part of his duties in that capacity. The State did not contest this evidence at trial, but argued on appeal that the defendant failed to promptly return the weapons to the Marine Corps and that the defendant was “on a detour” (and not acting in his capacity as a soldier) at the time of the offense. “Even if the State’s argument is true, this would not overcome Defendant’s properly admitted testimony and his right for the jury to resolve this issue.” *Carey* Slip op. at 8. The trial court had a duty to instruct the jury on all substantial features of the case, including the defense of lawful possession raised by the defendant’s evidence, and its failure to do so was plain error. The judgment of conviction for possession of a weapon of mass destruction was therefore vacated and the matter remanded for a new trial on that offense.

Judge Young dissented. According to his opinion, the N.C. Supreme Court’s decision remanding the case was limited to “the defendant’s remaining challenges” – those that were raised but not decided in the defendant’s original appeal to the Court of Appeals. The mandate therefore did not include new arguments that had not previously been raised at all, and Judge Young would not have considered the lawful possession argument.

The trial court properly declined to instruct on the defense of justification because undisputed trial evidence showed that the defendant continued to possess the firearm well after any potential threat had ended, despite many options for relinquishing possession

State v. Crooks, ___ N.C. App. ___, 852 S.E.2d 409 (Nov. 17, 2020). The State and the defendant’s version of events were inconsistent. For purposes of determining the sufficiency of the evidence supporting a jury instruction on justification, the Court of Appeals recounted the defendant’s version of events. The defendant was in David Harrison’s trailer drinking bourbon when Harrison suddenly stood up while only a few feet from the defendant, pulled a pistol out of his pocket, pointed it toward the wall near the defendant, and fired a shot at the wall. Before pulling out the gun, Harrison had not threatened the defendant in any way, nor did he appear angry or upset. As soon as Harrison fired the shot at the wall, the defendant grabbed the pistol from Harrison and left the trailer. The defendant went to look for Karen Tucker, who was dating his father, and who he believed would be sober and safely able to take the gun from him. When the defendant did not find Karen in her trailer, he waited with the gun in his possession, in the presence of Karen’s daughters, until Karen arrived. The defendant then gave Karen the gun.

Law enforcement officers who later arrived on the scene did not find bullet holes inside of Harrison's trailer but did find a shell casing sitting on a coffee table. The defendant was charged with a number of offenses, including possession of a firearm by a felon. At trial, the defendant requested a jury instruction on the defense of justification. The trial court denied the request, and the jury found the defendant guilty.

On appeal, the defendant argued that the trial court erred by denying his request for a jury instruction on the defense of justification. Using the test outlined in *State v. Mercer*, 373 N.C. 459, 463 (2020), the Court of Appeals determined that the evidence at trial was insufficient to establish the first factor of the test, which requires "that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury." The Court concluded that even assuming Harrison's drunken act of firing his pistol into the wall or ceiling of his house represented an "impending threat of death or serious bodily injury" to the defendant, that threat was gone once the defendant left Harrison's trailer with the gun, and the defendant did not take advantage of other opportunities, described in the opinion, to dispose of the gun. [Phil Dixon blogged about the justification defense [here](#).]

Crimes

Domestic Violence

The trial court erred by denying the defendant's motion to dismiss a charge of willfully violating a DVPO and instructing the jury on felonious breaking and entering in violation of a valid DVPO where there was no direct or circumstantial evidence that the defendant knew of the DVPO

State v. Tucker, ___ N.C. App. ___, 848 S.E.2d 265 (Aug. 18, 2020), *temp. stay allowed* 375 N.C. 499 (Sep. 4, 2020). Because there was insufficient evidence that the defendant knew of the terms of a domestic violence protective order, the trial court erred by denying the defendant's motion to dismiss a charge of violating a civil DVPO while in possession of a deadly weapon and the trial court erred by instructing the jury on breaking and entering in violation of a protective order. After being arrested for assaulting the victim, the defendant was served with an ex parte DVPO and notice of a hearing regarding whether another DVPO would be entered. The defendant did not attend that hearing and, at the time of the incident giving rise to the charges at issue, had not been served with a yearlong DVPO that was entered at the hearing in his absence. As there was no direct evidence that the defendant had actual or constructive knowledge of the DVPO that was entered at the hearing he did not attend, the trial court erred by denying his motion to dismiss the charge of willfully violating the order. Further, because the defendant did not have knowledge of the DVPO, it was plain error for the trial court to instruct the jury on felony breaking and entering in violation of a valid DVPO. Judge Murphy concurred in part and in the judgment but dissented from the majority's discussion of two unpublished cases. He would have sanctioned the State for certain misleading comments included in its brief.

Robbery and Theft Offenses

Denial of motion to dismiss affirmed where the State presented sufficient evidence to show that the defendant possessed the requisite felonious intent by using force in an effort to regain money which was the subject of an illegal transaction

State v. Cox, 375 N.C. 165 (August 14, 2020). The defendant, along with two others, went to the home of an individual to whom they paid cash to provide them with controlled substances. The individual neither obtained the illegal drugs nor returned any of the drug purchase money to the defendant. At the home of the individual, the individual was assaulted, accompanied by a demand for the return of the money. While leaving, the defendant fired a shot into the residence. The defendant was arrested and charged with first-degree burglary, conspiracy to commit robbery with a dangerous weapon, and discharging a weapon into an occupied property. At trial, the defendant moved to dismiss the charges against him for insufficiency of the evidence, and the trial court denied the motion. The defendant was found guilty on all charges.

The Court of Appeals reversed the defendant's conviction for conspiracy to commit robbery with a dangerous weapon and felonious breaking or entering. The Court of Appeals relied on *State v. Spratt*, 265 N.C. 524 (1965), and *State v. Lawrence*, 262 N.C. 162 (1964), in concluding that the defendant could not be guilty of conspiracy to commit robbery with a dangerous weapon because the defendant did not have the requisite felonious intent when attempting to take property from the individual, under a bona fide claim of right to the money which had been given on defendant's behalf. The Court of Appeals also held that the lack of felonious intent negated the defendant's ability to be convicted of the offense of felonious breaking or entering, and remanded the matter in order for the trial court to enter judgment against defendant for misdemeanor breaking or entering, which does not require felonious intent.

The Supreme Court held that the case precedent on which the Court of Appeals relied did not apply to the facts at hand. The Court concluded that "neither *Spratt*, nor *Lawrence*, nor any other case in this state has heretofore authorized a party to legally engage in 'self-help' by virtue of the exercise of a bona fide claim of right or title to property which is the subject of an illegal transaction," and therefore held that there was no error in the defendant's convictions of the offense of conspiracy to commit armed robbery with a dangerous weapon and the offense of felonious breaking or entering. [Phil Dixon blogged about the Court of Appeals decision in the case [here](#).]

Acting in Concert

(1) Where the defendant was not actively or constructively present at the time of the underlying offense, there was insufficient evidence to show the defendant acted in concert to obtain property by false pretenses; (2) The trial court did not plainly err in failing to instruct the jury on the specific misrepresentations for the obtaining property by false pretense offenses

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 31, 2020). The defendant, the former District Attorney for Person and Caldwell Counties, was tried for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The jury acquitted on one count of felony obstruction and the conspiracy count but convicted on the remaining charges (with the exception that the jury returned a verdict of guilty of misdemeanor obstruction on one of the remaining felony obstruction counts). The trial court subsequently arrested judgment on the aiding and abetting obtaining property conviction. The charges stemmed from a scheme whereby the defendant and another elected District Attorney hired each other's wives to work in each other's offices. Under this arrangement, both wives were wrongfully paid for working hours that they had not actually worked.

(1) There was insufficient evidence to support the conviction for obtaining property by false pretenses. The State alleged that the defendant acted in concert with the employee who improperly submitted work hours. Acting in concert requires the actual or constructive presence of the defendant at the scene of the crime. "A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime." Slip op. at 15 (citation omitted). Although the employee at issue worked for the defendant, she was allowed to work at her husband's office in another district. The defendant was therefore not physically present when the fraud of reporting unworked hours occurred. The State argued that the defendant was constructively present, pointing out that the fraudulent hours were approved by a supervisor at the defendant's direction. The court rejected this argument, noting that the approval of hours occurred at a much later time than when the hours were submitted. While "actual distance is not determinative, . . . the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime." *Id.* at 19 (citation omitted). Here, the defendant was not in the same county as the employee who submitted the fraudulent hours at the time they were submitted. The fact that the employee could have called the defendant for help with the crime at the time was not enough to satisfy the constructive presence element. "To hold the theory of acting in concert would be satisfied merely where 'remote assistance' is possible would broadly expand the universe of criminal conduct under this theory." *Id.* at 22. Thus, the defendant's conviction for acting in concert to obtain property by false pretenses was vacated for insufficient evidence [although the trial court was instructed on remand to reinstate the judgment previously arrested for aiding and abetting obtaining property].

(2) The trial court did not commit plain error by failing to instruct the jury on the specific misrepresentations for the obtaining property by false pretenses offenses. "[A] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds 'no variance between the indictment, the proof presented at trial, and the instructions to the jury.'" *Id.* at 34 (citation omitted). The defendant argued that the evidence showed alternative false representations that the jury could have improperly relied on in rendering its verdict of guilty for the two offenses. Reviewing the evidence, the court rejected this argument. "We hold the trial court did not err, nor plainly err, in failing to give an instruction about the misrepresentation alleged in the indictment." *Id.* at 37.

Impaired Driving

(1) Defendant failed to properly preserve for appellate review the denial of her motion to suppress; (2) The trial court did not err by denying defendant’s motion to dismiss for insufficient evidence; (3) The trial court did not err in sentencing the defendant based on a grossly aggravating factor for which the State failed to provide the statutorily required notice

State v. McGaha, ___ N.C. App. ___, 851 S.E.2d 659 (Nov. 3, 2020). The defendant was stopped by a state trooper who saw her driving erratically. The defendant smelled of alcohol, had slurred and mumbled speech, and stumbled and staggered when she got out of her car. She registered a positive result on a portable breath test and was arrested for driving while impaired. She subsequently refused to submit to a breath test. The defendant pled guilty in district court to driving while impaired and appealed. In superior court, the defendant moved to suppress evidence and requested a bench trial. The superior court denied the motion to suppress and found the defendant guilty. At sentencing, the court found the grossly aggravating factor of a prior impaired driving conviction within seven years of the date of the offense and imposed a Level Two sentence. The defendant appealed, arguing that the trial court erred in denying her motion to suppress, the evidence was insufficient to support her conviction, and that the trial court erred in sentencing her based on a grossly aggravating factor for which the State failed to provide the statutorily required notice.

(1) The court of appeals determined that the defendant did not properly preserve the denial of her motion to suppress for review on appeal as she did not renew her objection when the evidence was offered for consideration at her bench trial. And because the defendant did not argue plain error on appeal, the court did not review the denial of the motion for plain error.

(2) The court of appeals determined that the trial court did not err by denying defendant’s motion to dismiss for insufficient evidence. The trooper testified as to his opinion that the defendant was impaired by alcohol. He based that opinion on seeing the defendant stumbling and staggering when she got out of her car, smelling a moderate odor of alcohol on her breath, hearing her mumbled and slurred speech, and observing her erratic driving. Evidence of the defendant’s refusal to submit to a breath test at the police station also was admissible evidence of impairment. The appellate court held that, viewed in the light most favorable to the State, this evidence was sufficient to show that the defendant was under the influence of an impairing substance.

(3) The State failed to file notice of its intent to rely at sentencing upon the aggravating factor of a prior impaired driving conviction. Such notice is required by G.S. 20-179(a1)(1) for misdemeanor impaired driving charges appealed to superior court. The court explained that the right to notice of the State’s intent to rely on a prior conviction is a statutory right, not a constitutional one, and thus may be waived. The defendant admitted to the prior conviction on cross-examination, and her counsel stipulated at sentencing that she “did have the prior DWI.” Slip op. at 12. Moreover, defense counsel did not object to the court’s consideration of the prior conviction as an aggravating factor. The court of appeals determined that the defendant’s admission and her counsel’s stipulation along with her failure to object to lack of notice at the sentencing hearing amounted to a waiver of her statutory right to notice.

Offenses Against Public Order

(1) Trial court erred in denying defendant’s motion to dismiss charge of disorderly conduct when the only evidence of defendant’s interference with the operation of a school and its students was a group of students hearing her use profanity on the way to class; (2) Trial court erred in denying defendant’s motion to dismiss the charge of resisting a public officer as the State failed to present substantial evidence that the defendant did anything more than merely remonstrate or that she acted willfully in purposeful or deliberate violation of the law

State v. Humphreys, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 31, 2020). The defendant was charged with disorderly conduct and resisting a public officer based on events that occurred in the parking lot outside her daughter’s high school. A drug sniffing dog alerted to the defendant’s car, which her daughter had driven to the school. The defendant came to the school to observe the search of her vehicle. She remained close to the officers who were conducting the search, used profanity throughout the encounter, and refused to comply with officers’ requests for her to back up and away. The defendant said to a class of students walking through the parking lot on the way to their weightlifting class, “[y]ou-all about to see . . . an unarmed black woman get shot.” Slip op. at 3.

While officers were searching the car, the defendant walked out of an officer’s view for about three seconds. She then refused to stand precisely where she was instructed to stand, telling officers, “you can keep an eye on me from right here.” Slip op. at 4. One of the officers asked her, “are you refusing to come back here?” *Id.* The defendant said, “I’m not breaking no law.” *Id.* The officer then arrested her. The defendant asked what she was being arrested for and told the officers she had broken no law.

At the close of the evidence in her trial for disorderly conduct and resisting an officer, the defendant moved to dismiss the charges for insufficient evidence. The trial court denied the motion, and the defendant was convicted. She appealed.

(1) The Court of Appeals determined that the defendant’s conduct, viewed in the light most favorable to the State, was not disorderly conduct in violation of G.S. 14-288.4(a)(6) as it did not constitute a substantial interference with and disruption and confusion of the operation of the school in its program of instruction and training of its students. Defendant’s behavior did not cause students to be directed around the area of the search — the search alone required that redirection. And the defendant did not disrupt classroom instruction when she spoke to students as they were walking through the parking lot on the way to class. Finally, her use of profanity did not interfere with students by drawing their attention to the commotion; that would have happened anyway given the presence of the police officer and the dog. The only interference with a school function caused by defendant that the appellate court identified was the class of high school students hearing profanity during their normal walk to class. The Court held that alone did not constitute a substantial interference.

(2) The Court of Appeals held that there was not substantial evidence to show that the defendant resisted, delayed, or obstructed a sheriff’s deputy in discharging his official duties or that she acted willfully and unlawfully. First, the Court noted that merely remonstrating with an officer or criticizing or questioning (in an orderly manner) an officer who is performing his duty does not amount to obstructing or delaying an officer in the performance of his duties. The Court noted that the defendant’s actions and words were not aggressive or suggestive of violence. Instead, she orderly (if loudly) remonstrated by remaining where she could see the officer executing the search. Moreover, the Court concluded that the evidence did not indicate that the defendant stood near her car with a purpose to do so without authority or careless of whether she had the right to stand there. In fact, on the scene, she stated, “I’m

not breaking no law” when she was told she needed to return to the deputy and then was arrested. Slip op. at 4. The Court thought it clear that even after the officers asked the defendant to move several times, she believed she had the right to stand and observe the search, so long as the deputy could see her and she was not obstructing the other officer’s search of the vehicle. The Court held that a reasonable mind would not conclude that the evidence supported a finding that the defendant acted purposely and deliberately, indicating a purpose to act whether she had the right or not.

Burglary and Breaking or Entering Offenses

The trial court erred in denying a motion to dismiss a first-degree burglary charge when it considered G.S. 14-54(a1) (breaking and entering with the intent to terrorize or injure an occupant) as the felony underlying the first-degree burglary charge

State v. McDaris, ___ N.C. App. ___, 852 S.E.2d 403 (Nov. 17, 2020). At approximately 1:00 a.m. on January 1, 2018, the defendant woke Mr. and Mrs. Ridenhour by loudly banging on the front door of their residence. Mr. Ridenhour, thinking a neighbor was at the door, went to the front door and flipped the deadbolt. The defendant violently pushed the front door open, knocking Mr. Ridenhour backwards. The defendant entered the house and began beating Mr. Ridenhour, who shouted for his wife to call the police and grab his pistol. The defendant struck Mr. Ridenhour multiple times, causing him to fall down a flight of stairs and knocking him unconscious. Mrs. Ridenhour entered the hall, pointed a gun at the defendant, and told him to leave. The defendant then left the house, and Mr. Ridenhour regained consciousness and locked the door. The defendant briefly walked in the front yard but returned and began banging on the front door again. Caldwell County Sheriff’s Deputies arrived at the scene and detained the defendant at the front door. The defendant was indicted for first-degree burglary and the lesser included offense of felonious breaking and entering.

During a bench trial, the defendant twice moved to dismiss, arguing that the State had not presented sufficient evidence of his intent to commit an underlying felony when he entered the Ridenhour house, as required for first-degree burglary. The trial court denied both motions. In a subsequent charge conference, the trial court stated it was considering larceny, attempted murder, and a violation of G.S. 14-54(a1) (breaking or entering a building with intent to terrorize or injure an occupant) as potential underlying felonies for the first-degree burglary charge. However, the trial court, as finder of fact, convicted the defendant of first-degree burglary solely on the basis of G.S. 14-54(a1), stating that “the defendant . . . committed first-degree burglary by committing the felony of [G.S. 14-54(a1)] when he broke and entered into the building with the intent to terrorize and injure the occupant, because that’s what happened.” Slip op. at 5.

On appeal, the defendant challenged the sufficiency of the evidence, specifically arguing that G.S. 14-54(a1) cannot be an underlying felony for first-degree burglary because “grammatically and logically, the initial breaking and entering must be distinct from the crime which a burglar subsequently intends to commit therein.” Slip op. at 6. The Court of Appeals agreed with the defendant, reasoning that “for G.S. 14-54(a1) to satisfy the felonious intent element of first-degree burglary, a defendant must (1) break and enter a dwelling (2) with the intent to *therein* (3) break or enter a building (4) with the intent to terrorize or injure an occupant” Slip op. at 8–9. (emphasis in original). The Court held that sufficient evidence was not presented to support the inference that the defendant broke and entered the Ridenhours’ residence with the intent to subsequently break or enter another building within the residence and therein terrorize the Ridenhours and as a result, the defendant’s motion to dismiss should

have been granted. Moreover, the Court explained that in determining that the first-degree burglary charge was *only* supported by the defendant's intent to violate G.S. 14-54(a1), the trial court acquitted the defendant of the other potential underlying felonies, including attempted murder, assault inflicting serious bodily injury, and larceny. The Court reversed the defendant's first-degree burglary conviction and remanded for entry of judgment for misdemeanor breaking or entering, a lesser included offense that does not require proof of intent to commit an underlying felony.

Offenses Against Minors

(1) Child abduction is a general intent crime, and the State need only show that the defendant acted knowingly, not willfully; (2) There was sufficient evidence to support child abduction where the defendant continued fleeing in a stolen car after realizing a child was present in the vehicle; (3) Because child abduction is not a specific intent crime, the trial court did not plainly err in failing to instruct the jury that the defendant must have acted willfully

State v. French, ___ N.C. App. ___, 849 S.E.2d 360 (Oct. 6, 2020). In this Lincoln County case, the defendant stole a car left running outside of a gas station. A three-year old child was in the backseat. Once officers attempted to stop the car, the defendant led police on a high-speed chase and ultimately crashed. The child was not harmed. During the chase, the defendant called 911 and attempted to bargain for the child's release. He was charged with first-degree kidnapping, abduction of a child, larceny of a motor vehicle, possession of stolen property, and habitual felon. The jury convicted on all counts. The defendant did not appeal, but later filed a petition for writ of certiorari seeking review of his convictions, which was granted.

(1) The child abduction statute includes language that the offense must occur "without legal justification or excuse." See G.S. § 14-41(a). The defendant contended that this language required the State to prove that the defendant acted willfully, and that the failure to instruct the jury on *mens rea* improperly treated the crime as a strict liability offense. The Court of Appeals disagreed. There is no requirement of "willfulness" in the language of the statute. While the offense is not a strict liability crime, it is also not a specific intent crime as defendant argued. Rather, the offense is a general intent crime, requiring a showing only that the defendant acted "knowingly." The "without justification or excuse" language in the statute allows the defendant to argue defenses like mistake of fact, necessity, or others, but does not create a specific intent requirement. This argument was therefore rejected.

(2) There was sufficient evidence to support the conviction for child abduction. The evidence showed that the defendant continued driving the car at high speeds while fleeing police, even after realizing that a child was in the backseat. After the point at which the defendant called 911 and acknowledged the presence of the child in the car, he continued to disobey police and dispatch commands to stop and continued fleeing for at least 15 minutes. Though "[a] defendant may exculpate a mistake though subsequent conduct," the defendant here made no such showing. Slip op. at 10.

(3) There was no error, much less plain error, in the trial court's failure to instruct the jury that the defendant must have acted willfully in abducting the child, for the same reasons that the statute does not create a specific intent crime. There was therefore no error in the trial court's instructions to the jury for that offense.

Obstruction of Justice

Where defendant’s false statement to investigators did not actually impede the investigation, there was insufficient evidence of felony obstruction of justice

State v. Bradsher, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 6, 2020). The defendant, the former District Attorney for Person and Caldwell Counties, was tried for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The jury acquitted on one count of felony obstruction and the conspiracy count but convicted on the remaining charges (with the exception that the jury returned a verdict of guilty of misdemeanor obstruction on one of the remaining felony obstruction counts). The trial court subsequently arrested judgment on the aiding and abetting obtaining property conviction. The charges stemmed from a scheme whereby the defendant and another elected District Attorney hired each other’s wives to work in each other’s offices. Under this arrangement, both wives were wrongfully paid for working hours that they had not actually worked.

There was insufficient evidence of felony obstruction of justice. That offense requires the State to prove that the defendant actually impeded the administration of justice. The indictment alleged that the defendant made false statements to an SBI investigator concerning the employee. One of the defendant’s statements at issue was “at most misleading, and not false,” as it was a misrepresentation by omission and not affirmatively a false statement as the indictment charged. There was sufficient evidence that another of the defendant’s statements to the investigator was false, but there was no evidence that this statement actually obstructed the course of the investigation. The defendant responded truthfully to some of the investigator’s questions about the employee, which actually facilitated the investigation. The defendant was never directly asked whether the employee was in fact performing work for the defendant. “To support a conviction for obstruction of justice, the State must establish substantial evidence for every element of the crime, including that the act in question ‘obstructed justice[.]’” *Id.* at 27 (citation omitted). The motion to dismiss for felony obstruction of justice therefore should have been granted, and that conviction was vacated.

Evidence

Expert and Lay Opinion

(1) Drug overdose immunity provisions of G.S. 90-96.2 are not jurisdictional and are waived where not raised at trial; (2) Admission of lay opinion and field tests identifying substance as heroin was not plain error

State v. Osborne, ___ N.C. App. ___ (Dec. 15, 2020). In this case from Randolph County, the Court of Appeals initially vacated the defendant’s conviction for possession of heroin (discussed here). The North Carolina Supreme Court reversed, finding the evidence sufficient to support the drug conviction. *State v. Osborne*, 372 N.C. 619 (2019) (discussed here). On remand, the Court of Appeals was instructed to consider the applicability of G.S. 90-96.2 to the case. That statute provides “limited immunity” from prosecution for certain drug offenses when the evidence is discovered as a result of a call for assistance relating to a drug overdose. The Court of Appeals was also directed to consider plain error challenges to the admission of certain evidence that it previously left undecided.

(1) The defendant did not raise the issue of potential immunity at trial or on appeal. While subject matter jurisdictional defects cannot be waived and may be asserted at any time, the court determined that the immunity provisions of G.S. 90-96.2 are not jurisdictional and are therefore waivable:

In sum, we hold that N.C. Gen. Stat. § 90-96.2(c) does not contain a clear indication that it is a jurisdictional requirement, and we therefore treat the provision as one granting traditional immunity from prosecution. This type of immunity must be asserted as a defense by the defendant in the trial court proceeding. The failure to raise the issue waives it and precludes further review on appeal. Slip op. at 9 (citations omitted).

The issue of immunity here was thus waived and the merits of the issue were not decided. The defendant could, however, assert ineffective assistance of counsel in post-conviction proceedings based on trial counsel's failure to raise the issue. [Jamie Markham blogged about the immunity provisions of G.S. 90-96.2 [here](#)].

(2) The defendant also claimed the admission of field tests and lay opinions from police officers that the substance discovered in her room was heroin amounted to plain error. The Supreme Court's opinion in the case acknowledged the "ample evidence" that the substance was heroin even without the challenged evidence, and the Court of Appeals agreed. Accordingly, the erroneous admission of field tests and lay opinion "is simply not the sort of fundamental error that calls into question the 'fairness, integrity or public reputation of judicial proceedings,'" making a finding of plain error inappropriate. *Id.* at 11.

Expert testimony of victim's PTSD diagnosis was properly admitted for corroborative purposes; failure of trial court to give unrequested limiting instruction on the use of that evidence was not plain error

State v. Thompson, ___ N.C. App. ___, 852 S.E.2d 365 (Oct. 6, 2020). The defendant was convicted at trial of numerous sex offenses against minor children, including statutory sex offense, sexual activity by substitute parent, and sale of controlled substances to minors in Cleveland County. He was sentenced to a minimum of 600 months and ordered to enroll in satellite-based monitoring ("SBM") for life upon release based on the convictions relating to one victim, with an additional 10 year term of SBM for the other victim. The defendant properly appealed his convictions but failed to give notice of appeal of the SBM orders. In its discretion, the Court of Appeals granted his petition for writ of certiorari to review that issue.

A therapist for one of the minor victims testified as an expert in childhood and teen trauma for the State at trial. She testified that the child had post-traumatic stress disorder ("PTSD") and major depression and relayed to the jury disclosures by the victim of instances of sexual abuse by the defendant. This testimony was offered for corroborative purposes. The defendant did not object, and no limiting instruction about the testimony was given to the jury. The court therefore reviewed for plain error only. The North Carolina Supreme Court has held that it is improper to admit evidence of a PTSD diagnosis for substantive purposes. *See State v. Hall*, 330 N.C. 808, 821 (1992). However, such testimony may be admitted to corroborate substantive evidence, to rebut defense evidence of consent, or to explain why disclosure of the crime was delayed. When such evidence is admitted, the trial court should provide a limiting instruction to the jury regarding the use of the testimony. Failure to give the limiting instruction is not error, however, if the defendant fails to request one. Here, the testimony was properly admitted for corroborative purposes. Further, "even if a limiting instruction were required in the absence of a specific request by defendant, defendant was not prejudiced by the omission such that it would amount

to fundamental error.” *Thompson* Slip op. at 8. There was therefore no plain error in the admission of the therapist’s diagnosis of PTSD.

(1) Rule 702 governs the admission of expert evidence, including experimental evidence, which is reviewed for abuse of discretion (and not de novo, as pre-Rules of Evidence cases held); no abuse of discretion in admitting results of experiment to show pattern of bullet shell ejections; (2) No abuse of discretion to qualify expert to testify in field of bullet shell ejection patterns despite expert’s lack of training or experience in that specific field

State v. Turner, ___ N.C. App. ___, 849 S.E.2d 327 (Oct. 6, 2020). The defendant was convicted of first-degree murder in Person County. The victim was a neighbor with whom the defendant had long-running disputes. According to the defendant, he shot the neighbor in self-defense. The victim was shot 11 or 12 times, with the vast majority of the bullets having entered the victim from the back and side of his body. The State presented evidence from an experiment performed by a forensic firearms examiner attempting to replicate the production of the layout of bullet shell casings found at the scene in order to demonstrate the shooter’s location and to rebut the defendant’s self-defense claim. The expert only reported the results of the experiment and did not specifically opine about the shooter’s location.

(1) Relying on cases pre-dating the adoption of the Rules of Evidence, the defendant argued this evidence was improperly admitted in violation of the “substantial similarity” test. These older cases imposed stricter requirements for the admission of “experimental evidence” – that is, evidence “about an experiment that is used to prove something about the actual events that occurred in the case.” Slip op. at 8. The defendant argued that these rules controlled, rather than Rule of Evidence 702. Under those cases, the standard of review on appeal of this issue would have been de novo, rather than the abuse of discretion standard applied to Rule 702 challenges. The defendant did not argue or cite to Rule 702 or to any cases applying the rule since the 2011 amendments adopting the *Daubert* standard for expert testimony. Rejecting this argument, the court found that later cases, even those pre-dating the 2011 amendment to Rule 702, had in fact adopted an abuse of discretion standard of review for experimental evidence. The court also rejected the notion that the substantial similarity test stood apart from Rule 702. “The notion of ‘substantial similarity’ for experimental evidence is one of the many ‘particular factors articulated in previous cases’ that is now baked into the third prong of Rule 702’s reliability test.” *Id.* at 10. Thus, pursuant to Rule 702, the standard of review is abuse of discretion. Even if the defendant’s argument that the evidence was erroneously admitted was not forfeited by his failure to argue Rule 702 or abuse of discretion, the trial court did not err in admitting the testimony. In the words of the court: “Here, the trial court’s determination that the experiment met the Rule 702 criteria was a reasoned one and not manifestly arbitrary. Thus, we cannot hold that the trial court abused its discretion.” *Id.* at 12.

(2) The defendant also argued that the trial court erred in qualifying the expert to give an opinion about shell ejection patterns. Voir dire of the expert revealed that he had not received training on ejection patterns of bullet shells, that no certification for this subject exists, and that he had not previously performed this type of experiment. According to the court, the trial court did not abuse its discretion in so qualifying the expert: “[I]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist’ as long as ‘the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.’” *Id.* at 14. Based on his extensive training and experience in the field of firearms, the trial court acted within its discretion and did not err in qualifying the expert.

The conviction was therefore unanimously affirmed with Judges Berger and Arrowood concurring.

Sentencing

Life Sentences

(1) Defendant’s constitutional challenges to consecutive terms of life with parole were preserved; (2a) De facto life sentences may violate *Miller* and its progeny; (2b) Consecutive sentences may aggregate to create a de facto life sentence; (2c) Defendant’s minimum sentence of 50 years constituted a de facto life sentence in violation of *Miller*

State v. Kelliher, ___ N.C. App. ___, 849 S.E.2d 333 (Oct. 6, 2020), *temp. stay allowed*. ___ N.C. ___, 848 S.E.2d 493 (Oct. 23, 2020). The defendant was a participant in a double murder at the age of 17 and sentenced to consecutive terms of life without parole (“LWOP”) in Cumberland County in 2001. He moved for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences for juvenile offenders violates the 8th Amendment) and its progeny. The trial court determined at resentencing that the defendant did not present the rare case of an “irredeemable” or “incorrigible” juvenile, and therefore did not qualify for an LWOP sentence. The defendant’s evidence at resentencing showed an abusive childhood, early substance abuse, substantial educational and self-improvement while in prison. He also presented expert mental health testimony indicating he was at low-risk to reoffend and evidence of a near-perfect disciplinary record while in prison (among other evidence). The trial court resentenced the defendant to two consecutive terms of life with parole, which meant that the defendant would be parole-eligible after a term of at least 50 years. The defendant appealed, arguing that the sentence amounted to a de facto life sentence in violation of state and federal constitutional protections. The Court of Appeals unanimously agreed.

(1) The defendant’s challenge to his sentence was preserved. He raised *Miller*, the 8th Amendment, and comparable provisions of the state constitution in his MAR seeking resentencing, and specifically argued for concurrent life with parole sentences. The specific grounds of his objections to the sentence were thus clear from context and at least amounted to “an implied argument” that his sentence violated constitutional protections. Even if the argument was not preserved, the defendant asked the court to invoke Rule 2 of the Rules of Appellate Procedure to consider the argument, and the court found that invocation of the rule was appropriate here to review the constitutional issue.

(2) Conducting an extensive review of the *Miller* line of cases, the court made three rulings of first impression in the state. (2a) A “clear majority” of jurisdictions have held that a de facto life sentences are reviewable under *Miller*, and North Carolina joined that majority. To allow *Miller* protections to be circumvented by labeling a sentence a term of years as opposed to life without parole when the effect of the sentence would preclude a meaningful opportunity for release would render the constitutional protections hollow. “*Roper*, *Graham*, and *Miller* are all concerned with ‘imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.’ A *de jure* LWOP sentence is certainly as ‘harsh’ as its functional equivalent.” *Kelliher* Slip op. at 30. (2b) Consecutive sentences that aggregate to create a de facto life sentence for juveniles not otherwise eligible for LWOP violate the constitutional protections for the punishment of juveniles. The court recognized that courts around the country are “sharply divided” on this point. A majority of jurisdictions have determined that consecutive sentences may lead to an impermissible de facto life sentence, and North Carolina again joined that majority. “The applicability and scope of protection found in the Eighth Amendment . . . [turn] on the identity of the

defendant, not on the crimes perpetrated.” *Id.* at 35. The court distinguished North Carolina law from that of other jurisdictions holding otherwise. (2c) The defendant’s sentence to consecutive life with parole terms was unconstitutional. The defendant would become eligible for parole at age 67 under his current sentence. This was long enough to constitute a de facto life sentence. In the words of the court:

To release an individual after their opportunity to directly contribute to society—both through a career and in other respects, like raising a family—does not provide a meaningful opportunity to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*. *Id.* at 40 (citation omitted) (cleaned up).

The court observed that the defendant would not necessarily be released from prison even after becoming parole eligible. However, to afford the defendant the constitutional protections established by the *Miller* line of cases, the defendant’s consecutive sentences could not stand. The sentences were therefore vacated, and the trial court was ordered to impose concurrent life with parole sentences on remand.

Aggravating Factors

No error to find grossly aggravating factor despite lack of proper notice by the State where the defendant admitted the prior conviction on the stand and trial counsel stipulated at sentencing

State v. McGaha, ___ N.C. App. ___, 851 S.E.2d 659 (Nov. 3, 2020). The defendant was stopped by a state trooper who saw her driving erratically. The defendant smelled of alcohol, had slurred and mumbled speech, and stumbled and staggered when she got out of her car. She registered a positive result on a portable breath test and was arrested for driving while impaired. She subsequently refused to submit to a breath test. The defendant pled guilty in district court to driving while impaired and appealed. In superior court, the defendant moved to suppress evidence and requested a bench trial. The superior court denied the motion to suppress and found the defendant guilty. At sentencing, the court found the grossly aggravating factor of a prior impaired driving conviction within seven years of the date of the offense and imposed a Level Two sentence. The defendant appealed, arguing that the trial court erred in denying her motion to suppress, the evidence was insufficient to support her conviction, and that the trial court erred in sentencing her based on a grossly aggravating factor for which the State failed to provide the statutorily required notice.

The State failed to file notice of its intent to rely at sentencing upon the aggravating factor of a prior impaired driving conviction. Such notice is required by G.S. 20-179(a1)(1) for misdemeanor impaired driving charges appealed to superior court. The court explained that the right to notice of the State’s intent to rely on a prior conviction is a statutory right, not a constitutional one, and thus may be waived. The defendant admitted to the prior conviction on cross-examination, and her counsel stipulated at sentencing that she “‘did have the prior DWI.’” Slip op. at 12. Moreover, defense counsel did not object to the court’s consideration of the prior conviction as an aggravating factor. The court of appeals determined that the defendant’s admission and her counsel’s stipulation along with her failure to object to lack of notice at the sentencing hearing amounted to a waiver of her statutory right to notice.