

Criminal Case Update
NC Magistrates' Virtual Fall Conference
October 1, 2020

Cases covered include reported decisions from the North Carolina appellate courts decided between October 4, 2019 and September 15, 2020. The summaries were prepared by School of Government faculty and staff, including Shea Denning, Phil Dixon, Jonathan Holbrook, Jamie Markham, John Rubin, Christopher Tyner, and Brittany Williams. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Arrest, Search, and Investigation

Evidence of disorderly conduct in an investigatory stop case

Middle finger gesture from passing car did not create reasonable suspicion of disorderly conduct

State v. Ellis, 374 N.C. 340, 841 S.E. 2d 247 (May 1, 2020)

In this Stanly County case, no reasonable suspicion existed when a trooper, already conducting a traffic stop, observed the defendant gesturing with his middle finger from the passenger side of a car driving past the stop. The Court of Appeals unanimously rejected the State's argument that the stop of the defendant was justified by the community caretaking exception to the Fourth Amendment, but a majority of the panel found that the stop was supported by reasonable suspicion of disorderly conduct ([here](#)). Judge Arrowood dissented and would have ruled that the act was protected speech under the First Amendment and that the trooper lacked reasonable suspicion [Jeff Welty blogged about that decision [here](#)].

On appeal to the Supreme Court, the State waived oral argument and conceded that the trooper lacked reasonable suspicion. The court agreed. The State's evidence at suppression showed that the trooper saw the defendant waving from the car, and then begin "flipping the bird," perhaps vigorously. The trooper did not know for whom the gesture was intended, and otherwise observed no traffic violations or other suspect activities. This failed to establish reasonable suspicion of a crime. In the court's words:

The fact that [the trooper] was unsure of whether defendant's gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver. . . Based on the facts in the record, we are unable to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace.

Slip op. at 6-7.

The court did not consider the defendant's First Amendment arguments in light of its ruling, and the matter was unanimously reversed and remanded.

Sufficiency for conviction of evidence of impairment and resisting a public officer

State v. Hoque, ___ N.C. App. ___, 837 S.E.2d 464 (Jan. 7, 2020)

The defendant was found guilty by a Cleveland County jury of impaired driving and resisting a public officer and was found responsible for possession of open container. He appealed, challenging the denial of his motion to dismiss, the denial of his mid-trial motion to suppress, an evidentiary ruling, and alleging constitutional violations for lost evidence. The Court of Appeals unanimously affirmed.

(1) The defendant claimed there was insufficient evidence that he operated the vehicle while impaired. As to operation, the defendant was found asleep behind the wheel with the car running in the middle of the road and had a bottle of vodka between his legs. No passengers were present, and the defendant asked the officer if he could move the car, revving the engine several times. He also used the driver side door to exit the vehicle. This was sufficient to establish operation. "An individual who is asleep behind the wheel of a car with the engine running is in actual physical control of the car, thus driving the car within the meaning of the statute." As to impairment, while the defendant's blood alcohol content was only 0.07, the defendant's blood revealed the presence of marijuana, amphetamine and methamphetamine. In addition to the blood test, the defendant "failed" horizontal and vertical gaze nystagmus tests, refused a breath test, had a strong odor of alcohol, was "confused and disoriented," and exhibited other signs of impairment. This was sufficient evidence of impairment.

The defendant also claimed there was insufficient evidence to support his conviction for resisting a public officer. Specifically, he argued that he was merely confused and in pain at the time of his interactions with the officers, and that this was the cause of his "negative interactions" with the officers. The court rejected this argument, noting: "The conduct proscribed under [N.C. Gen. Stat. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in discharge of his duties." Here, the defendant committed multiple acts that obstructed the officer's duties. The defendant would not roll down his window when asked by the officer, he repeatedly tried to start his car after being commanded to stop, he refused a breath test at least 10 times, and repeatedly put his hands in his pockets during the nystagmus testing after being instructed not to do so. He also refused to get into the patrol car once arrested and refused to voluntarily allow his blood to be drawn after a search warrant for it was obtained. In the court's words:

Through these actions and his inactions, Defendant directly opposed the officers in their efforts to discharge their investigative duties of identifying him, speaking with him, and performing field sobriety tests. Thus, Defendant resisted the officers within the meaning of the statute.

The motion to dismiss for insufficient evidence of resisting a public officer was therefore properly denied.

The defendant also claimed his motion to dismiss for insufficiency as to the possession of open container of alcohol should have been granted. He pointed out that the bottle found in his car

was not missing much alcohol and the officer admitted to emptying the bottle on the side of the road. Rejecting this argument, the court observed:

[T]he amount of alcohol missing from the container is irrelevant for purposes of this offense, because a container is opened 'if the seal on [the] container of alcoholic beverages has been broken.' Additionally, the fact that [the officer] poured out the contents of the container goes to the weight of the evidence, not its sufficiency.

The trial court therefore did not err in denying the motion for insufficient evidence for this offense.

Criminal Offenses

Assaults

Consent as a Defense to Assault

(1) Trial judge did not err in refusing to instruct the jury on consent in case involving assault inflicting serious bodily injury (AISBI)

State v. Russell, ___ N.C. App. ___, 844 S.E.2d 586 (May 19, 2020)

The defendant met his former girlfriend and new boyfriend, the victim in the case, at a bar. The defendant asked the victim to step outside to talk. During the exchange, the victim told the defendant to hit him. (According to the concurrence, the victim said, "If you want to hit me, hit me, but this is not the way we need to solve this issue."). The defendant hit the victim and broke his jaw in two places, requiring surgery to repair the damage. The defendant argued that the trial court erred in refusing to instruct the jury on consent in relation to AISBI. The majority stated that consent is not a defense to assault in North Carolina and held that the trial court did not err in refusing to instruct on consent for AISBI. The concurring judge found it unnecessary to decide whether consent is an element of or defense to assault, finding that the trial judge did not err in refusing to instruct on consent because the evidence did not show the victim consented to an assault inflicting serious bodily injury and arguably did not consent to an assault all.

Threats

(1) Alleged threats prohibited by statute must be "true threats" to survive constitutional challenge; (2) proving that the statement was a true threat, and was intended as one by the defendant, are essential elements of the offense; (3) defendant must subjectively intend the statement as a true threat, and it must be one that would be perceived in context as a threat

by an objectively reasonable recipient; (4) as a mixed question of law and fact, convictions for making a threat are subject to whole case review on appeal.

State v. Taylor, ___ N.C. App. ___, 841 S.E.2d 776 (Mar. 17, 2020), temp. stay allowed, ___ N.C. ___, 839 S.E.2d 856 (Apr. 7, 2020), writ of supersedeas entered, discretionary review granted ___ N.C. ___, 2020 WL 5746946 (Sept. 23, 2020)

The victim in this case was the elected district attorney for the county, and the defendant was an acquaintance who worked in an office building next to the courthouse. After learning that the district attorney would not be pursuing criminal charges in a matter involving the death of a child, the defendant made a series of posts on Facebook. Some of the posts broadly addressed the defendant's general anger and frustration with politics and the judicial system as a whole, while other posts more specifically referenced the district attorney in particular, using phrases such as "death to her as well" or calling for "old time mtn [mountain] justice," and implied his willingness to use firearms against law enforcement if they came to his house in response to the posts. The defendant deleted the posts later the same evening, but a detective who was a Facebook friend of the defendant took screenshots of the posts before they were removed. After bringing in the SBI to investigate and interviewing the defendant about the posts, the defendant was charged with threatening a court officer under G.S. 14-16.7(a). Following a jury trial, the defendant was convicted and appealed.

At trial, the defendant raised a First Amendment challenge, arguing that anti-threat statutes such as G.S. 14-16.7 must be construed as constitutionally requiring proof of a "true threat," meaning that the communication shows a serious intent to cause harm to the victim, and further arguing that the trial court should not admit the five posts offered by the state while excluding other posts and comments that would have provided relevant context and explanation. On appeal, the defense argued that the trial court erred by: (i) denying the defendant's motion to dismiss at the close of evidence based on the state's failure to prove the alleged threats were true threats; and (ii) failing to properly instruct the jury on the law and requirements of a true threat.

Ruling as a matter of first impression, the Court of Appeals found in favor of the defendant and reversed the conviction. The appellate court's decision contains an exhaustive review of case law from North Carolina and other jurisdictions on the First Amendment's application to anti-threat statutes and other forms of protected speech, but it relies most extensively on *Watts v. United States*, 394 U.S. 705 (1969), *Virginia v. Black*, 538 U.S. 343 (2003), and their progeny. Based on those cases, the appellate court agreed that laws which criminalize speech must be construed in accordance with the First Amendment; here, that means a threat cognizable under the statute must be a "true threat" as defined by *Black*: "under the First Amendment the State can punish threatening expression, but only if the 'speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" To clarify its holding and provide guidance in future cases, the court made six supplemental holdings that were not yet fully addressed by the North Carolina case law.

First, when reviewing a conviction under an anti-threat statute, the appellate court will engage in a "whole record" review. Whenever a defendant's conviction is based in part on a

determination that the state met its burden of proving a true threat, the appellate court will conduct an independent review of the entire record to determine the sufficiency of the evidence and whether the defendant's First Amendment rights were preserved.

Second, establishing that an alleged threat was a "true threat" must be treated as an essential element of the offense to be proved by the state. At trial in this case, the state relied heavily on the fact that the underlying statute and pattern jury instructions only used the single word "threat," without further qualification. The appellate court's holding on this point acknowledged that fact, but explained that in order to comport with the First Amendment, "'true threat' must be incorporated into the *definition* of N.C.G.S. § 14-16.7(a) if the statute is to be held constitutional" (emphasis in original).

Third, the "intent" to communicate a true threat is also deemed an essential element of the offense. A statement is only a true threat if it was made intentionally, meaning that it was made with both the general intent to make the threatening statement (considered "from the viewpoint of an objective, reasonable person considering the alleged threat in full context") and specific intent (i.e., a subjective intent to truly threaten). This does not require proof that the defendant actually intended to carry out the threatened act, but he must have intended that it would be received as a true threat by him to do so.

Fourth, deciding on appeal whether a statement was a true threat is a mixed question of fact and law. Therefore, proving a true threat will usually be a matter for the jury (or judge acting as trier of fact) to decide initially, but as noted above the appellate courts will conduct a "de novo whole record review" on appeal, even if the jury was properly instructed on the law and there is some evidence in the record to support its finding.

Fifth, noting that many types of protected speech may be unpopular, crude, or even aggressive, a "true threat" is defined in accordance with *Black* as only those statements where "the speaker intends to communicate, to a particular individual or group of individuals, a threat, being 'a serious expression of an intent to commit an act of unlawful violence[.]'" This definition incorporates the intent requirements adopted above, meaning that the defendant had the "subjective intent to threaten a person or group of persons by communicating the alleged threat." But deciding whether a statement was a true threat must also be evaluated objectively, based on the "context in which the communication was made; i.e., all the facts surrounding the communication of the challenged speech." In other words, finding a statement to be a true threat requires both a subjective and an objective determination: (i) the defendant subjectively intended the statement to be understood as a true threat; and (ii) the people hearing or reading it would objectively understand it, in context, as a serious expression of intent to kill or injure the person or group identified.

Sixth, applying the preceding analyses to the particular statute at issue, the court identified and summarized the seven essential elements of the offense as follows:

In order to obtain a constitutional conviction for threatening a court officer pursuant to N.C.G.S. § 14-16.7(a), the State must prove, beyond a reasonable doubt, that: (1) the defendant; (2) knowingly and willfully; (3)

made a threat; (4) constituting a “true threat,” meaning a statement “that an ordinary, reasonable [person] who is familiar with the context in which the statement [wa]s made would interpret as a serious expression of an intent to do harm”; (5) to a court official; (6) knowing the court official was a court official; and (7) when the defendant communicated the statement, the defendant specifically intended the statement to be understood by the court officer as a real threat expressing the defendant’s intention to carry out the actions threatened.

Additionally, since proving a true threat is an essential element of the offense, failure to properly instruct the jury on these issues violates the defendant’s First, Sixth, and Fourteenth Amendment rights. That error is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.

Finally, turning back to the case at hand, the court conducted an independent whole case review to decide whether the statements made by this defendant were true threats, whether the defendant had the subjective intent that they reach the recipient and cause her to believe that he intended to kill her, and whether they would be understood as threats by an objectively reasonable person.

Looking first at the plain language of the posts, although some of them did contain aggressive statements such as “death to her as well” and “she will be first to go,” the court concluded that they were also vague or contingent on the occurrence of unlikely events (such as a revolution), and “there were no specifics such as time, manner, place, ability, preparation, or other facts that might allow a reasonable person to read Defendant’s words as a ‘true threat’ to kill D.A. Welch.” As a result, none of the posts offered by the state rose to the level of constituting a true threat.

The court then evaluated the statements in context, considering other factors such as the defendant’s reference (and apparent access) to firearms, his close proximity and ability to reach the purported victim, and the initial concern of the detective who saw the posts indicating that she viewed the threat as real. However, other evidence indicated that neither the victim nor law enforcement perceived the statements as true threats, such as the detective’s somewhat delayed response to the posts, the purported victim’s belief that additional security was unnecessary, the fact that officers did not further investigate the defendant’s ability to carry out the alleged threats, a history of “polite and non-threatening” interactions between the parties, and the broad nature of other comments directed at the judicial system as a whole.

As part of its whole case review, the appellate court also considered the hyperbolic nature of many posts on “public forums” like Facebook, the political context of the defendant’s related comments about the judicial system, the lack of specificity to any alleged threats, the reactions of others who saw the posts, and the defendant’s explanation for the posts. In sum, the court found that as a matter of law the defendant’s posts did not rise to the level of being a “true threat” in this case, and the evidence did not support a finding that the defendant’s intent in

posting the comments was to make the purported victim believe he actually intended to kill her. Consistent with the holdings above, the appellate court found that the trial court erred by failing to instruct the jury on the constitutionally required elements of a “true threat” and state’s burden to prove the defendant’s intent, and further found that the error was not harmless beyond a reasonable doubt in this case, given the erroneous law and arguments presented to the jury.

Based on its whole record review (or, in the alternative, based on the regular standard of appellate review as well as the trial court’s failure to properly instruct the jury), the defendant’s conviction was reversed and the case was remanded for entry of judgment of acquittal. The court then reiterated and summarized the essential elements of the offense, the state’s burden of proof, and the jury instructions required for a constitutionally valid conviction under the statute.

Abuse Offenses

In a neglect of an elder adult case there was sufficient evidence that the defendant was her elderly mother’s “caretaker”

State v. Stubbs, ___ N.C. App. ___, 845 S.E.2d 125 (June 2, 2020), **temp. stay granted, 374 N.C. 749 (June 3, 2020)**

In this neglect of an elder adult case, the trial court did not err by denying the defendant’s motion to dismiss for insufficient evidence that she was her elderly mother’s “caretaker” as that word is defined by G.S. 14-32.3(d)(1), and the trial court did not commit plain error by allowing a video of the defendant’s mother to be played for the jury. Despite the defendant’s argument that she and her mother, who lived at the defendant’s house, did not have a “close relationship” and were “more like roommates” and testimony describing the mother as a “very private person [who] liked to keep to herself,” the court found the State’s evidence sufficient to send the question of the defendant’s caretaker status to the jury. This evidence included that in her mother’s final weeks of life the defendant helped her bathe; purchased food and supplies for her; assisted her in paying her bills; helped with “general normal care, daily things;” and purchased life insurance on her behalf and at her request.

Sex Offenses

Defining “school personnel” in sex offense statutes

The trial court properly denied the defendant’s motion to dismiss as the defendant fell within the “teacher” category as defined in G.S. 14-27.7 (2013) [now G.S. 14-27.32 (2015)].

State v. Smith, ___ N.C. ___, 846 S.E.2d 492 (Aug. 14, 2020)

The defendant worked full-time at Knightdale High School, initially as an In-School Suspension teacher and then as a Physical Education teacher. Although not certified as a teacher, he worked the same hours as a certified teacher, which included a regularly scheduled planning period. During his time teaching at the school, the defendant met a minor, D.F., a student at the school. On October 29, 2014, D.F. went to the defendant’s home and later alleged the two engaged in sexual activity.

The defendant was indicted for two counts of engaging in sexual activity with a student pursuant to G.S. 14-27.7. At the close of the State’s evidence, defense counsel made a motion to dismiss based on insufficient evidence, asserting that the State’s evidence was conflicting. The trial court denied the motion. At the end of all the evidence, defense counsel renewed the motion to dismiss, asserting that there was no physical evidence. The trial court again denied the motion, and the defendant was ultimately convicted of two counts of sexual activity with a student.

(2) On the merits of the case, the defendant argued that there was no substantial evidence that he was a “teacher” under the statute. G.S. 14-27.7(b) (2013) provides: “For purposes of this subsection, the terms “school”, “school personnel”, and “student” shall have the same meaning as in G.S. 14-202.4(d),” which in turn refers to G.S. 115C-332. The latter statute provides that “school personnel” includes substitute teachers, driving training teachers, bus drivers, clerical staff, and custodians. The Court determined that it was “evident that the General Assembly intended to cast a wide net prohibiting criminal sexual conduct with students by any adult working on school property” and that “a person’s categorization as a ‘teacher’ should be based on a common-sense evaluation of all of the facts of the case, not a hyper-technical interpretation based solely on the individual’s title.”

Despite his lack of certification, defendant was at the school on a long-term assignment, an employee of Wake County Public Schools, and held to the same standards as a certified teacher. Defendant taught at the school daily, had a planning period, and had full access to students as any certified teacher would. The only difference between the defendant and other teachers was his title based on his lack of a teaching certificate at that time. The Court held that the defendant was correctly deemed a teacher in this case and the trial court properly denied the defendant’s motion to dismiss.

Kidnapping & Related Offenses

The State presented sufficient evidence of first-degree kidnapping based upon the defendant terrorizing the victim and also presented sufficient evidence of misdemeanor assault with a deadly weapon

State v. English, ___ N.C. App. ___, 845 S.E.2d 901 (June 16, 2020)

In this case involving convictions for first-degree kidnapping and misdemeanor assault with a deadly weapon, among other offenses, the State presented sufficient evidence of the offenses and the trial court did not err by denying the defendant's motion to dismiss on that basis. With regard to the kidnapping conviction, the defendant argued that the State failed to present substantial evidence the defendant's purpose was to terrorize the victim. Recounting evidence that the defendant hid in the backseat of the victim's car holding a knife while he waited for her to get off work, forced her to remain in the car and drive by choking her and threatening her with the knife, and forcefully struck her on the head when she attempted to scream for help, the court rejected this argument and bolstered its position by describing her frantic efforts to escape.

The court also found sufficient evidence of misdemeanor assault with a deadly weapon under both the show of violence theory of assault and the act or attempt to do injury to another theory of assault. The State's evidence tended to show that after two men scuffled with the defendant in an attempt to aid the victim, the defendant jumped into the driver's seat of the victim's car and attempted to run the men over and nearly did so. This was sufficient evidence of assault under either theory.

Larceny

In a larceny case, the State established no more than the defendant's mere opportunity to commit the crime and failed to present sufficient evidence that the defendant was the perpetrator.

State v. Campbell, 373 N.C. 216 (Dec. 6, 2019)

In a larceny case, the State failed to present sufficient evidence that the defendant was the perpetrator. The State's evidence at trial showed that audio equipment had been taken from Manna Baptist Church after the church doors were inadvertently left unlocked following a Wednesday evening service. The doors were locked by a church secretary the next morning and remained locked until Sunday morning. The church's pastor discovered that the equipment was missing following the Sunday service. The defendant's wallet was found near where some of the equipment had been stored. In an interview with an investigator, the defendant admitted to being at the church on the night the doors were left unlocked but claimed to not remember anything that he had done while he was there. At trial he testified that while at the church he did "a lot of soul searching" and drank a bottle of water but that he "did not take anything away from the church." An EMT who interacted with the defendant soon after he left the church testified that the EMT did not see him carrying anything at that time.

The court reviewed “well-settled caselaw” establishing that “evidence of a defendant’s mere opportunity to commit a crime is not sufficient to send the charge to the jury.” Reviewing the evidence, the court said that while it “may be fairly characterized as raising a suspicion of defendant’s guilt of larceny,” crucial gaps existed in that “[t]he State failed to actually link defendant to the stolen property or to prove that he was in the church at the time when the equipment—which was never recovered—was stolen.” The court noted that the evidence showed a four-day time span over which the theft could have occurred and that a number of other persons had access to the interior of the church during that period. It further noted that the State was unable to show how the defendant would have been physically able to carry away the cumbersome audio equipment at issue. The evidence presented was, in the court’s words, “simply not enough to sustain a conviction for larceny.”

Robbery

There was no error in the trial court’s ruling where the State presented sufficient evidence at the defendant’s trial 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, ___ N.C. ___, 846 S.E.2d 482 (Aug. 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.

Evidence was sufficient to show a taking by force from the victim’s presence

State v. Young-Kirkpatrick, ___ N.C. App. ___, 846 S.E.2d 525 (July 7, 2020)

The defendant in this Davidson County case was tried for common law robbery, habitual misdemeanor assault, and habitual felon. The charges stemmed from an incident between the defendant and his then-girlfriend at her residence, resulting in him assaulting her, damaging her car, and ultimately taking her car after she fled inside the home. The defendant had recently purchased the car for the woman and had been reimbursed by her family for its value, and this was apparently part of the argument. At trial, evidence was also presented that the defendant provided the victim heroin during their relationship. The defendant was convicted on all counts and appealed.

The defendant argued there was insufficient evidence that he used force to take the car or that he took property from the victim’s presence. The court rejected the arguments, observing that “even when there is some attenuation between the use of force and the taking, the action can still amount to a continuous transaction.” Slip op. at 7. Here, the defendant’s acts of assaulting the victim and stealing her car occurred within a 20-minute time period in the victim’s front yard, and evidence showed that the argument and assault were related to the car. Viewed in the light most favorable to the State, the victim fled in response to the defendant’s assault, and the defendant took her car immediately afterwards. This was sufficient to show a continuous transaction linking the defendant’s use of force to the taking of property. The same facts showed that the taking occurred “in the presence of” the victim. In the words of the court:

If the force . . . for the purpose of taking personal property has been used and caused the victim in possession or control to flee the premises and this is followed by the taking of the property in one continuous course of conduct, the taking is from the “presence” of the victim.” *Id.* at 8 (citation omitted).

The trial court did not therefore err in denying the motion to dismiss the common law robbery charge for insufficient evidence.

There was insufficient evidence that an air pistol and a pellet rifle were dangerous weapons for purposes of attempted armed robbery

State v. Williamson, ___ N.C. App. ___, 845 S.E.2d 876 (June 16, 2020)

In this robbery case where the defendant was punished as a habitual felon, there was insufficient evidence of attempted armed robbery.

With regard to insufficiency of the evidence of attempted armed robbery, the defendant argued that there was insufficient evidence of the use of a dangerous weapon. The defendant

had threatened an associate with a pistol and rifle that appeared to be firearms but turned out to be an air pistol and a pellet rifle. Reviewing the rules from *State v. Allen*, 317 N.C. 119 (1986) and related cases about sufficiency of the evidence in situations involving instruments that appear to be but may not in fact be dangerous weapons, the court said that because the evidence was conclusive that the pistol and rifle were not firearms, the State was required to introduce evidence of the weapons' "capability to inflict death or great bodily injury" to merit submission of the attempted armed robbery charge to the jury. As no such evidence was introduced, the trial court erred in denying the defendant's motion to dismiss for insufficient evidence.

Drug Offenses

In a keeping or maintaining a vehicle drug case, there was insufficient evidence that the defendant kept or maintained a vehicle; assuming evidence of keeping or maintaining the vehicle was sufficient, there was insufficient evidence that the defendant's purpose for doing so was keeping or selling controlled substances

State v. Weldy, ___ N.C. App. ___, 844 S.E.2d 357 (June 2, 2020)

In this keeping or maintaining a vehicle for the keeping or sale of controlled substances case, there was insufficient evidence that the defendant kept or maintained a vehicle or did so for the keeping or selling of controlled substances. Officers had received information from another agency indicating that the defendant was selling drugs. During a traffic stop and weapons frisk following 20-25 minutes of surveillance of the defendant driving, approximately 56 grams of methamphetamine and 7 grams of heroin were discovered on the defendant's person, and an officer later testified that neither amount was consistent with personal use. The defendant was driving a vehicle registered to his wife and mother-in-law.

Noting that North Carolina courts have defined the words "keep" and "maintain" separately, the court explained that they are similar terms, "often used interchangeably, to establish a singular element of the offense" and that whether a vehicle is "kept or maintained" for the keeping or selling of controlled substances depends on the totality of the circumstances. Finding that the State presented no evidence that the defendant "maintained" the vehicle because there was no evidence that the defendant had title to or owned the vehicle, had a property interest in it, or paid for its purchase or upkeep, the court turned to whether there was sufficient evidence that the defendant "kept" the car within the meaning of G.S. 90-108(a)(7). Reviewing relevant caselaw, which establishes that the "keep or maintain" language of the statute "refers to possessing something at least for a short period of time—or intending to retain possession of something in the future—for a certain use," the court determined that evidence of the defendant's possession of the vehicle for approximately 20-25 minutes, standing alone, was insufficient to prove that the defendant "kept" the vehicle.

The court then turned to whether, assuming there had been sufficient evidence of the defendant's keeping or maintaining the vehicle, the State presented sufficient evidence that the defendant's purpose in doing so was the "keeping or selling" of controlled substances. Again

reviewing relevant caselaw, the court determined that the discovery on the defendant's person of single bags containing approximately 56 grams of methamphetamine and 7 grams of heroin was insufficient to prove the purpose of keeping or maintaining the vehicle was the keeping or selling of controlled substances. The court noted that the State presented no evidence that cell phones, cash, scales, baggies or other paraphernalia had been discovered in the vehicle. There also was no evidence that the vehicle had been modified to conceal drugs or that drugs had been discovered in the vehicle itself, hidden or otherwise.

Judge Berger dissented and expressed his view that there was sufficient evidence of the offense and that the majority erroneously conflated "keeping" and "maintaining" in its analysis of whether the defendant kept or maintained the vehicle. In Judge Berger's view there was sufficient evidence that the defendant "kept" the vehicle based on his possession of the vehicle while engaging in drug activity. He also would have found sufficient evidence that the defendant's purpose in doing so was the keeping or selling of controlled substances based on the defendant's use of the vehicle to transport drugs, the discovery of a purported drug ledger in the vehicle, and other evidence that the defendant was involved in the sale of drugs.

In a drug trafficking case, there was insufficient evidence that the defendant knowingly possessed methamphetamine where the defendant mistakenly believed that the drugs provided to him at a controlled sale were fake and handled them only for the purpose of inspection

State v. Campbell, ___ N.C. App. ___, 845 S.E.2d 119 (June 2, 2020)

In this trafficking of methamphetamine case, substantial evidence showed that the defendant believed the white substance handed to him during a controlled drug sale was fake, rather than an impure mixture containing methamphetamine, and therefore there was insufficient evidence that the defendant knowingly possessed the methamphetamine. At a controlled drug sale arranged by law enforcement with the help of an informant, the defendant stated his belief that the substance presented to him as methamphetamine was, contrary to his expectations, "re-rock," a term that was defined by the State's witnesses to describe "fake" drugs. In fact, the substance was a mixture of 1 gram of methamphetamine and at least 28 grams of a cutting agent. As the defendant and an associate inspected the substance, law enforcement officers entered the room and arrested them. Finding the case to be controlled by *State v. Wheeler*, 138 N.C. App. 163 (2000), the court explained that when there is no evidence that a person intends to continue a drug transaction because he or she believes the drugs are fake, handling the drugs for the sole purpose of inspection does not constitute possession.

Judge Berger dissented and expressed his view that there was sufficient evidence that the defendant knowingly possessed the methamphetamine because of his previous dealings in methamphetamine with the informant and because the defendant's use of the term "re-rock" may have been a reference to impure, rather than fake, methamphetamine. Judge Berger also distinguished *Wheeler* on the grounds that the defendant in this case did not affirmatively reject the methamphetamine mixture.

In possession of a controlled substance on jail premises cases, the State is not required to prove unlawful possession as an element of the offense

State v. Palmer, ___ N.C. App. ___, ___ S.E.2d ___, 2020 WL 4758601 (Aug. 18, 2020)

In this possession of a controlled substance on jail premises case involving Oxycodone, the trial court did not err by refusing to instruct the jury that an element of the offense is that the controlled substance be possessed unlawfully. The court explained that a plain reading of the relevant statutes does not require the State to prove unlawful possession of a controlled substance as an element of the offense. Instead, lawful possession is a defense that the defendant carries the burden of proving.

Impaired Driving

The trial court erred by denying the defendant’s motion to dismiss DWI and felony death by motor vehicle charges due to insufficient evidence of impairment; There was sufficient evidence of malice to submit a second-degree murder charge to the jury

State v. Nazzal , ___ N.C. App. ___, 840 S.E.2d 881 (Mar. 3, 2020)

In this case arising from a fatal automobile collision involving convictions for second-degree murder, DWI, felony death by motor vehicle, and failure to maintain lane control, the trial court erred by denying the defendant’s motion to dismiss the DWI and felony death by motor vehicle charges due to insufficient evidence of impairment. There was, however, substantial evidence of malice with respect to second-degree murder and the trial court did not err in submitting that charge to the jury, nor did it err in submitting to the jury the failure to maintain lane control charge.

Likening the case to its previous decision in *State v. Eldred*, 259 N.C. App. 345 (2018), the court found that there was insufficient evidence the defendant was impaired at the time of the collision where the officer who formed the opinion on impairment, an opinion based on observations occurring five hours after the collision, did so “entirely through passive observation” of the defendant, without requesting him to perform any field tests. Moreover, the court noted, the officer did not ask the defendant if or when he and ingested any impairing substances. The trial court erred by denying the defendant’s motion to dismiss the DWI charge, and, because DWI was a necessary element of the felony death by motor vehicle charge, also erred in denying the defendant’s motion to dismiss that charge.

Substantial evidence supported the failure to maintain lane control charge under G.S. 20-146(d)(1), a statute providing the disjunctive mandates that a motorist must (1) drive his or her vehicle “as nearly as practicable entirely within a single lane” and (2) refrain from changing lanes unless he or she “has first ascertained that such movement can be made with safety.” The defendant had argued that the fact that a tow truck partially obstructed his lane of travel meant that it was not “practicable” for him to drive entirely within that lane. The court rejected that argument, finding that a reasonable juror could infer that the defendant could have avoided departing from his lane had he been traveling at a reasonable speed for

conditions. The court also explained that there was substantial evidence that the defendant failed to ascertain that his lane change movement could be made with safety as the tow truck also obstructed the defendant's view of the perils which lay in his chosen lane change path.

The jury was instructed that the defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second degree murder, and having upheld his conviction on the lane control offense the court's only remaining task was to determine whether there was substantial evidence that the defendant acted with malice. Recounting the evidence in the light most favorable to the state, the court noted that the defendant was driving while knowing that his license was revoked for DWI and non-DWI offenses, was driving at an irresponsible speed for the icy conditions, made an unconventional maneuver to attempt to pass the tow truck partially obstructing his lane, became involved in a severe collision, left the scene without ascertaining whether anyone was harmed, and washed his car in an apparent attempt to destroy evidence and avoid apprehension. The court also noted that the defendant's extensive record of motor vehicle offenses and car accidents was published to the jury, allowing the jury to infer that he was aware of the risk to human life caused by his behavior on the road but nevertheless once again engaged in dangerous driving with indifference to its consequences. This substantial evidence supported the element of malice by reckless disregard for human life.

Finally, the court determined that any error related to the admission of certain evidence was harmless because that evidence was relevant only to the issue of impairment, and further determined that the trial court's denial of the defendant's request for a jury instruction on the defense of accident, assuming the denial was error, was harmless because the jury's verdicts suggested that it had rejected the notion that the defendant's fatal unconventional traffic maneuver was unintentional.