Criminal Case Compendium

Covering Significant Cases Decided Nov. 2008 – Aug. 21, 2015

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Jessica Smith's Criminal Case Compendium contains comprehensive, searchable annotations of significant cases affecting criminal proceedings in North Carolina from Nov. 2008 - present. Continually updated, with a detailed navigation pane/index. Coverage includes the following topics: Criminal Procedure, Evidence, Arrest, Search & Investigation, Criminal Offenses, Defenses, Capital Law, Post-Conviction Proceedings, and Judicial Administration.

THERE ARE TWO WAYS TO NAVIGATE THIS DOCUMENT:

(1) Click on the contents links at the left to advance to a section. If the links are not displaying, change your browser's default reader to Adobe. Note that the links expand and collapse.

(2) Search full text using the Control + F feature.

Within each section and subsection cases are listed from highest court (U.S. S.Ct.) to lowest court (N.C. App.), in reverse chronological order.

Criminal Procedure

Appellate Issues

State v. Stokes, 367 N.C. 474 (April 11, 2014). The court reversed and remanded the decision below, *State v. Stokes*, __ N.C. App. __, 745 S.E.2d 375 (Jun. 4, 2013) (vacating the defendant's conviction for second-degree kidnapping on grounds that the evidence was insufficient to establish removal when during a robbery the defendant ordered the clerk to the back of the store but the clerk refused). The court held that the court of appeals erred by failing to consider whether the State presented sufficient evidence to support a conviction of attempted second-degree kidnapping. The court went on to find that the evidence supported conviction of the lesser offense. The court rejected the defendant's argument that it could not consider whether the evidence was sufficient to establish the lesser offense because the State had not argued for that result on appeal, stating: "While we agree it would be better practice for the State to present such an alternative argument, we have not, however, historically imposed this requirement." It continued:

> When acting as an appellee, the State should bring alternative arguments to the appellate court's attention, and we strongly encourage the State to do so. Nonetheless, we are bound to follow our long-standing, consistent precedent of acting ex mero motu to recognize a verdict of guilty of a crime based upon insufficient evidence as a verdict of guilty of a lesser included offense. Hence, the Court of Appeals incorrectly refused to consider whether defendant's actions constituted attempted second-degree kidnapping.

State v. Howard, 367 N.C. 320 (Mar. 7, 2014). The court affirmed per curiam the decision below in *State v. Howard*, __ N.C. App. __, 742 S.E.2d 858 (June 18, 2013) (over a dissent, the court dismissed the defendant's appeal where the defendant objected to the challenged evidence at trial under Rule 403 but on appeal argued that it was improper under Rule 404(b); the court stated: "A defendant cannot 'swap horses between courts in order to get a better mount'"; the dissenting judge believed that the defendant preserved his argument and that the evidence was improperly admitted).

State v. Hester, 367 N.C. 119 (Oct. 4, 2013). The court per curiam affirmed the decision below, *State v. Hester*, __ N.C. App. __, 736 S.E.2d 571 (Dec. 18, 2012), which had held, over a dissent, that the defendant's first asserted issue must be dismissed because although he argued plain error, he failed provide an analysis of the prejudicial impact of the challenged evidence.

State v. Carter, 366 N.C. 496 (April 12, 2013). The court reversed the decision below in *State v. Carter*, 216 N.C. App. 453 (Nov. 1, 2011) (in a child sexual offense case, the trial court committed plain error by failing to instruct on attempted sexual offense where the evidence of penetration was conflicting), concluding that the defendant failed to show plain error. The court held that when applying the plain error standard

> [t]he necessary examination is whether there was a "probable impact" on the verdict, not a possible one. In other words, the inquiry is whether the defendant has shown that, "absent the error, the jury probably would have returned a different verdict." Thus, the Court of Appeals' consideration of what the jury "could rationally have found," was improper.

Slip Op at 7 (citations omitted). Turning to the case at hand, the court found even if the trial court had erred, the defendant failed to show a probable impact on the verdict.

State v. Oates, 366 N.C. 264 (Oct. 5, 2012). The court reversed *State v. Oates*, 215 N.C. App. 491 (Sept. 6, 2011), and held that the State's notice of appeal of a trial court ruling on a suppression motion was timely. The State's notice of appeal was filed seven days after the trial judge in open court orally granted the defendant's pretrial motion to suppress but three months before the trial judge issued his corresponding written order of suppression. The court held that the window for filing a written notice of appeal in a criminal case opens on the date of rendition of the judgment or order and closes fourteen days after entry of the judgment or order. The court clarified that rendering a judgment or an order means to pronounce, state, declare, or announce the judgment or order and is "the judicial act of the court in pronouncing the sentence of the law upon the facts in controversy." Entering a judgment or an order is "a ministerial act which consists in spreading it upon the record." It continued:

> For the purposes of entering notice of appeal in a criminal case . . . a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge's decision regarding the judgment or order.

State v. Towe, 366 N.C. 56 (June 14, 2012). The court modified and affirmed *State v. Towe*, 210 N.C. App. 430 (Mar. 15, 2011) (plain error to allow the State's medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion). The

court agreed that the expert's testimony was improper but held that the court of appeals mischaracterized the plain error test. The court of appeals applied a "highly plausible that the jury could have reached a different result" standard. The correct standard, however, is whether a fundamental error occurred that "had a probable impact on the jury's finding that the defendant was guilty." Applying that standard, the court found it satisfied.

State v. Lawrence, 365 N.C. 506 (Apr. 13, 2012). Reaffirming its decision in *State v. Odom*, 307 N.C. 655, 660 (1983), the court clarified "how the plain error standard of review applies on appeal to unpreserved instructional or evidentiary error." It stated:

> For error to constitute plain error, a defendant must demonstrate that a fundamental error occurred at trial. To show that an error was fundamental, a defendant must establish prejudice—that, after examination of the entire record, the error "had a probable impact on the jury's finding that the defendant was guilty." Moreover, because plain error is to be "applied cautiously and only in the exceptional case," the error will often be one that "seriously affect[s] the fairness, integrity or public reputation of judicial proceedings."

(citations omitted). Applying that rule to the case at hand, the court held that the court of appeals applied the incorrect formulation of the plain error standard in *State v. Lawrence*, 210 N.C. App. 73 (Mar. 1, 2011) (holding that the trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery). Although the trial judge erred (the judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm but failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim), the error did not rise to the level of plain error.

State v. Beckelheimer, 366 N.C. 127 (June 14, 2012). In this child sexual abuse case, the court clarified that when analyzing Rule 404(b) and 403 rulings, it "conduct[s] distinct inquiries with different standards of review." It stated:

When the trial court has made findings of fact and conclusions of law to support its 404(b) ruling . . . we look to whether the evidence supports the findings and whether the findings support the conclusions. We review de novo the legal conclusion that the evidence is, or is not, within the coverage of Rule 404(b). We then review the trial court's Rule 403 determination for abuse of discretion.

State v. Shaw, __ N.C. App. __, 763 S.E.2d 161 (Sept. 16, 2014). The defendant had no statutory right to appeal from a guilty plea to DWI where none of the exceptions to G.S. 15A-1444(e) applied.

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 116 (July 1, 2014) (No. COA13-661). The court denied the defendant's motion to strike the State's brief, which was filed in an untimely manner without any justification or excuse and after several extensions of the time within which it was authorized to do so had been obtained. However, the court "strongly admonished" counsel for the State "to refrain from engaging in such inexcusable conduct in the future" and that counsel "should understand that any repetition of the conduct disclosed by the present record will result in the imposition of significant sanctions upon both the State and himself personally."

State v. Williams, __ N.C. App. __, 759 S.E.2d 350 (June 17, 2014). On appeal from the trial court's order granting the defendant's suppression motion, the court rejected the defendant's argument that the State failed to meet the certification requirements of G.S. 15A-979(c) by addressing its certificate to "the court" rather than the trial court judge. The defendant argued that because G.S. 15A-979(c) requires that the certificate be presented to the judge who granted the motion, any deviation from this statutory language renders the State's certificate void. The court concluded that the word "judge" is synonymous with "the court."

State v. Foushee, __ N.C. App. __, 758 S.E.2d 47 (May 20, 2014). Although the State had a right to appeal the trial court's order dismissing charges because of a discovery violation, it had no right to appeal the trial court's order precluding testimony from two witnesses as a sanction for a discovery violation.

State v. Bryan, __ N.C. App. __, 749 S.E.2d 900 (Nov. 5, 2013). Because the State failed to file a certificate as required by G.S. 15A-1432(e), the appellate court lacked jurisdiction over the appeal. In district court the defendant moved to dismiss his DWI charge on speedy trial grounds. When the district court issued an order indicating its preliminary approval of the defendant's motion, the State appealed to superior court. The superior court remanded to the district court for additional factual findings. Once the superior court received further findings of fact, it affirmed the district court's preliminary order and remanded the case to district court with orders to affirm the dismissal. After the district court issued its final judgment, the State again appealed and the superior court affirmed the district court's judgment. The court determined that G.S. 15A-1432(e), not G.S. 15A-1445(a)(1), applied to the State's appeal to the appellate division. Because the State failed to comply with G.S. 15A-1432(e)'s certificate requirement, the court had no jurisdiction over the appeal.

State v. Gamez, __ N.C. App. __, 745 S.E.2d 876 (July 16, 2013). Where the State's witness testified regarding statements made to the victim by the victim's brother and the defendant failed to move to strike the testimony, the defendant failed to preserve the issue for appellate review.

State v. Storm, __ N.C. App. __, 743 S.E.2d 713 (July 2, 2013). By failing to object to the omission of diminished capacity and voluntary intoxication from the trial court's final mandate to the jury instructions on murder, the defendant failed to preserve this issue for appellate review. The trial court had instructed on those defenses per the pattern instructions. The defendant never requested that the final mandate for murder include voluntary intoxication and diminished capacity. The court went on to reject the defendant's argument that this constituted plain error.

State v. Davis, __ N.C. App. __, 742 S.E.2d 640 (June 4, 2013). Relying on language in G.S. 15A-979, the court held that a defendant may appeal an order denying a motion to suppress made pursuant to G.S. 15A-980 (right to suppress use of certain prior convictions obtained in violation of right to counsel) where the defendant reserved the right to appeal in his guilty plea.

State v. Hernandez, __ N.C. App. __, 742 S.E.2d 825 (June 4, 2013). The court determined that it need not address the substance of the defendants' challenge to the trial court's order denying their suppression motions where the argument asserted was not advanced at the suppression hearing in the trial court.

State v. Hunt, 221 N.C. App. 48 (June 5, 2012). Because a civil no contact order entered under G.S. 15A-1340.50 (permanent no contact order prohibiting future contact by convicted sex offender with crime victim) imposes a civil remedy, notice of appeal from such an order must comply with N.C. R. Appellate Procedure 3(a).

State v. Lineberger, 221 N.C. App. 241 (June 5, 2012). In an appeal from an order requiring the defendant to enroll in lifetime SBM in which defense counsel filed an *Anders* brief, the court noted that SBM proceedings are civil in nature and that *Anders* protections do not extend to civil cases. The court however exercised discretion to review the record and found no error.

State v. Miles, 221 N.C. App. 211 (June 5, 2012). Plain error review is not available for a claim that the trial court erred by requiring the defendant to wear prison garb during trial. Plain error is normally limited to instructional and evidentiary error.

State v. King, 218 N.C. App. 347 (Feb. 7, 2012) (COA11-526). Gaps in the verbatim trial transcript were sufficiently addressed by other materials so that appellate review was possible. However, the complete lack of a verbatim transcript of the habitual felon phase of his trial precluded appellate review and warranted a new determination on this issue.

Bond Forfeiture

State v. Cortez, __ N.C. App. __, 747 S.E.2d 346 (Aug. 20, 2013). (1) Even though the surety's name was not listed on the first page of form AOC-CR-201 (Appearance Bond for Pretrial Release) the surety was in fact the surety on a $570,000.00 bond, where among other things, the attached power of attorney named the surety and the surety collected the premium on the bond and did not seek to return it until 3 years later when the trial court ordered a forfeiture. (2) The trial court did not err by concluding that the surety's exclusive remedy for relief from a final judgment of forfeiture is an appeal pursuant to G.S. 15A-544.8. (3) The trial court did not err in granting the Board monetary sanctions against the surety and the bondsmen pursuant to G.S. 15A-544.5(d)(8). The court rejected the surety's argument that the Board's sanctions motion was untimely. (4) The trial court properly considered the relevant statutory factors before imposing monetary sanctions against the surety under G.S. 15A-544.5(d)(8) where there was no evidence that the surety's failure to attach the required documentation was unintentional. (5) The trial court did not abuse its discretion by imposing a monetary sanction of $285,000 on the surety.

State v. Fred Adams, 220 N.C. App. 406 (May 1, 2012). The trial court did not err by denying the surety's motion to set aside a bond forfeiture when the trial court's ruling was properly based on G.S. 15A-544.5(f) (no forfeiture may be set aside when the surety had actual notice before executing a bond that the defendant had already failed to appear on two or more prior occasions in the case for which the bond was executed).

State v. Williams, 218 N.C. App. 450 (Feb. 7, 2012). (1) The trial court did not err by denying the surety's motion to set aside a bond forfeiture when the defendant was not surrendered until 9:40 pm on the day the 150-day time limit in G.S. 15A-544.5 expired and the surety's motion to set aside was not filed until the next day. The court rejected the surety's argument that the 150-

day period should not expire when the courthouse closes, but should be extended until 11:59 pm. (2) The trial court did not abuse its discretion by failing to fully remit the forfeited amount pursuant to G.S. 15A-544.8(b)(2). The surety had argued that because the trial court found extraordinary circumstances warranting partial remission, remission should be in full unless the trial court makes specific findings supporting partial remission, but cited no authority for this proposition.

State v. Cortez, 215 N.C. App. 576 (Sept. 20, 2011). The county school board's notice of appeal from a judge's order affirming the Clerk's ruling setting aside bond forfeitures divested the Clerk and trial court of jurisdiction to enter a second forfeiture while the appeal was pending.

State ex rel Guilford County Board of Educ. v. Herbin, 215 N.C. App. 348 (Sept. 6, 2011). (1) A bail agent may file a motion to set aside a forfeiture. (2) Filing such a motion by a bail agent does not constitute unauthorized practice of law. (3) A bail agent may appear pro se at a hearing on a motion to set aside forfeiture if the agent has a financial liability to the surety as a result of the bond. However, a bail agent may not appear at the motion hearing in court to represent the corporate surety.

State v. Largent, 197 N.C. App. 614 (June 16, 2009). The trial court properly denied the surety's motion to set aside a bond forfeiture under G.S. 15A-544.5(b)(7) (defendant incarcerated at the time of the failure to appear). The statute refers to a one continuous period of incarceration beginning at the time of the failure to appear and ending no earlier than 10 days after the date that the district attorney is notified of the incarceration. In this case, the period of incarceration was not continuous.

State v. Dunn, 200 N.C. App. 606 (Nov. 3, 2009). A probation violation was a separate case from the original criminal charges for purposes of G.S. 15A-544.6(f) (providing that no more than two forfeitures may be set aside in any case).

Capacity to Proceed and Related Issues

Obligation to Order Hearing Sua Sponte

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014). Where the defendant voluntarily ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol during jury deliberations of his non-capital trial, the trial court did not err by failing to conduct a sua sponte competency hearing. The court relied on the fact that the defendant voluntarily ingested the intoxicants in a short period of time apparently with the intent of affecting his competency.

State v. Chukwu, __ N.C. App. __, 749 S.E.2d 910 (Nov. 19, 2013). The court rejected the defendant's argument that his due process rights were violated when the trial court failed to *sua sponte* conduct a second competency hearing. The court held that the record demonstrated the defendant's competency, that there was no evidence that his competency was temporal in nature, and that the trial court did not err by failing to *sua sponte* conduct another competency hearing. It further found that the trial court's findings were supported by competent evidence.

State v. Holland, __ N.C. App. __, 749 S.E.2d 464 (Nov. 5, 2013). (1) The trial court did not err by failing to inquire, sua sponte, about the defendant's competency after he was involuntarily committed to a psychiatric unit during trial. After the defendant failed to appear in court mid-trial and defense counsel was unable to explain his absence, the defendant was tried in absentia. Later during trial, defense counsel obtained information indicating that the defendant might have been committed, but was unable to confirm that. Evidence produced in connection with the defendant's motion for appropriate relief (MAR) established that he in fact had been committed at that time. However, during trial, there was no evidence that the defendant had a history of mental illness and the defendant's conduct in court indicated that he was able to communicate clearly and with a reasonable degree of rational understanding. While the trial court had information indicating that the defendant might have been committed, defense counsel was unable to confirm that information. Furthermore, at the MAR hearing defense counsel maintained he had no reason to believe anything was wrong with the defendant and thought the defendant's hospitalization was part of a plan to avoid prosecution. (2) The trial court did not err by denying the defendant's MAR which asserted that the defendant was incompetent to stand trial. Adequate evidence supported the trial court's determination that the defendant was malingering.

State v. Ashe, __ N.C. App. __, 748 S.E.2d 610 (Oct. 1, 2013). The trial court erred by failing to sua sponte order a hearing to evaluate the defendant's competency to stand trial. Although no one raised an issue of competency, a trial court has a constitutional duty to sua sponte hold a competency hearing if there is substantial evidence indicating that the defendant may be incompetent. Here, that standard was satisfied. The defendant proffered evidence of his extensive mental health treatment history and testimony from a treating psychiatrist showing that he has been diagnosed with paranoid schizophrenia, anti-social personality disorder, and cocaine dependency in remission. Additionally, his conduct before and during trial suggests a lack of capacity, including, among other things, refusing to get dressed for trial and nonsensically interrupting. The court rejected the remedy of a retrospective competency hearing and ordered a new trial.

State v. Whitted, 209 N.C. App. 522 (Feb. 15, 2011). The trial court erred by failing to sua sponte inquire into the defendant's competency. In light of the defendant's history of mental illness, including paranoid schizophrenia and bipolar disorder, her remarks that her appointed counsel was working for the State and that the trial court wanted her to plead guilty, coupled with her irrational behavior in the courtroom, constituted substantial evidence and created a bona fide doubt as to competency. The court rejected the State's argument that the trial court did in fact inquire into competency when, after defense counsel mentioned that she had recently undergone surgery and was taking pain medication, the trial court asked the defendant and counsel whether the medication was impairing her ability to understand the proceedings or her decision to reject the plea bargain offered by the State. Both replied in the negative. The trial court also asked the defendant about her ability to read and write and whether she understood the charges against her. However, this inquiry pertained only to effects of the pain medication. More importantly, it was not timely given that the defendant's refusal to return to the courtroom and resulting outbursts occurred two days later. The court remanded for a determination of whether a meaningful retrospective competency hearing could be held.

Denying Defense Motion for Evaluation

State v. Robinson, 221 N.C. App. 509 (July 17, 2012). The trial court abused its discretion by denying defense counsel's motion requesting that the defendant be evaluated by a mental health professional to determine competency. At the call of the case for trial, defense counsel made a motion, supported by an affidavit by defense counsel and prior mental health evaluation reports, questioning the defendant's capacity to proceed and seeking an assessment of his competency by a mental health professional. After conducting a hearing on the motion and considering the documentary evidence and arguments presented, the trial court denied the motion. Reviewing those materials, the court concluded that "[t]he entirety of the evidence presented . . . indicated a 'significant possibility' that defendant may have been incompetent . . . , necessitating the trial court to appoint an expert or experts to inquire into defendant's mental health". The court noted that when the a trial court conducts a proper competency hearing but abuses its discretion in proceeding to trial in light of the evidence indicating the defendant's incompetency to proceed, the proper remedy is to vacate the judgment and remand the case for a new trial if and when the defendant is properly determined competent to proceed with trial. However, in this case a defense witness, Dr. Corvin, testified on direct examination that "there has been a time during my evaluation where I was somewhat concerned about [defendant's current competency to stand trial], although not currently." The court noted that defense counsel did not question Dr. Corvin on the issue of competency. It concluded: "Given Dr. Corvin's presence at trial and his testimony that he was not currently concerned with defendant's competency to stand trial, we fail to see how the trial court's error prejudiced defendant."

Hearing

State v. Leyshon, 211 N.C. App. 511 (May 3, 2011). The court rejected the defendant's argument that his due process rights were violated when the trial judge failed to provide him with a hearing before ordering an examination of his capacity to proceed. G.S. 15A-1002 does not require the trial judge to conduct a hearing before such an examination. A defendant may request a hearing after the examination but failure to do so—as happened here—constitutes a waiver.

Competency Decision Upheld

State v. Newson, ___ N.C. App. ___, 767 S.E.2d 913 (Feb 3, 2015). The defendant was competent to stand trial and to represent himself. As to competency to stand trial, the defendant had several competency evaluations and hearings; the court rejected the defendant's argument that a report of the one doctor who opined that he was incompetent was determinative of the issue, noting that numerous other doctors opined that he was malingering. The court also rejected the defendant's argument that even after several competency hearings, the trial court erred by failing to hold another competency hearing when the defendant disrupted the courtroom, noting in part that four doctors had opined that the defendant's generally disruptive behavior was volitional. The court also rejected the defendant's argument that even if he was competent to stand trial, the trial court erred by allowing him to proceed pro se. The court found *Indiana v. Edwards* inapplicable because here--and unlike in *Edwards*--the trial court granted the defendant's request to proceed pro se. Also, the defendant did not challenge the validity of the waiver of counsel colloquy.

Miscellaneous Cases

In re Murdock, 222 N.C. App. 45 (Aug. 7, 2012). When assessing whether a defendant is charged with a violent crime pursuant to G.S. 15A-1003(a) and in connection with an involuntary commitment determination, courts may consider the elements of the charged offense and the underlying facts giving rise to the charge. However, the fact-based analysis applies only with respect to determining whether the crime involved assault with a deadly weapon. The court held:

> [F]or purposes of [G.S.] 15A-1003(a), a "violent crime" can be either one which has as an element "the use, attempted use, threatened use, or substantial risk of use of physical force against the person or property of another[,]" or a crime which does not have violence as an element, but assault with a deadly weapon was involved in its commission.

Slip Op. at 10 (citation omitted). Here, the defendant was charged with possession of a firearm by a felon and resisting an officer. Because violence is not an element of either offense, neither qualifies as a violent crime under the elements-based test. However, applying the fact-based analysis, the commission of the offenses involved an assault with a deadly weapon. The fact that the defendant stated that he wasn't going with the officers, that he ran into a bedroom and stood within reach of a loaded revolver, and that he resisted while being handcuffed and removed showed an unequivocal appearance of an attempt, with force and violence, to do some immediate physical injury to the officers.

Collateral Estoppel

State v. Macon, __ N.C. App. __, 741 S.E.2d 688 (May 7, 2013). The trial court did not err when during a retrial in a DWI case it instructed the jury that it could consider the defendant's refusal to take a breath test as evidence of her guilt even though during the first trial a different trial judge had ruled that the instruction was not supported by the evidence. Citing *State v. Harris*, 198 N.C. App. 371 (2009), the court held that neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to legal rulings in a retrial following a mistrial. It concluded that on retrial de novo, the second judge was not bound by rulings made during the first trial. Moreover, it concluded, collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. Here, the first judge's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial.

State v. Cornelius, 219 N.C. App. 329 (Mar. 6, 2012). The trial court did not err by allowing offensive collateral estoppel to establish the underlying felony for the defendant's felony murder conviction. The defendant was charged with felony-murder and an underlying felony of burglary. At the first trial the jury found the defendant guilty of burglary but hung on felony murder. The trial court entered a PJC on the burglary and declared a mistrial as to felony murder. At the retrial, the trial judge instructed the jury with respect to felony murder that "because it has previously been determined beyond a reasonable doubt in a prior criminal proceeding that [the defendant] committed first degree burglary . . . . you should consider that this element [of felony murder (that defendant committed the felony of first degree burglary)] has been proven to you

beyond a reasonable doubt." Citing *State v. Dial*, 122 N.C. App. 298 (1996), the trial court's instruction was proper.

Controlling the Courtroom

Restraining the Defendant

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). In a first-degree murder case, the trial court did not abuse its discretion or violate defendant's constitutional rights by ordering the defendant to be physically restrained during trial after the defendant attempted to escape mid-trial, causing a lockdown of the courthouse. [Author's note: For more detail about restraining a defendant during trial, see my Benchbook chapter here.]

State v. Posey, __ N.C. App. __, 757 S.E.2d 369 (May 6, 2014). The trial court did not abuse its discretion by requiring the defendant to wear restraints at trial. The defendant, who was charged with murder and other crimes, objected to having to wear a knee brace at trial. The brace was not visible to the jury and made no noise. At a hearing on the issue, a deputy testified that it was "standard operating procedure" to put a murder defendant "in some sort of restraint" whenever he or she was out of the sheriff's custody. Additionally, the trial court considered the defendant's past convictions and his five failures to appear, which it found showed "some failure to comply with the [c]ourt orders[.]" The trial court also considered a pending assault charge that arose while the defendant was in custody.

State v. Miles, 221 N.C. App. 211 (June 5, 2012). The trial court did not err by requiring the defendant to be restrained during trial.

State v. Lee, 218 N.C. App. 42 (Jan. 17, 2012). Although the trial court abused its discretion by requiring the defendant to remain shackled during his trial, the error was harmless in light of the trial court's curative instruction and the overwhelming evidence of guilt. The court "strongly caution[ed] trial courts to adhere to the proper procedures regarding shackling of a defendant" [*Author's note:* For the section of the superior court judge's benchbook outlining the law on this issue here.].

State v. Stanley, 213 N.C. App. 545 (July 19, 2011). (1) The trial court did not abuse its discretion by failing to remove the defendant's handcuff restraints during trial. The defendant was an incarcerated prisoner charged with possession of drugs at a penal institution. The trial court properly considered the defendant's past record and reasoned that incarceration for second-degree murder and kidnapping raised safety concerns. (2) Although the trial court erred by failing to give the limiting instruction required by G.S. 15A-1031 regarding the defendant's restraints, the error was not prejudicial.

Counsel Issues

Absolute Impasse

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *temporary stay allowed*, ___ N.C. ___, 768 S.E.2d 551 (Dec. 31, 2014). The trial court erred by failing to adequately address an impasse between the defendant and defense counsel regarding the questioning of a

prosecution witness. The record "clearly reveals" that the defendant and counsel "reached an absolute impasse concerning a specific tactical issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination." In the face of the defendant's repeated statements that his trial counsel refused to ask questions that the defendant wanted posed, the trial court instructed the defendant, "that's between you and [counsel]" and stated that it was not the trial court's place "to interject" in the matter. As such, the trial court failed to inquire into the nature of the impasse and order defense counsel to comply with the defendant's lawful instructions. [Author's note: For a discussion of absolute impasse and the required procedure for the trial court, see my judges' benchbook chapter here]

State v. Jones, 220 N.C. App. 392 (May 1, 2012). An absolute impasse did not occur when trial counsel refused to abide by the defendant's wishes to pursue claims of prosecutorial and other misconduct that counsel believed to be frivolous. Under the absolute impasse doctrine counsel need only abide by a defendant's lawful instructions with respect to trial strategy. Here, the impasses was not over tactical decisions, but rather over whether the defendant could compel counsel to file frivolous motions and assert theories that lacked any basis in fact. The court concluded: "Because nothing in our case law requires counsel to present theories unsupported in fact or law, the trial court did not err in failing to instruct counsel to defer to Defendant's wishes."

State v. Freeman, 202 N.C. App. 740 (Mar. 2, 2010). When the defendant and trial counsel reached an absolute impasse regarding the use of a peremptory challenge to strike a juror, the trial court committed reversible error by not requiring counsel to abide by the defendant's wishes. "It was error for the trial court to allow council's decision to control when an absolute impasse was reached on this tactical decision, and the matter had been brought to the trial court's attention."

Competency to Waive & Forfeit Counsel

State v. Lane, 365 N.C. 7 (Mar. 11. 2011). This capital case came back before the N.C. Supreme Court after that court remanded in *State v. Lane*, 362 N.C. 667 (Dec. 12, 2008) (*Lane I*), for consideration under *Indiana v. Edwards*, 554 U.S. 164 (2008), as to whether the trial judge should have exercised discretion to deny the defendant's request to represent himself. *Edwards* held that states may require counsel to represent defendants who are competent to stand trial but who suffer from severe mental illness to the extent that they are not competent to represent themselves. At trial, the trial court had accepted the defendant's waiver of counsel and allowed the defendant to proceed pro se. Following a hearing, held on remand after *Lane I*, the trial court concluded that the defendant was competent to stand trial and to discharge his counsel and proceed pro se. The N.C. Supreme Court held that because the defendant never was denied his constitutional right to self-representation (he was allowed to proceed pro se), the U.S. "Supreme Court's holding in *Edwards*, that the State may deny that right if a defendant falls into the "gray area" of competence, does not guide our decision here." Slip op. at 22. Rather, the N.C. Supreme Court clarified, because the trial court found the defendant competent to stand trial, the issue was whether the defendant made a knowing and voluntary waiver of his right to counsel. On that issue, and after a detailed review of the trial court's findings, the court concluded that the trial court's inquiry was sufficient to support its determination that the defendant knowingly and

voluntarily waived his right to counsel. In the course of that ruling, the court reaffirmed that a defendant's technical legal knowledge is not relevant to an assessment of a valid waiver of counsel.

While *Lane I* could be read to suggest that the trial court always must undertake an *Edwards* inquiry before allowing a defendant to proceed pro se, *Lane II* suggests otherwise. In *Lane II*, the court clarified the options for the trial court, stating:

> For a defendant whose competence is at issue, he must be found [competent] before standing trial. If that defendant, after being found competent, seeks to represent himself, the trial court has two choices: (1) it may grant the motion to proceed *pro se*, allowing the defendant to exercise his constitutional right to self-representation, if and only if the trial court is satisfied that he has knowingly and voluntarily waived his corresponding right to assistance of counsel . . . ; or (2) it may deny the motion, thereby denying the defendant's constitutional right to self-representation because the defendant falls into the "gray area" and is therefore subject to the "competency limitation" described in *Edwards.* The trial court must make findings of fact to support its determination that the defendant is "unable to carry out the basic tasks needed to present his own defense without the help of counsel." 365 N.C. at 22 (citations omitted).

State v. Newson, ___ N.C. App. ___, 767 S.E.2d 913 (Feb 3, 2015). The defendant was competent to stand trial and to represent himself. As to competency to stand trial, the defendant had several competency evaluations and hearings; the court rejected the defendant's argument that a report of the one doctor who opined that he was incompetent was determinative of the issue, noting that numerous other doctors opined that he was malingering. The court also rejected the defendant's argument that even after several competency hearings, the trial court erred by failing to hold another competency hearing when the defendant disrupted the courtroom, noting in part that four doctors had opined that the defendant's generally disruptive behavior was volitional. The court also rejected the defendant's argument that even if he was competent to stand trial, the trial court erred by allowing him to proceed pro se. The court found *Indiana v. Edwards* inapplicable because here--and unlike in *Edwards*--the trial court granted the defendant's request to proceed pro se. Also, the defendant did not challenge the validity of the waiver of counsel colloquy.

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). Based on assessments from mental health professionals and the defendant's own behavior, the trial court did not abuse its discretion by ruling that the defendant was competent to represent himself at trial.

State v. Cureton, __ N.C. App. __, 734 S.E.2d 572 (Nov. 6, 2012). No violation of the defendant's Sixth Amendment right to counsel occurred when the trial court found that the defendant forfeited his right to counsel because of serious misconduct and required him to proceed pro se. The court rejected the defendant's argument that *Indiana v. Edwards* prohibits a finding of forfeiture by a "gray area" defendant who has engaged in serious misconduct.

State v. Reid, 204 N.C. App. 122 (May 18, 2010). The trial court did not err in allowing the defendant to represent himself after complying with the requirements of G.S. 15A-1242. The court rejected the defendant's argument that his conduct during a pre-trial hearing and at trial

indicated that he was mentally ill and not able to represent himself, concluding that the defendant's conduct did not reflect mental illness, delusional thinking, or a lack of capacity to carry out self-representation under *Indiana v. Edwards*, 128 S. Ct. 2379 (2008).

"Critical Proceedings" Where Counsel Required

State v. Wray, __ N.C. App. __, 747 S.E.2d 133 (Aug. 6, 2013). The trial court did not err by failing to appoint counsel for the defendant after his case was remanded from the appellate division and before ordering the defendant to submit to a capacity to proceed evaluation. The court held: "the trial court's order committing defendant to a competency evaluation was not a critical stage and defendant was not denied his Sixth Amendment right to counsel."

State v. Clark, 211 N.C. App. 60 (Apr. 19, 2011). Because a SBM hearing is not a criminal proceeding to which the right to counsel applies, the defendant cannot assert an ineffective assistance of counsel claim as to counsel's performance at such a hearing.

State v. Miller, 209 N.C. App. 466 (Feb. 1, 2011). The court noted in dicta that ineffective assistance of counsel claims are not available in civil appeals, such as that from an SBM eligibility hearing.

Forfeiture of the Right to Counsel
Finding of Forfeiture Proper

State v. Brown, ___ N.C. App. ___, 768 S.E.2d 896 (Mar. 3, 2015). Because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, he forfeited his right to counsel. Citing *State v. Leyshon*, 211 N.C. App. 511 (2011), the court began by holding that defendant did not waive his right to counsel. When asked whether he wanted a lawyer, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements about whether he waived his right to counsel were sufficiently equivocal such that they did not constitute a waiver of the right to counsel. However, defendant forfeited his right to counsel. In addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about 3½ months he never obtained counsel. As in *Leyshon*, this behavior amounted to willful obstruction and delay of trial proceedings and therefore defendant forfeited his right to counsel.

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). The court rejected the defendant's argument that the trial court failed to make the proper inquiry required by G.S. 15A-1242 before allowing him to proceed pro se, concluding that the defendant's actions "absolved the trial court from this requirement" and resulted in a forfeiture of the right to counsel. As recounted in the court's opinion, the defendant engaged in conduct that obstructed and delayed the proceedings.

State v. Mee, __ N.C. App. __, 756 S.E.2d 103 (April 15, 2014). The defendant forfeited his right to counsel where he waived the right to appointed counsel, retained and then fired counsel twice, was briefly represented by an assistant public defender, repeatedly refused to state his wishes with respect to representation, instead arguing that he was not subject to the court's jurisdiction, would not participate in the trial, and ultimately chose to absent himself from the courtroom during the trial. The court rejected the defendant's argument that he should not be held to have forfeited his right to counsel because he did not threaten counsel or court personnel and was not abusive. The court's opinion includes extensive colloquies between the trial court and the defendant.

State v. Cureton, __ N.C. App. __, 734 S.E.2d 572 (Nov. 6, 2012). (1) No violation of the defendant's Sixth Amendment right to counsel occurred when the trial court found that the defendant forfeited his right to counsel because of serious misconduct and required him to proceed pro se. The court rejected the defendant's argument that *Indiana v. Edwards* prohibits a finding of forfeiture by a "gray area" defendant who has engaged in serious misconduct. (2) The trial court did not err by finding that the defendant forfeited his right to counsel because of serious misconduct. The court rejected the defendant's argument that the misconduct must occur in open court. The defendant was appointed three separate lawyers and each moved to withdraw because of his behavior. His misconduct went beyond being uncooperative and noncompliant and included physically and verbally threatening his attorneys. He consistently shouted at his attorneys, insulted and abused them, and spat on and threatened to kill one of them. The court also rejected the defendant's argument that *State v. Wray*, 206 N.C. App. 354 (2010), required reversal of the forfeiture ruling.

State v. Leyshon, 211 N.C. App. 511 (May 3, 2011). The trial court did not err by allowing the defendant to proceed pro se where the defendant forfeited his right to counsel. In July 2007, the defendant refused to sign a waiver of counsel form. At a Jan. 2008 hearing, the court twice advised the defendant of his right to counsel and repeatedly asked if he wanted a lawyer. The defendant refused to answer, arguing, "I want to find out if the Court has jurisdiction before I waive anything". Even after the court explained the basis of its jurisdiction, the defendant refused to state if he wanted an attorney, persistently refusing to waive anything until jurisdiction was established. At a July 2008 hearing, the defendant would not respond to the court's inquiry regarding counsel, asserting, "I'm not waiving my right to assistance of counsel," but also refusing the assistance of the appointed attorney. At the next hearing, he continued to challenge the court's jurisdiction and would not answer the court's inquiry regarding whether he wanted an attorney or to represent himself. Instead, he maintained, "If I hire a lawyer, I'm declaring myself a ward of the Court . . . and the Court automatically acquires jurisdiction . . . and I'm not acquiescing at this point to the jurisdiction of the Court." The defendant willfully obstructed and delayed the proceedings and thus forfeited his right to counsel.

State v. Boyd, 200 N.C. App. 97 (Sept. 15, 2009). Holding that the defendant willfully obstructed and delayed court proceedings by refusing to cooperate with his appointed attorneys and insisting that his case would not be tried; he thus forfeited his right to counsel. The defendant's lack of cooperation lead to the withdrawal of both of his court-appointed attorneys. His original appointed counsel was allowed to withdraw over disagreements with the defendant including

counsel's refusal to file a motion for recusal of the trial judge on grounds that various judges were in collusion to fix the trial. In his first motion to withdraw, the defendant's next lawyer stated that the defendant did not want him as counsel and that he could not effectively communicate with the defendant. In his second motion to withdraw, counsel stated that the defendant had been "totally uncooperative" such that counsel "was unable to prepare any type of defense to the charges." Further, the defendant repeatedly told counsel that his case was not going to be tried.

Finding of Forfeiture Improper

State v. Wray, 206 N.C. App. 354 (Aug. 17, 2010). The trial court erred by ruling that the defendant forfeited his right to counsel. The defendant's first lawyer was allowed to withdraw because of a breakdown in the attorney-client relationship. His second lawyer withdrew on grounds of conflict of interest. The defendant's third lawyer was allowed to withdraw after the defendant complained that counsel had not promptly visited him and had "talked hateful" to his wife and after counsel reported that the defendant accused him of conspiring with the prosecutor and contradicted everything the lawyer said. The trial court appointed Mr. Ditz and warned the defendant that failure to cooperate with Ditz would result in a forfeiture of the right to counsel. After the defendant indicated that he did not want to be represented by Ditz, the trial court explained that the defendant either could accept representation by Ditz or proceed pro se. The defendant rejected these choices and asked for new counsel. When Ditz subsequently moved to withdraw, the trial court allowed the motion and found that the defendant had forfeited his right to counsel. On appeal, the court recognized "a presumption against the casual forfeiture" of constitutional rights and noted that forfeiture should be restricted cases of "severe misconduct." The court held that the record did not support the trial court's finding of forfeiture because: (1) it suggested that while the defendant was competent to be tried, under *Indiana v. Edwards*, 554 U.S. 164 (2008), he may have lacked the capacity to represent himself; (2) Ditz had represented the defendant in prior cases without problem; (3) the record did not establish serious misconduct required to support a forfeiture (the court noted that there was no evidence that the defendant used profanity in court, threatened counsel or court personnel, was abusive, or was otherwise inappropriate); (4) evidence of the defendant's misbehavior created doubt as to his competence; and (5) the defendant was given no opportunity to be heard or participate in the forfeiture hearing.

Term of a Forfeiture

State v. Boyd, 205 N.C. App. 450 (July 20, 2010). Defendant's forfeiture of his right to counsel did not carry over to his resentencing, held after a successful appeal. To determine the life of a forfeiture of counsel the court adopted the standard for life of a waiver of counsel (a waiver is good and sufficient until the proceedings are terminated or the defendant makes it known that he or she desires to withdraw the waiver). Applying this standard, the court found that "a break in the period of forfeiture occurred" when the defendant accepted the appointment of counsel (the Appellate Defender) for the appeal of his initial conviction. The court noted in dicta that the defendant's statement at resentencing that he did not want to be represented and his refusal to sign a written waiver did not constitute a new forfeiture. Because the initial forfeiture did not carry through to the resentencing and because the trial judge did not procure a waiver of counsel

under G.S. 15A-1242 at the resentencing, the defendant's right to counsel was violated.

Hybrid Representation

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). The trial court did not err by failing to rule on the defendant's pro se motions, made when the defendant was represented by counsel.

State v. Glenn, 221 N.C. App. 143 (June 5, 2012). The court declined to consider the defendant's pro se MAR on grounds that he was represented by appellate counsel. It noted that having elected for representation by appointed counsel, the defendant cannot also file motions on his own behalf or attempt to represent himself; a defendant has no right to appear both by himself and by counsel.

State v. Williamson, 212 N.C. App. 393 (June 7, 2011). Because the defendant's lawyer adopted the defendant's pro se filing under G.S. 15A-711 by submitting evidence to the trial court in support of it, the trial court properly considered the pro se filing, made while the defendant was represented by counsel.

State v. Howell, 211 N.C. App. 613 (May 3, 2011). The trial court did not err by considering the defendant's pro se speedy trial motion, filed when he was represented by counsel.

Professionalism Issues

State v. Kelly, 221 N.C. App. 643 (July 17, 2012). The court admonished defense counsel for exceeding the bounds of zealous advocacy. In attacking the professionalism and ethics of the prosecutors, counsel said that the prosecutor "failed to investigate the truth"; "distort[ed] the truth"; "misled and misrepresented facts"; "subverted the truth by presenting false evidence in the form of [defendant's] confession"; "suppressed the truth by failing to disclose potentially truth-enhancing evidence"; and "dominated the fact-finding process all led directly to [defendant's] conviction for a crime she did not commit." Counsel asserted that "[a] prosecutor should be professionally disciplined for proceeding with prosecution if a fair-minded person could not reasonably conclude, on the facts known to the prosecutor, that the accused is guilty beyond a reasonable doubt." These comments were unsupported by the record and "highly inappropriate." The court "urge[d] counsel to refrain from making such comments in the future."

Right to Proceed Pro Se/Termination of Right

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). Because the defendant would not allow the trial to proceed while representing himself, the trial court did not err by denying the defendant the right to continue representing himself and forcing him to accept the representation of a lawyer who had been serving as standby counsel.

Removal of Counsel/Withdrawal

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). In a capital case, the trial court did not err by removing second-chair counsel, who was re-appointed by Indigent Defense Services, after

having been allowed to withdraw by the trial court. Nor did the trial court err by failing to ex mero motu conduct a hearing on an unspecified conflict of interest between the defendant and counsel that was never raised by the defendant.

State v. Gentry, __ N.C. App. __, 743 S.E.2d 235 (June 4, 2013). The trial court did not err by denying defense counsel's motions to withdraw and for the appointment of substitute counsel. The court rejected the defendant's argument that he and his trial counsel experienced "a complete breakdown in their communications" resulting in ineffective assistance of counsel. The court noted that in the absence of a constitutional violation, the decision about whether to replace appointed counsel is a discretionary one. Although the defendant expressed dissatisfaction with counsel's performance on several occasions, he did not establish the requisite "good cause" for appointment of substitute counsel or that assigned counsel could not provide him with constitutionally adequate representation. The court concluded that any breakdown in communication "stemmed largely from Defendant's own behavior" and that the defendant failed to show that the alleged communication problems resulted in a deprivation of his right to the effective assistance of counsel.

Representation by Non-Lawyer

State v. Sullivan, 201 N.C. App. 540 (Dec. 22, 2009). A defendant does not have a right to be represented by someone who is not a lawyer.

Substitute Counsel

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). Where appointed counsel was allowed to withdraw, on the sixth day of a bribery trial, pursuant to Comment 3, Rule 1.16(a) of the N.C. Rules of Professional Conduct, the trial court was not required to appoint substitute counsel. Comment 3 states in relevant part:

> Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

Under G.S. 7A-450(b), appointment of substitute counsel at the request of either an indigent defendant or original counsel is constitutionally required only when it appears that representation by original counsel could deprive the defendant of his or her right to effective assistance. The statute also provides that substitute counsel is required and must be appointed when the defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. Here, counsel's representation did not fail to afford the defendant his constitutional right to counsel nor did the defendant show good cause for the appointment of substitute counsel. Nothing in the record suggests a complete breakdown in communications or a conflict of interest. Indeed, the court noted, "there was no indication that [counsel]'s work was in any way deficient. Rather, [his] withdrawal was caused by [defendant] himself demanding that [counsel] engage in unprofessional conduct.

State v. Holloman, __ N.C. App. __, 751 S.E.2d 638 (Dec. 17, 2013). The trial court did not abuse its discretion by denying an indigent defendant's request for substitute counsel. The court rejected the defendant's argument that the trial court erred by failing to inquire into a potential conflict of interest between the defendant and counsel, noting that the defendant never asserted a conflict, only that he was unhappy with counsel's performance.

State v. Gentry, __ N.C. App. __, 743 S.E.2d 235 (June 4, 2013). The trial court did not err by denying defense counsel's motions to withdraw and for the appointment of substitute counsel. The court rejected the defendant's argument that he and his trial counsel experienced "a complete breakdown in their communications" resulting in ineffective assistance of counsel. The court noted that in the absence of a constitutional violation, the decision about whether to replace appointed counsel is a discretionary one. Although the defendant expressed dissatisfaction with counsel's performance on several occasions, he did not establish the requisite "good cause" for appointment of substitute counsel or that assigned counsel could not provide him with constitutionally adequate representation. The court concluded that any breakdown in communication "stemmed largely from Defendant's own behavior" and that the defendant failed to show that the alleged communication problems resulted in a deprivation of his right to the effective assistance of counsel.

State v. Glenn, 221 N.C. App. 143 (June 5, 2012). The trial court did not abuse its discretion by denying the defendant's motion to replace his court-appointed lawyer. Substitute counsel is required and must be appointed when a defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. However, general dissatisfaction or disagreement over trial tactics is not a sufficient basis to appoint new counsel. In this case, the defendant's objections fell into the latter category. The court also rejected the defendant's argument that the trial court failed to inquire adequately when the defendant raised the substitute counsel issue.

State v. Covington, 205 N.C. App. 254 (July 6, 2010). The trial court did not abuse its discretion by denying the defendant's request for substitute counsel where there was no evidence that the defendant's constitutional right to counsel was violated. The defendant waived the right to appointed counsel and retained an attorney. The day after the jury was impaneled for trial the defendant requested substitute counsel, asserting that counsel had not communicated enough with him, that the defendant was unaware the case would be tried that day, and that he had concerns about counsel's strategy, particularly counsel's advice that the defendant not testify. None of these concerns constituted a violation of the defendant's constitutional right to counsel.

Waiver of Right to Counsel
Proper Waiver

State v. Jastrow, __ N.C. App. __, 764 S.E.2d 663 (Nov. 18, 2014). The trial court did not err by allowing the defendant to waive his right to counsel and proceed pro se. Notwithstanding the defendant's refusal to acknowledge that he was subject to court's jurisdiction, the trial court was able to conduct a colloquy that complied with G.S. 15A-1242. The court reminded trial judges, however, that "our Supreme Court has approved a series of 14 questions that can be used to satisfy the requirements of Section 15A-1242." "[B]est practice," it continued "is for trial courts

to use the 14 questions . . . which are set out in the Superior Court Judges' Benchbook provided by the University of North Carolina at Chapel Hill School of Government."

State v. Gentry, __ N.C. App. __, 743 S.E.2d 235 (June 4, 2013). Although the trial court misstated the maximum sentence during the waiver colloquy, it adequately complied with G.S. 15A-1242. The trial court twice informed the defendant that if he was convicted of all offenses and to be a habitual felon, he could be sentenced to 740 months imprisonment, or about 60 years. However, this information failed to account for the possibility that the defendant would be sentenced in the aggravated range and thus understated the maximum term by 172 months. The court held:

> [W]e do not believe that a mistake in the number of months which a trial judge employs during a colloquy with a defendant contemplating the assertion of his right to proceed pro se constitutes a per se violation of N.C. Gen. Stat. § 15A-1242. Instead, such a calculation error would only contravene N.C. Gen. Stat. § 15A-1242 if there was a reasonable likelihood that the defendant might have made a different decision with respect to the issue of self-representation had he or she been more accurately informed about "the range of permissible punishments.

The court found that although the trial court's information "was technically erroneous" the error did not invalidate the defendant's "otherwise knowing and voluntary waiver of counsel." It explained:

> Our conclusion to this effect hinges upon the fact that Defendant was thirty-five years old at the time of this trial, that a sentence of 740 months imprisonment would have resulted in Defendant's incarceration until he reached age 97, and that a sentence of 912 months would have resulted in Defendant's incarceration until he reached age 111. Although such a fourteen year difference would be sufficient, in many instances, to preclude a finding that Defendant waived his right to counsel knowingly and voluntarily as the result of a trial court's failure to comply with N.C. Gen. Stat. § 15A-1242, it does not have such an effect in this instance given that either term of imprisonment mentioned in the trial court's discussions with Defendant was, given Defendant's age, tantamount to a life sentence. Simply put, the practical effect of either sentence on Defendant would have been identical in any realistic sense. In light of this fact, we cannot conclude that there was a reasonable likelihood that Defendant's decision concerning the extent, if any, to which he wished to waive his right to the assistance of counsel and represent himself would have been materially influenced by the possibility that he would be incarcerated until age 97 rather than age 111. As a result, we conclude that Defendant's waiver of the right to counsel was, in fact, knowing and voluntary and that the trial court did not err by allowing him to represent himself.

State v. Reid, __ N.C. App. __, 735 S.E.2d 389 (Dec. 4, 2012). The trial court did not err when taking the defendant's waiver of counsel. The trial court complied with the statute and asked the standard waiver questions in the judges' bench book. The court rejected the defendant's argument that the waiver was invalid because the trial judge did not inform him of his right to hire a private lawyer.

State v. Jones, 220 N.C. App. 392 (May 1, 2012). Based on the trial court's extensive colloquy with the defendant, the trial court properly took a waiver of counsel in compliance with G.S. 15A-1242.

State v. Paterson, 208 N.C. App. 654 (Dec. 21, 2010). (1) The defendant's waiver of counsel was sufficient even though a box on the waiver form was left blank and the form was executed before the court advised the defendant of the charges and the range of punishment. Citing *State v. Heatwole*, 344 N.C. 1, 18 (1996), and *State v. Fulp*, 355 N.C. 171, 177 (2002), the court first concluded that a waiver of counsel form is not required and any deficiency in the form will not render the waiver invalid, if the waiver was knowing, intelligent, and voluntary. Next, the court concluded that the waiver was not invalid because the trial court failed to go over the charges and potential punishments prior to the defendant signing the waiver form. The trial court discussed the charges and potential punishments with the defendant the following day, and defendant confirmed his desire to represent himself in open court. Although the waiver form requires the trial judge to certify that he or she informed the defendant of the charges and punishments, given that the form is not mandatory, no prejudice occurs when the trial court does, in fact, provide that information in accordance with the statute and the defendant subsequently asserts the right to proceed pro se. (2) The trial court conducted an adequate inquiry under G.S. 15A-1242. The court noted that there is no mandatory formula for complying with the statute. Here, the trial judge explicitly informed the defendant of his right to counsel and the process to secure a court-appointed attorney; the defendant acknowledged that he understood his rights after being repeatedly asked whether he understood them and whether he was sure that he wanted to waive counsel; the judge informed him of the charges and potential punishments; and the judge explained that he would be treated the same at trial regardless of whether he had an attorney. The trial court's colloquies at the calendar call and before trial, coupled with the defendant's repeated assertion that he wished to represent himself, demonstrate that the defendant clearly and unequivocally expressed his desire to proceed *pro se* and that such expression was made knowingly, intelligently, and voluntarily.

Improper Waiver & Related Issues

State v. Brown, ___ N.C. App. ___, 768 S.E.2d 896 (Mar. 3, 2015). Because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, he forfeited his right to counsel. Citing *State v. Leyshon*, 211 N.C. App. 511 (2011), the court began by holding that defendant did not waive his right to counsel. When asked whether he wanted a lawyer, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements about whether he waived his right to counsel were sufficiently equivocal such that they did not constitute a waiver of the right to counsel. However, defendant forfeited his right to counsel. In addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about 3½ months he never obtained counsel. As in *Leyshon*,

this behavior amounted to willful obstruction and delay of trial proceedings and therefore defendant forfeited his right to counsel.

State v. Jacobs, __ N.C. App. __, 757 S.E.2d 366 (May 6, 2014). The trial court erred by allowing the defendant to proceed pro se at a probation revocation hearing without taking a waiver of counsel as required by G.S. 15A-1242. The defendant's appointed counsel withdrew at the beginning of the revocation hearing due to a conflict of interest and the trial judge allowed the defendant to proceed pro se. However, the trial court failed to inquire as to whether the defendant understood the range of permissible punishments. The court rejected the State's argument that the defendant understood the range of punishments because "the probation officer told the court that the State was seeking probation revocation." The court noted that as to the underlying sentence, the defendant was told only that, "[t]here's four, boxcar(ed), eight to ten." The court found this insufficient, noting that it could not assume that the defendant understood this legal jargon as it related to his sentence. Finally, the court held that although the defendant signed the written waiver form, "the trial court was not abrogated of its responsibility to ensure the requirements of [G.S.] 15A-1242 were fulfilled."

State v. Frederick, 222 N.C. App. 576 (Aug. 21, 2012). The defendant was denied his right to counsel at a suppression hearing. The suppression hearing was a critical stage. Although the trial court recorded waivers of counsel prior to the hearing, the waivers were not valid because the trial court failed to inform the defendant of the maximum possible sentence, as required by G.S. 15A-1242. The trial court advised the defendant that he could "go to prison for a long, long time[,]" and if convicted "the law requires you get a mandatory active prison sentence[.]" These statements do not meet the statutory requirements for a valid waiver. The court reiterated that a waiver will not be presumed from a silent record and that a completed waiver of counsel form is no substitute for compliance with the statute.

State v. Ramirez, 220 N.C. App. 150 (Apr. 17, 2012). The trial court committed reversible error by requiring the defendant to proceed pro se in a probation revocation hearing when the defendant had waived only the right to assigned counsel not the right to all assistance of counsel.

State v. Watlington, 216 N.C. App. 388 (Oct. 18, 2011). The trial court committed reversible error by allowing the defendant to proceed pro se without conducting the inquiry required by G.S. 15A-1242.

State v. Anderson, 365 N.C. 466 (Mar. 9, 2012). In a per curiam opinion, the court affirmed *State v. Anderson*, 215 N.C. App. 169 (Aug. 16, 2011) (holding that the trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242; among other things, the trial court failed to clarify the specific charges or inform the defendant of the potential punishments or that he could request court-appointed counsel).

State v. Seymore, 214 N.C. App. 547 (Aug. 16, 2011). The trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Significantly, on the waiver form the defendant checked the box waiving his right to assigned counsel, not the box waiving his right to all assistance of counsel. Citing *State*

v. Callahan, 83 N.C. App. 323, 324 (1986), the court noted that "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." It continued, quoting *Callahan* and stating: "In cases where 'the record is silent as to what questions were asked of defendant and what his responses were' this Court has held, '[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel[.]' When there is no 'transcription of those proceedings,' the defendant "is entitled to a new trial."

State v. Sorrow, 213 N.C. App. 571 (July 19, 2011). The trial court erred by permitting the defendant to waive counsel and proceed pro se at a probation revocation hearing without first satisfying the requirements of G.S. 15A-1242. The court concluded that even though the defendant executed two Waiver of Counsel forms (AOC-CR-227), one of which was certified by the trial court, "these waivers are not presumed to have been knowing, intelligent, and voluntary because the rest of the record indicates otherwise." Nothing in the record indicated that the defendant understood and appreciated the consequences of the decision to proceed pro se, the nature of the charges, the proceedings, or the range of possible punishments. Noting that the trial court is not required to follow a specific "checklist" of questions when conducting the waiver inquiry, the court referenced a checklist that appears in the judges' bench book. [Author's note: the Bench Book cited in the opinion is out of print. However, the relevant section in the current version of the Superior Court Judges' Bench Book is available here, and it includes the relevant checklist].

State v. McLeod, 197 N.C. App. 707 (July 7, 2009). Trial court erred by allowing the defendant to dismiss counsel and proceed pro se mid-trial without making the inquiry required by G.S. 15A-1242.

In Re Watson, 209 N.C. App. 507 (Feb. 15, 2011). (1) Because the trial court failed to comply with the statutory mandates of G.S. 15A-1242, 122C-268(d), and IDS Rule 1.6, the respondent's waiver of counsel in his involuntary commitment hearing was ineffective. The court adopted language from *State v. Moore*, 362 N.C. 319, 327-28 (2008), endorsing a fourteen-question checklist for taking a waiver of counsel. [Author's note: this same checklist appears in the Superior Court Judges On-Line Bench Book (The "Survival Guide")]. The court also noted with approval language from an Arizona case suggesting the proper inquiry in involuntary commitment cases. (2) The fact that the respondent had standby counsel did not cure the improper waiver of counsel.

Request to Waive

State v. Leyshon, 211 N.C. App. 511 (May 3, 2011). The trial court did not err by appointing counsel for the defendant where there was no clear and unequivocal waiver. The defendant refused to answer whether he waived or asserted his right to counsel and made contradictory statements on the issue. He stated: "I'm not waiving my right to assistance of counsel," "I want to retain my right", and "I'm reserving my rights". He also said: "I don't need an attorney", "I refuse his counsel", and "I'll have no counsel".

Mid-Trial Waiver Request

State v. Wheeler, 202 N.C. App. 61 (Jan. 19, 2010). The trial court's action denying the defendant's mid-trial request to discharge counsel and proceed pro se was not an abuse of discretion and did not infringe on the defendant's right to self-representation. Prior to trial, the defendant waived his right to counsel and standby counsel was appointed. Thereafter, he informed the trial court that he wished standby counsel to select the jury. The trial court allowed the defendant's request, informing the defendant that he would not be permitted to discharge counsel again. The defendant accepted the trial court's conditions and stated that he wished to proceed with counsel. After the jury had been selected and the trial had begun, the defendant once again attempted to discharge counsel. The trial court denied the defendant's request, noting that the defendant already had discharged four or five lawyers and had been uncooperative with appointed counsel.

Withdrawal of Counsel

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). (1) Where appointed counsel moved, on the sixth day of a bribery trial, for mandatory withdrawal pursuant to Rule 1.16(a) of the N.C. Rules of Professional Conduct, the trial court did not abuse its discretion by allowing withdrawal upon counsel's citation of Comment 3 to Rule 1.16 as grounds for withdrawal. Comment 3 states in relevant part:

> Difficulty may be encountered if withdrawal is based on the client's demand that the lawyer engage in unprofessional conduct. The court may request an explanation for the withdrawal, while the lawyer may be bound to keep confidential the facts that would constitute such an explanation. The lawyer's statement that professional considerations require termination of the representation ordinarily should be accepted as sufficient.

In light of the Comment, the trial court did not abuse its discretion by accepting counsel's assertion that his withdrawal was mandatory in light of professional considerations. (2) After allowing the withdrawal, the trial court was not required to appoint substitute counsel. Under G.S. 7A-450(b), appointment of substitute counsel at the request of either an indigent defendant or original counsel is constitutionally required only when it appears that representation by original counsel could deprive the defendant of his or her right to effective assistance. The statute also provides that substitute counsel is required and must be appointed when the defendant shows good cause, such as a conflict of interest or a complete breakdown in communications. Here, counsel's representation did not fail to afford the defendant his constitutional right to counsel nor did the defendant show good cause for the appointment of substitute counsel. Nothing in the record suggests a complete breakdown in communications or a conflict of interest. Indeed, the court noted, "there was no indication that [counsel]'s work was in any way deficient. Rather, [his] withdrawal was caused by [defendant] himself demanding that [counsel] engage in unprofessional conduct.

Ineffective Assistance of Counsel
Conflict of Interest

State v. Hunt, ___ N.C. ___, 766 S.E.2d 288 (Dec. 19, 2014). The court affirmed per curiam that

aspect of the decision below that generated a dissenting opinion. In the decision below, *State v. Hunt*, 221 N.C. App. 489 (July 17, 2012), the court of appeals held, over a dissent, that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial.

State v. Phillips, 365 N.C. 103 (June 16, 2011). The trial court did not err by failing to inquire into defense counsel's alleged conflict of interest and by failing to obtain a waiver from the defendant of the right to conflict-free counsel. According to the defendant, the conflict arose when it became apparent that counsel might have to testify as a witness. The court rejected the defendant's argument that his claim should be assessed under the conflict of interest ineffective assistance of counsel standard rather than the standard two-prong *Strickland* analysis. It noted that the conflict of interest standard generally applies to conflicts that arise from multiple or successive representation and it deferred to defense counsel's conclusion that no conflict existed in the case at hand. Applying *Strickland,* the court rejected the defendant's claim, concluding that even if counsel's conduct fell below an objective standard of reasonableness, no prejudice occurred.

State v. Choudhry, 365 N.C. 215 (Aug. 26, 2011). Although the trial court's inquiry of the defendant was insufficient to assure that the defendant knowingly, intelligently, and voluntarily waived his right to conflict free counsel, because the defendant failed to show that counsel's performance was adversely affected by the conflict, he is not entitled to relief. At the defendant's noncapital first-degree murder trial, the prosecution informed the trial court that defense counsel had previously represented a State's witness, Michelle Wahome, who was the defendant's girlfriend at the time of the incident in question and with whom the defendant had a child. Specifically, defense counsel had represented Wahome with respect to charges arising out of an incident at a shopping mall. The charges were reduced to common law forgery and although the defendant had not been charged in the matter, both he and Wahome appeared in the video surveillance and the items in question were men's clothing. Defense counsel indicated that the prior representation would not impair his ability to represent the defendant and that he did not plan to question Wahome about the earlier incident. The trial court then informed the defendant that defense counsel had previously represented Wahome, a witness for the State and asked the defendant if he had any concerns about counsel's ability appropriately to represent him, if he was satisfied with counsel's representation, and if he desired to have counsel continue his representation. The defendant said that he had no concerns about counsel's representation and gave an affirmative answer to each remaining question. The defendant was convicted and appealed. In a split decision, the court of appeals found no error. State v. Choudhry, 206 N.C. App. 418, 430 (Aug. 17, 2010). The dissenting judge contended that the trial court erred by failing to fully inform the defendant of the consequences of the potential conflict and that a remand was required. The supreme court determined that because the prosecutor brought a potential conflict to the trial judge's attention, the trial judge was obligated to make an inquiry. The court concluded that because the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question Wahome regarding her earlier criminal charges or indicate that he had given the defendant such an explanation, the trial judge failed to establish that the defendant had sufficient understanding of the implications of counsel's

prior representation of Wahome to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest. However, it went on to conclude that in light of counsel's effective cross-examination of Wahome, the defendant failed to demonstrate an actual conflict of interest adversely affecting performance and thus was not entitled to relief.

State v. Johnson, ___ N.C. App. ___, 767 S.E.2d 891 (Dec. 31, 2014). The trial court erred by ordering, under threat of contempt, that defense counsel's legal assistant appear as a witness for the State. The State served the assistant with a subpoena directing her to appear to testify on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014. However, the trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Because the assistant had not been properly subpoenaed to appear on Tuesday, November 19th, the trial court erred by ordering, under threat of contempt, that she appear on that day as a witness for the State. The court went on to find the error prejudicial and ordered a new trial. The court held that if on re-trial the assistant again testifies for the State, the trial court must conduct a hearing to determine whether an actual conflict of interest exists that denies the defendant the right to effective assistance of counsel.

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). (1) Even if counsel provided deficient performance by informing the trial court, with the defendant's consent, that the defendant wanted to go to trial and "take the chance that maybe lightning strikes, or I get lucky, or something," no prejudice was shown. (2) The court declined the defendant's invitation to consider his ineffective assistance claim a conflict of interest that was per se prejudicial, noting that the court has limited such claims to cases involving representation of adverse parties.

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). No error occurred when the trial court denied defense counsel's request for an overnight recess after having to defend himself against the State's motion for contempt based on an allegation that counsel violated the court's order regarding the rape shield rule in connection with his examination of the victim in this child sexual abuse case. After the trial court denied the State's motion, defense counsel requested an overnight recess to "calm down" about the contempt motion. The trial court denied this request but at 11:38 am called a recess until 2 pm that day. The court rejected the defendant's arguments that there was a conflict of interest between the defendant and defense counsel and that the trial court's denial of the overnight recess resulted in ineffective assistance of counsel.

State v. Gray, __ N.C. App. __, 736 S.E.2d 837 (Feb. 5, 2013). The defendant was entitled to a new trial where the trial court proceeded to trial over the defendant's objection to continued representation by appointed counsel who had previously represented one of the State's witnesses. At a pretrial hearing the State informed the trial court that defense counsel had previously represented Mr. Slade, who the State intended to call as a trial witness. The defendant told the trial court that he was concerned about a conflict of interest and asked for another lawyer. Slade subsequently waived any conflict and the State Bar advised the trial court that since Slade had consented "the lawyer's ability to represent the current client is not affected" and that the current client's consent was not required. The trial court conducted no further inquiry. The court held that the trial court erred by failing to make any inquiry into the nature and extent of the potential conflict and whether the defendant wished to waive the conflict. It concluded:

> [W]e believe that Defendant . . . was effectively forced to go to trial while still represented by his trial counsel, who had previously represented one of the State's witnesses and who acknowledged being in the possession of confidential information which might be useful for purposes of cross-examining that witness, despite having clearly objected to continued representation by that attorney. As a result, given that prejudice is presumed under such circumstances, Defendant is entitled to a new trial.

State v. Rogers, 219 N.C. App. 296 (Mar. 6, 2012). The trial court did not err by removing the defendant's retained counsel, Wayne Eads, based on the possibility that Eads might be called to testify as a witness at trial. The defendant was charged with attempted murder and felony assault. The defendant was having an affair with the victim's wife and the victim's wife had discussed with the defendant the possibility of leaving her husband. Prior to the incident at issue, the victim's wife also communicated with Eads, who was the defendant's best friend and attorney, about her relationship with the defendant and the consequences of a divorce. The trial court's action was proper given "a serious potential for conflict" based on Eads' relationship with the defendant and communication with the victim's wife. The court stated:

> Eads was aware of personal and sensitive information, including the nature of their affair, which was a major factor leading to the shooting. Had Eads remained as defendant's counsel, he might have been called to testify, at which time he might have been asked to disclose confidential information regarding the relationship between defendant and [the victim's wife], which information may have divulged defendant's motive for shooting [the victim], which in turn could compromise his duty of loyalty to his client.

The court went on to conclude that competent evidence supported the trial court's conclusion that Eads was likely to be a necessary witness at trial and that none of the exceptions to Rule 3.7 of the N.C. Revised Rules of Professional Conduct applied.

Denial of Counsel

Woods v. Donald, 575 U.S. ___ (Mar. 30, 2015) (per curiam). In this habeas corpus case, the Court reversed the Sixth Circuit, which had held that defense counsel provided per se ineffective assistance of counsel under *United States v. Cronic*, 466 U. S. 648 (1984), when he was briefly absent during testimony concerning other defendants. The Court determined that none of its decisions clearly establish that the defendant is entitled to relief under *Cronic*. The Court clarified: "We have never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions." The Court was however careful to note that it expressed no view on the merits of the underlying Sixth Amendment principle.

State v. Phillips, 365 N.C. 103 (June 16, 2011). (1) Investigators did not violate the capital defendant's constitutional right to counsel by continuing to question him after an attorney who had been appointed as provisional counsel arrived at the sheriff's office and was denied access to the defendant. The interrogation began before the attorney arrived, the defendant waived his *Miranda* rights, and he never stated that he wanted the questioning to stop or that he wanted to speak with an attorney. (2) Office of Indigent Defense Services statutes and rules regarding an indigent's entitlement to counsel did not make the defendant's statement inadmissible. Although

the relevant statutes create an entitlement to counsel and authorize provisional counsel to seek access to a potential capital defendant, they do not override a defendant's waiver of the right to counsel, which occurred in this case.

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). Where appointed counsel was allowed to withdraw, on the sixth day of a bribery trial, pursuant to Comment 3 of Rule 1.16(a) of the N.C. Rules of Professional Conduct, the court rejected the defendant's argument that private counsel retained after this incident was presumptively ineffective given the limited time he had to review the case. The defendant noted that new counsel entered the case on the seventh day of trial and requested only a four-hour recess to prepare. Given the status of the trial and the limited work to be done, the court rejected the defendant's argument. The court also rejected the defendant's argument that new counsel rendered deficient performance by failing to request a longer or an additional continuance.

State v. Rouse, __ N.C. App. __, 757 S.E.2d 690 (May 20, 2014). The defendant was denied his constitutional right to counsel when the trial court held a resentencing hearing on the defendant's pro se MAR while the defendant was unrepresented. The court vacated the judgment and remanded for a new sentencing hearing.

State v. Banks, 210 N.C. App. 30 (Mar. 1, 2011). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

Harbison **Issues**

State v. Wilson, __ N.C. App. __, 762 S.E.2d 894 (Sept. 16, 2014). In an attempted murder case, counsel did not commit a *Harbison* error when he stated during closing argument: "You have heard my client basically admit that while pointing the gun at someone, he basically committed a crime: Assault by pointing a gun." Because assault by pointing a gun is not a lesser-included of the charged offense, counsel's statement fell outside of *Harbison.*

State v. Pemberton, __ N.C. App. __, 743 S.E.2d 719 (July 2, 2013). In a murder case, trial counsel did not impermissibly concede the defendant's guilt under *Harbison.* Although defense counsel never explicitly conceded the defendant's guilt during trial, she did make factual concessions, including admitting that the defendant was present at the shooting and that he believed that he was participating in a plan to commit a robbery. The court found that it did not

need to decide whether the factual admissions constituted an admission of guilt to first degree felony-murder given that the defendant expressly consented to counsel's admissions.

State v. Lovette, __ N.C. App. __, 737 S.E.2d 432 (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that counsel did not commit a *Harbison* error (unconsented to admission of guilt by counsel). Even taken out of context, the remark at issue did not even approach a concession of guilt.

State v. Holder, 218 N.C. App. 422 (Feb. 7, 2012). The court rejected the defendant's *Harbison* claim (it is ineffective assistance of counsel for a defense lawyer to concede guilt without the defendant's consent) where defense counsel raised the admission with the trial court before it was made and the defendant consented to counsel's strategy.

State v. King, 218 N.C. App. 347 (Feb. 7, 2012) (COA11-568). The court dismissed the defendant's *Harbison* claim without prejudice to it being raised in a motion for appropriate relief. During closing argument, defense counsel stressed that the defendant was a drug user, not a drug dealer. With regard to a charge of possession of drug paraphernalia, counsel stated "finding him guilty of the drug paraphernalia I would agree is about as open and shut as we can get in this case, but finding him guilty of the selling, you don't have the seller." The court noted that this statement conceded guilt. However, because of the incomplete record as to consent by the defendant, the court dismissed without prejudice.

State v. Spencer, 218 N.C. App. 267 (Jan. 17, 2012). Although concluding that counsel admitted the defendant's guilt to the jury, the court dismissed the defendant's *Harbison* claim without prejudice to his right to file a motion for appropriate relief on that basis in the trial court. Counsel conceded guilt to resisting a public officer and eluding arrest when he stated, among other things, that the defendant "chose to get behind the wheel after drinking, and he chose to run from the police[,]" and "[the officer] was already out of the way and he just kept on going, kept running from the police." However, the record did not indicate whether the defendant had consented to these admissions.

State v. Johnson, 217 N.C. App. 605 (Dec. 20, 2011). The court dismissed the defendant's *Harbison* claim without prejudice in order for it to be raised by way of a motion for appropriate relief in the trial division. As to a charge of resisting an officer, defense counsel had argued to the jury that "[T]he elements are there. They were officers of the law. They were discharging a duty of their office. We are not contending they were doing anything unlawful at the time and he didn't obey. He delayed them. He obstructed them, he resisted them[.]" The court concluded that such statements cannot be construed in any other light than admitting the defendant's guilt. However, the court determined, based on the record on appeal, it was unclear whether the defendant consented to this admission of guilt.

State v. Womack, 211 N.C. App. 309 (Apr. 19, 2011). (1) Defense counsel did not commit a *Harbison* error during the habitual felon proceeding by admitting that the defendant had pled guilty to three felonies. Although defense counsel admitted the defendant's prior convictions, he never argued that the jury should find that the defendant had attained habitual felon status and in fact suggested that the jury take certain mitigating factors into account. (2) Even if such an

admission occurred, the defendant would not be entitled to relief because *Harbison* does not apply to a habitual felon proceeding.

State v. Maready, 205 N.C. App. 1 (July 6, 2010). Because defense counsel admitted the defendant's guilt to assault with a deadly weapon and involuntary manslaughter to the jury without obtaining the defendant's express consent, counsel was per se ineffective under *State v. Harbison*, 315 N.C. 175 (1985). A majority of the panel distinguished the United States Supreme Court's holding in *Florida v. Nixon*, 543 U.S. 175 (2004) (under federal law, when the defendant alleges ineffective assistance due to an admission of guilt, the claim should be analyzed under the *Strickland* attorney error standard), on grounds that *Nixon* was a capital case and the case before the court was non-capital. The majority further concluded that post-*Nixon* decisions by the North Carolina Supreme Court and the court of appeals required it to apply the *Harbison* rule.

State v. Goode, 197 N.C. App. 543 (June 16, 2009). No *Harbison* error occurred in this murder case where the defendant consented, on the record, to counsel's strategy of admitting guilt.

Strickland **Attorney Error Issues**

Hinton v. Alabama, 571 U.S. __, 134 S. Ct. 1081 (Feb. 24, 2014). Defense counsel in a capital case rendered deficient performance when he made an "inexcusable mistake of law" causing him to employ an expert "that he himself deemed inadequate." Counsel believed that he could only obtain $1,000 for expert assistance when in fact he could have sought court approval for "any expenses reasonably incurred." The Court clarified:

> We wish to be clear that the inadequate assistance of counsel we find in this case does not consist of the hiring of an expert who, though qualified, was not qualified enough. The selection of an expert witness is a paradigmatic example of the type of "strategic choic[e]" that, when made "after thorough investigation of [the] law and facts," is "virtually unchallengeable." We do not today launch federal courts into examination of the relative qualifications of experts hired and experts that might have been hired. The only inadequate assistance of counsel here was the inexcusable mistake of law—the unreasonable failure to understand the resources that state law made available to him—that caused counsel to employ an expert that he himself deemed inadequate.

Slip Op. at 12 (citation omitted). The court remanded for a determination of whether counsel's deficient performance was prejudicial.

Missouri v. Frye, 566 U.S. __, 132 S. Ct. 1399 (Mar. 21, 2012). The Court held that a defense lawyer rendered ineffective assistance by allowing a plea offer by the prosecution to expire without advising the defendant of the offer or allowing him to consider it. The defendant was charged with felony driving with a revoked license, an offense carrying a maximum term of imprisonment of four years. On November 15, the prosecutor sent a letter to defense counsel offering a choice of two plea bargains. First, the prosecutor offered to recommend a 3-year sentence for a guilty plea to the felony charge, without a recommendation regarding probation but with a recommendation for 10 days in jail as so called "shock" time. Second, to reduce the charge to a misdemeanor and, if the defendant pleaded guilty, to recommend a 90-day sentence.

The misdemeanor charge would have carried a maximum term of imprisonment of one year. The letter stated both that offers would expire on December 28. The defendant's attorney did not tell the defendant of the offers and they expired. Before this charge was resolved, the defendant was again arrested for driving with a revoked license. The defendant subsequently plead guilty to the initial charge. There was no plea agreement. The trial court accepted the guilty plea and sentenced the defendant to three years in prison. The defendant challenged his conviction, arguing that counsel's failure to inform him of the plea offer constituted ineffective assistance of counsel.

The Court began its analysis by concluding that the constitutional right to counsel extends to the negotiation and consideration of plea offers that lapse or are rejected. It stated: "In today's criminal justice system . . . the negotiation of a plea bargain . . . is almost always the critical point for a defendant." Having determined that there is a right to effective assistance with respect to plea offers, the Court turned to the question of whether defense counsel has the duty to communicate the terms of a formal offer to accept a plea on terms and conditions that may result in a lesser sentence, a conviction on lesser charges, or both. On this issue it held:

> [A]s a general rule, defense counsel has the duty to communicate formal offers from the prosecution to accept a plea on terms and conditions that may be favorable to the accused. Any exceptions to that rule need not be explored here, for the offer was a formal one with a fixed expiration date. When defense counsel allowed the offer to expire without advising the defendant or allowing him to consider it, defense counsel did not render the effective assistance the Constitution requires.

The Court then turned to the issue of prejudice and laid out the following standards:

> To show prejudice from ineffective assistance of counsel where a plea offer has lapsed or been rejected because of counsel's deficient performance, defendants must demonstrate a reasonable probability they would have accepted the earlier plea offer had they been afforded effective assistance of counsel. Defendants must also demonstrate a reasonable probability the plea would have been entered without the prosecution canceling it or the trial court refusing to accept it, if they had the authority to exercise that discretion under state law. To establish prejudice in this instance, it is necessary to show a reasonable probability that the end result of the criminal process would have been more favorable by reason of a plea to a lesser charge or a sentence of less prison time.

Applying these standards to the case before it, the Court concluded that because defense counsel made no meaningful attempt to inform the defendant of the written plea offer, counsel's representation fell below an objective standard of reasonableness. As to prejudice, the Court found that the state court applied the wrong standard. Specifically, it did not require the defendant to show that the first plea offer, if accepted, would have been adhered to by the prosecution and accepted by the trial court, particularly given the defendant's subsequent arrest for the same offense. The Court remanded on this issue.

Lafler v. Cooper, 566 U.S. __, 132 S. Ct. 1376 (Mar. 21, 2012). The Court held that defense counsel rendered ineffective assistance by advising a defendant to reject a plea offer and it specified the appropriate remedy for the constitutional violation. The defendant was charged with assault with intent to murder, possession of a firearm by a felon, possession of a firearm in the commission of a felony, misdemeanor possession of marijuana, and being a habitual

offender. The prosecution twice offered to dismiss two of the charges and to recommend a sentence of 51-85 months for the other two, in exchange for a guilty plea. The defendant rejected both offers, allegedly after his attorney convinced him that the prosecution would be unable to establish intent to murder. On the first day of trial the prosecution offered a significantly less favorable plea deal, which the defendant rejected. The defendant was convicted on all counts and received a mandatory minimum sentence of 185-360 months' imprisonment. He then challenged the conviction, arguing that his attorney's advice to reject the plea constituted ineffective assistance.

On appeal the parties agreed that counsel rendered deficient performance when he advised the defendant to reject the plea offer. Thus, the only issue before the Court was how to apply *Strickland*'s prejudice prong. The court held that when ineffective assistance results in a rejection of the plea offer and the defendant is convicted at the later trial

> a defendant must show that but for the ineffective advice of counsel there is a reasonable probability that the plea offer would have been presented to the court (i.e., that the defendant would have accepted the plea and the prosecution would not have withdrawn it in light of intervening circumstances), that the court would have accepted its terms, and that the conviction or sentence, or both, under the offer's terms would have been less severe than under the judgment and sentence that in fact were imposed.

The Court then addressed the issue of the appropriate remedy, noting that the injury suffered by defendants who decline a plea offer as a result of ineffectiveness and then receive a greater sentence at a trial can come in at least one of two forms. Sometimes, the Court explained, the sole advantage a defendant would have received under the plea is a lesser sentence. In this situation, the trial court may conduct an evidentiary hearing to determine whether the defendant has shown a reasonable probability that but for counsel's errors he or she would have accepted the plea. "If the showing is made," the Court elaborated, "the court may exercise discretion in determining whether the defendant should receive the term of imprisonment the government offered in the plea, the sentence he received at trial, or something in between." In some situations, however, the Court noted "resentencing alone will not be full redress for the constitutional injury," such as when an offer was for a guilty plea to a less serious crime than the one the defendant ends up getting convicted for at trial, or if a mandatory sentence limits a judge's sentencing discretion. In these situations, the Court explained, "the proper exercise of discretion to remedy the constitutional injury may be to require the prosecution to reoffer the plea proposal. Once this has occurred, the judge can then exercise discretion in deciding whether to vacate the conviction from trial and accept the plea or leave the conviction undisturbed." The Court noted that when implementing a remedy in both situations, the trial court must weigh various factors. Although it determined that the "boundaries of proper discretion need not be defined here" the Court noted two relevant considerations:

> First, a court may take account of a defendant's earlier expressed willingness, or unwillingness, to accept responsibility for his or her actions. Second, it is not necessary here to decide as a constitutional rule that a judge is required to prescind (that is to say disregard) any information concerning the crime that was discovered after the plea offer was made. The time continuum makes it difficult to restore the defendant and the prosecution to the precise positions they occupied prior to the rejection of the plea offer, but that baseline can be consulted in finding

a remedy that does not require the prosecution to incur the expense of conducting a new trial.

Applying the relevant test to the case at hand, the Court found that the defendant met *Strickland*'s two-part test for ineffective assistance. The fact of deficient performance had been conceded and the defendant showed that but for counsel's deficient performance there is a reasonable probability that both he and the trial court would have accepted the guilty plea. Additionally, as a result of not accepting the plea and being convicted at trial, respondent received a minimum sentence 3½ times greater than he would have received under the plea. The Court found that the correct remedy is to order the State to reoffer the plea agreement. It continued: "Presuming [the defendant] accepts the offer, the state trial court can then exercise its discretion in determining whether to vacate the convictions and resentence respondent pursuant to the plea agreement, to vacate only some of the convictions and resentence respondent accordingly, or to leave the convictions and sentence from trial undisturbed."

Padilla v. Kentucky, 559 U.S. 356 (Mar. 31, 2010). After pleading guilty to a charge of transportation of a large amount of marijuana, the defendant, a lawful permanent resident of the United States for more than 40 years, faced deportation. He challenged his plea, arguing that his counsel rendered ineffective assistance by failing to inform him that the plea would result in mandatory deportation and by incorrectly informing him that he did not have to worry about his immigration status because he had been in the country so long. The Court concluded that when, as in the present case, "the deportation consequence [of a plea] is truly clear," counsel must correctly inform the defendant of this consequence. However, the Court continued, where deportation consequences of a plea are "unclear or uncertain[] [t]he duty of the private practitioner . . . is more limited." It continued: "When the law is not succinct and straightforward . . . , a criminal defense attorney need do no more than advise a noncitizen client that pending criminal charges may carry a risk of adverse immigration consequences." The Court declined to rule whether the defendant was prejudiced by his lawyer's deficient conduct.

Porter v. McCollum, 558 U.S. 30 (Nov. 30, 2009) (per curiam). A capital defendant's trial counsel's conduct fell below an objective standard of reasonableness when counsel failed to investigate and present mitigating evidence, including evidence of the defendant's mental health, family background, and military service. The state court's holding that the defendant was not prejudiced by counsel's deficient representation was unreasonable. To establish prejudice, the defendant need not show that counsel's deficient conduct more likely than not altered the outcome; the defendant need only establish a probability sufficient to undermine the confidence in the outcome, as he did in this case.

Bobby v. Van Hook, 558 U.S. 4 (Nov. 9, 2009). Although restatements of professional conduct, such as ABA Guidelines, can be useful guides to whether an attorney's conduct was reasonable, they are relevant only when they describe the professional norms prevailing at the time that the representation occurred. In this case, the lower court erred by applying 2003 ABA standards to a trial that occurred eighteen years earlier. Moreover, the lower court erred by treating the ABA Guidelines "as inexorable commands with which all capital defense counsel must comply." Such standards are merely guides to what is reasonable; they do not define reasonableness. The Court went on to reject the defendant's arguments that counsel was ineffective under prevailing norms; the defendant had argued that his lawyers began their mitigation investigation too late and that

the scope of their mitigation investigation was unreasonable. The Court held that even if the defendant's counsel had performed deficiently, the defendant suffered no prejudice.

Wong v. Belmontes, 558 U.S. 15 (Nov. 16, 2009). Even if counsel's performance was deficient with regard to mitigating evidence in a capital trial, the defendant could not establish prejudice. Trial counsel testified that he presented a limited mitigating case in order to avoid opening the door for the prosecution to admit damaging evidence regarding a prior murder to which the defendant admitted but for which the defendant could not be tried. The defendant did not establish a reasonable probability that the jury would have rejected a capital sentence after it weighed the entire body of mitigating evidence (including the additional testimony counsel could have presented, some of which was cumulative) against the entire body of aggravating evidence (including evidence of the prior murder, which would have be admitted had counsel made a broader case for mitigation).

Knowles v. Mirzayance, 556 U.S. 111 (Mar. 24, 2009). Counsel was not ineffective by recommending that the defendant withdraw his insanity defense. The defendant entered pleas of not guilty and not guilty by reason of insanity (NGI) at his first-degree murder trial in state court. State procedure required a bifurcated trial consisting of a guilt phase followed by a NGI phase. During the guilt phase, the defendant sought, through medical testimony, to show that he was insane and thus incapable of premeditation and deliberation. The jury nevertheless convicted him of first-degree murder. For the NGI phase, the defendant had the burden of showing insanity. Counsel had planned to meet that burden presenting medical testimony similar to that offered in the guilt phase. Although counsel had planned to offer additional testimony of the defendant's parents, counsel learned that the parents were refusing to testify. At this point, counsel advised the defendant to withdraw his NGI plea and the defendant complied. Defense counsel was not ineffective by recommending withdrawal of a defense that counsel reasonably believed was doomed to fail. The defendant's medical testimony already had been rejected in the guilt phase and the defendant's parents' expected testimony, which counsel believed to be the strongest evidence, was no longer available. Counsel is not required to raise claims that are almost certain to lose. Additionally, the defendant did now show prejudice; it was highly improbable that jury that had just rejected testimony about the defendant's mental state when the state bore the burden of proof would have reached a different result when the defendant presented similar evidence at the NFI phase.

Smith v. Spisak, 558 U.S. 139 (Jan. 12, 2010). Even if counsel's closing argument at the sentencing phase of a capital trial fell below an objective standard of reasonableness, the defendant could not show that he was prejudiced by this conduct.

Wood v. Allen, 558 U.S. 290 (Jan. 20, 2010). The state court's conclusion that the defendant's counsel made a strategic decision not to pursue or present evidence of his mental deficiencies was not an unreasonable determination of the facts. The Court did not reach the question of whether the strategic decision itself was a reasonable exercise of professional judgment under *Strickland.*

Sears v. Upton, 561 U.S. 945 (June 29, 2010) (per curiam). After the defendant was sentenced to death in state court, a state post-conviction court found that the defendant's lawyer conducted a

constitutionally inadequate penalty phase investigation that failed to uncover evidence of the defendant's significant mental and psychological impairments. However, the state court found itself unable to assess whether counsel's conduct prejudiced the defendant; because counsel presented some mitigating evidence, the state court concluded that it could not speculate as to the effect of the new evidence. It thus denied the defendant's claim of ineffective assistance. The United State Supreme Court held that although the state court articulated the correct prejudice standard (whether there was a reasonable likelihood that the outcome of the trial would have been different if counsel had done more investigation), it failed to properly apply that standard. First, the state court put undue reliance on the assumed reasonableness of counsel's mitigation theory, given that counsel conducted a constitutionally unreasonable mitigation investigation and that the defendant still might have been prejudiced by counsel's failures even if his theory was reasonable. More fundamentally, the Court continued, in assessing prejudice, the state court failed to consider the totality of mitigation evidence (both that adduced at trial and the newly uncovered evidence). The prejudice inquiry, the Court explained, requires the state court to speculate as to the effect of the new evidence. A proper prejudice inquiry, it explained, requires the court to consider the newly discovered evidence along with that introduced at trial and assess whether there is a significant probability that the defendant would have received a different sentence after a constitutionally sufficient mitigation investigation.

Harrington v. Richter, 562 U.S. 86 (Jan. 19, 2011). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that his counsel was deficient by failing to present expert testimony on serology, pathology, and blood spatter patterns; the defendant had asserted that this testimony would have confirmed his version of how the events in question occurred. The Court concluded that it was at least arguable that a reasonable attorney could decide to forgo inquiry into the blood evidence under the circumstances, which included, among other things, the fact that counsel had reason to question the truth of the defendant's version of the events. The Court also rejected the Ninth Circuit's conclusion that counsel was deficient because he had not expected the prosecution to offer expert testimony and therefore was unable to offer expert testimony of his own in response. The Court concluded that although counsel was mistaken in thinking the prosecution would not present forensic testimony, the prosecution itself did not expect to make that presentation and had made no preparations for doing so on the eve of trial. For this reason alone, the Court concluded, it is at least debatable whether counsel's error was so fundamental as to call the fairness of the trial into doubt. Finally, the Court concluded that it would not have been unreasonable for the state court to conclude that the defendant failed to establish prejudice. Justice Kagan did not participate in the consideration or decision of the case.

Premo v. Moore, 562 U.S. 115 (Jan. 19, 2011). The Court reversed the Ninth Circuit, which had held that the state court unreasonably applied existing law when rejecting the defendant's claim that counsel was ineffective by failing to file a motion to suppress the defendant's confession to police before advising him to accept a plea offer. Counsel had explained that he discussed the plea bargain with the defendant without first challenging the confession to the police because suppression would serve little purpose given that the defendant had made full and admissible confessions to two other private individuals, both of whom could testify. The state court would not have been unreasonable to accept this explanation. Furthermore, the Court held, the state court reasonably could have determined that the defendant would have accepted the plea

agreement even if his confession had been ruled inadmissible. Justice Kagan did not participate in the consideration or decision of the case.

Cullen v. Pinholster, 563 U.S. __, 131 S. Ct. 1388 (Apr. 4, 2011). In a capital case, the Ninth Circuit Court of Appeals improperly granted the defendant habeas relief on his claim of penalty-phase ineffective assistance of counsel. The defendant and two accomplices broke into a house at night, killing two men who interrupted the burglary. A jury convicted the defendant of first-degree murder, and he was sentenced to death. After the California Supreme Court twice denied the defendant habeas relief, a federal district court held an evidentiary hearing and granted the defendant relief under 28 U.S.C. § 2254 on grounds of "inadequacy of counsel by failure to investigate and present mitigation evidence at the penalty hearing." Sitting en banc, the Ninth Circuit affirmed, holding that the California Supreme Court unreasonably applied *Strickland* v. *Washington*, 466 U. S. 668 (1984), in denying the defendant's claim of penalty-phase ineffective assistance of counsel. The U.S. Supreme Court reversed, concluding that the defendant failed to show that the state court unreasonably concluded that defense counsel's penalty phase "family sympathy" strategy (that consisted principally of the testimony of the defendant's mother) was appropriate. Likewise, the defendant failed to show that the state court unreasonably concluded and that even if counsel's conduct was deficient, no prejudice occurred, given that the new evidence largely duplicated the mitigation evidence presented at trial and the extensive aggravating evidence.

State v. Gillespie, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Without addressing the deficient performance prong of the *Strickland* test, the court held that the defendant did not receive ineffective assistance of counsel where he was not prejudiced by counsel's conduct. The defendant had complained of counsel's failure to object to a law enforcement officer's testimony about the victim's demeanor and counsel's failure to object to the striking of a defense witness's testimony.

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). No error occurred when the trial court denied defense counsel's request for an overnight recess after having to defend himself against the State's motion for contempt based on an allegation that counsel violated the court's order regarding the rape shield rule in connection with his examination of the victim in this child sexual abuse case. After the trial court denied the State's motion, defense counsel requested an overnight recess to "calm down" about the contempt motion. The trial court denied this request but at 11:38 am called a recess until 2 pm that day. The court rejected the defendant's arguments that there was a conflict of interest between the defendant and defense counsel and that the trial court's denial of the overnight recess resulted in ineffective assistance of counsel.

State v. Allen, __ N.C. App. __, 756 S.E.2d 852 (April 15, 2014). Considering the defendant's ineffective assistance of counsel claim on appeal the court rejected his contention that counsel was ineffective by eliciting hearsay evidence that conflicted with his claim of self-defense, concluding that the evidence did not contradict this defense. It also rejected his contention that counsel was ineffective by failing to object to evidence that the defendant sold drugs on a prior occasion, concluding that even if this constituted deficient representation, there was no reasonable possibility that the error affected the outcome of the case. Finally, the court rejected the defendant's contention that counsel was ineffective by failing to move to dismiss the charges

at the close of the evidence, concluding that given the evidence there was no likelihood that the trial court would have granted the motion.

State v. Smith, __ N.C. App. __, 749 S.E.2d 507 (Nov. 5, 2013). The defendant was not denied effective assistance of counsel in a case where defense counsel had a meeting with the State's witnesses in which they offered to drop the charges against the defendant in exchange for compensation. Defense counsel cross-examined the witnesses extensively about their visit to his office and the resulting discussion, including that defense counsel did not give them any money or otherwise cooperate with their demands. Through cross-examination and closing argument, counsel called issues with the witnesses' credibility to the attention of the jury. Counsel was able to make the required points without serving as a witness in the defendant's trial.

State v. Gerald, __ N.C. App. __, 742 S.E.2d 280 (May 7, 2013), *temporary stay allowed*, 367 N.C. 201 (May 24, 2013). Counsel was ineffective by failing move to suppress evidence obtained by a "patently unconstitutional seizure." The State conceded that the evidence was obtained illegally but argued that counsel's failure to move to suppress could have been the result of trial strategy. The court rejected this argument, noting in part trial counsel's affidavit stating that he had no strategic reason for his failure. Trial counsel's conduct fell below an objective standard of reasonableness and the defendant suffered prejudice as a result.

In Re C.W.N., __ N.C. App. __, 742 S.E.2d 583 (May 7, 2013). (1) On direct appeal, the court rejected the juvenile's assertion that counsel's failure to make a closing argument in a delinquency proceeding was per se ineffective assistance. (2) In a delinquency case in which the juvenile was alleged to have assaulted another child, the court rejected the juvenile's argument that he received ineffective assistance of counsel when defense counsel failed argue that the incident was an accident that occurred during horseplay. Given counsel's cross-examination of the victim and other witnesses and direct examination of the juvenile, counsel's conduct did not fall below an objective standard of reasonableness. Nor was prejudice established.

State v. Canty, __ N.C. App. __, 736 S.E.2d 532 (Dec. 18, 2012). Counsel rendered ineffective assistance by failing to file what would have been a meritorious motion to suppress.

State v. Redman, __ N.C. App. __, 736 S.E.2d 545 (Dec. 18, 2012). Citing *Lafler v. Cooper*, __ U.S. __, 132 S. Ct. 1376 (2012) (defense counsel rendered ineffective assistance by advising a defendant to reject a plea offer), the court dismissed without prejudice the defendant's claim that defense counsel rendered ineffective assistance by advising him to reject a favorable plea offer. The court noted that the defendant may reassert his claim in a MAR.

State v. Hunt, 221 N.C. App. 489 (July 17, 2012), *aff'd per curiam*, __ N.C. __, 766 S.E.2d 288 (Dec. 19, 2014). Although counsel provided deficient performance in this sexual assault case, the defendant was not prejudiced by this conduct and thus the defendant's claim of ineffective assistance of counsel must fail. The defendant argued that counsel was ineffective when he asked the defendant on direct examination if he had "ever done such a thing before," despite knowing that other sexual offense charges were pending against the defendant. When the defendant responded in the negative, this opened the door to the State calling another witness to testify

about the defendant's alleged sexual abuse of her. Counsel's performance fell below an objective standard of reasonableness because there was no strategic benefit in opening the door to this testimony. However, because the evidence about the other pending charges did not likely affect the verdict, no prejudice resulted.

State v. Surratt, 216 N.C. App. 404 (Oct. 18, 2011). In a sex offense case, the defendant received ineffective assistance of counsel when counsel failed to object to the prosecutor's motion in limine to exclude specific reference to a prior DSS hearing and/or to clarify the evidence regarding that hearing. At the prior hearing the district court considered a DSS petition for abuse, neglect, and dependency of the defendant's children and concluded that the children were not sexually abused but were neglected. At the criminal trial, the trial court granted the State's motion in limine to exclude specific references to the outcome of the DSS hearing. Defense counsel did not object to this motion. A DSS social worker then testified to the victim's allegations of sexual abuse and stated that DSS removed the defendant's children from the home. Because of this testimony, the jury would have thought that the children were removed due to the sexual abuse allegations when in fact they were removed due to neglect.

State v. Carter, 210 N.C. App. 156 (Mar. 1, 2011). In a child sexual assault case, defense counsel's failure to move to strike testimony of a forensic interviewer that the fact that a young child had extensive sexual knowledge suggested that "something happened," did not constitute deficient performance.

State v. Boyd, 209 N.C. App. 418 (Feb. 1, 2011). (1) The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation fails because even if counsel had objected, the objection would have been overruled when the defendant opened the door to the evidence through his own trial testimony. (2) The defendant failed to demonstrate that counsel's performance was deficient. As noted, the defendant's own testimony opened the door to admission of the videotape. Trial counsel made a strategic decision to have the defendant testify to offer an alibi. On appeal, the defendant did not challenge this strategy, which the jury rejected, and thus did not overcome the presumption that counsel's trial strategy was reasonable.

Pro Se Defendants

State v. Brunson, 221 N.C. App. 614 (July 17, 2012). When a defendant discharges counsel and proceeds pro se, he or she may not assert a claim of ineffective assistance of counsel with regard to his or her own representation.

Review on Direct Appeal

State v. Pemberton, __ N.C. App. __, 743 S.E.2d 719 (July 2, 2013). The court dismissed the defendant's claim that counsel's trial strategy constituted ineffectiveness under *Strickland.* This claim was dismissed without prejudice to the defendant's right to assert the claim in a Motion for Appropriate Relief.

State v. Boyd, 209 N.C. App. 418 (Feb. 1, 2011). The defendant's claim that trial counsel was ineffective by failing to object to a videotape of the defendant's interrogation was properly

considered on appeal. Although the defendant asked the court to dismiss his claim without prejudice to raise it in a motion for appropriate relief, he failed to identify how the record on appeal was insufficient to resolve the claim.

Discovery, Subpoenas & Related Issues

***Brady* Violations**

Smith v. Cain, 565 U.S. __, 132 S. Ct. 627 (Jan. 10, 2012). The Court reversed petitioner Smith's conviction on grounds of a *Brady* violation. At Smith's trial, a single witness, Larry Boatner, linked Smith to the crime. Boatner testified that Smith and two other gunmen entered a home, demanded money and drugs, and then began shooting, killing five people. At trial, Boatner identified Smith as the first gunman through the door and claimed that he had been face to face with Smith during the initial moments of the robbery. No other witnesses and no physical evidence implicated Smith. Smith was convicted of five counts of murder. After an unsuccessful direct review, Smith sought post-conviction relief in the state courts. In connection with this effort he obtained notes of the lead police investigator. These notes contained statements by Boatner that conflicted with his testimony identifying Smith as a perpetrator. Specifically, they state that Boatner "could not . . . supply a description of the perpetrators other then [sic] they were black males." The investigator also made a handwritten account of a conversation he had with Boatner five days after the crime, in which Boatner said he "could not ID anyone because [he] couldn't see faces" and "would not know them if [he] saw them." The investigator's typewritten report of that conversation states that Boatner told the officer he "could not identify any of the perpetrators of the murder." Smith argued that the prosecution's failure to disclose the notes violated *Brady*. The State did not dispute that Boatner's statements were favorable to Smith and that they were not disclosed. The sole question for the Court thus was whether the statements were material. The Court noted that evidence impeaching an eyewitness may not be material if the State's other evidence is strong enough to sustain confidence in the verdict. However, it concluded the State's evidence was not sufficiently strong in this case. Boatner's testimony was the only evidence linking Smith to the crime. Also, Boatner's undisclosed statements directly contradicted his testimony. Boatner's undisclosed statements, the Court concluded, were plainly material. The Court went on to reject various reasons advanced by the State and the dissent regarding why the jury might have discounted Boatner's undisclosed statements. Justice Thomas dissented.

State v. Marino, __ N.C. App. __, 747 S.E.2d 633 (Aug. 20, 2013). In this misdemeanor DWI case the trial court did not err by denying the defendant's motions to examine the Intoximeter source code. The court rejected the defendant's argument that the source code was *Brady* evidence, reasoning that he failed to show that it was favorable and material. The court noted that the jury found the defendant guilty under both prongs of the DWI statute. The court also rejected the defendant's argument that under *Crawford* and the confrontation clause he was entitled to the source code.

Conduct Not Constituting a Violation

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). In this child sexual assault case no discovery violation occurred when the State's experts testified about their own

observations regarding the characteristics of sexual abuse and the reasons for delayed reporting. At trial the State offered expert testimony of two medical professionals who had treated the victim. The defendant objected, arguing that because the State had not provided defendant with the experts' opinions prior to trial, they should not be permitted to offer expert opinions at trial. The trial court sustained defendant's objection, ruling that the witnesses could testify to their own observations, but could not offer expert opinions. Because neither witness offered an expert opinion, no error occurred.

State v. Foushee, __ N.C. App. __, 758 S.E.2d 47 (May 20, 2014). The trial court erred by dismissing charges after finding that the State violated the discovery statutes by failing to obtain and preserve a pawn shop surveillance video of the alleged transaction at issue. On 7 August 2012, defense counsel notified that State that there was reason to believe another person had been at the pawn shop on the date of the alleged offense and inquired if the State had obtained a surveillance video from the pawn shop. On 18 February 2013, trial counsel made another inquiry about the video. The prosecutor then spoke with an investigator who went to the pawn shop and learned that the video had been destroyed six months ago. Before the trial court, the defendant successfully argued that the State was "aware of evidence that could be exculpatory and acted with negligence to allow it to be destroyed." On appeal, the court rejected this argument, noting that there was no evidence that the video was ever in the State's possession and under the discovery statutes, the State need only disclose matters in its possession; it need not conduct an independent investigation to locate evidence favorable to a defendant.

State v. Dorman, __ N.C. App. __, 737 S.E.2d 452 (Feb. 19, 2013). G.S. 15A-903 requires production of already existing documents; it imposes no duty on the State to create or continue to develop additional documentation regarding an investigation. To the extent the trial court concluded that the State violated statutory discovery provisions because it failed to document certain conversations, this was error.

State v. Flint, 199 N.C. App. 709 (Sept. 15, 2009). The trial court did not abuse its discretion in denying the defendant's motion to continue alleging that the defendant did not receive discovery at a reasonable time prior to trial where the defendant never made a motion for discovery and there was no written discovery agreement and thus the State was not required to provide discovery pursuant to G.S. 15A-903(a)(1). The trial court did not abuse its discretion in allowing a witness named Karen Holman to testify when her name allegedly was listed on the State's witness list as Karen Holbrook where the defendant never made a motion for discovery and there was no written discovery agreement, even if such a motion had been made, the trial judge had discretion under the statute to permit any undisclosed witness to testify, and the witness's testimony served only to authenticate a videotape.

State v. Rainey, 198 N.C. App. 427 (Aug. 4, 2009). A witness testified at trial that the defendant made the following statement about the victim during the robbery: "I hope this spic is dead." The court rejected the defendant's argument that the evidence should have been excluded because of a discovery violation. The State provided information prior to trial that the witness had stated that "they hated Mexicans" and there was no unfair surprise.

State v. Small, 201 N.C. App. 331 (Dec. 8, 2009). The trial court did not err by denying the

defendant's motion to dismiss the charges and her motion in limine, both of which asserted that the State violated the discovery rules by failing to provide her with the victim's pretrial statement to the prosecutor. The victim made a statement to the police at the time of the crime. In a later statement to the prosecutor, the victim recounted the same details regarding the crime but said that he did not remember speaking to the police at the crime scene. The victim's account of the incident, including his identification of the defendant as the perpetrator, remained consistent. Even though the victim told the prosecutor that he did not remember making a statement to the police at the scene, this was not significantly new or different information triggering a duty on the part of the State to disclose the statement.

Discovery Methods

State v. Marino, __ N.C. App. __, 747 S.E.2d 633 (Aug. 20, 2013). In this misdemeanor DWI case the court held that the defendant had no statutory right to pretrial discovery and rejected the defendant's argument that G.S. 15A-901 violated due process. The court noted, however, that the defendant did have discovery rights under *Brady*.

Effect of Evidence

Cone v. Bell, 556 U.S. 449 (Apr. 28, 2009). Although exculpatory evidence suppressed by the state was immaterial to the jury's finding of guilt, it might have affected the jury's decision to recommend a death sentence. The defendant offered an insanity defense based on his habitual use of an excessive amount of drugs and their affect on his behavior during the commission of the offenses. After the defendant was convicted and sentenced to death, it was discovered that the state had suppressed exculpatory evidence concerning the defendant's drug use The Court remanded to the federal habeas trial court for a full review of the suppressed evidence and its effect on sentencing.

Material Subject to Disclosure

State v. McCoy, __ N.C. App. __, 745 S.E.2d 367 (Aug. 6, 2013). The trial court did not err by refusing to provide defense counsel with an internal investigation report prepared by the police department's Office of Professional Standards and Inspections regarding a lead detective in the investigation. During the trial prosecutors learned of an ongoing internal investigation of the detective. The State informed the trial court and defense counsel of this and decided not to call the detective as a witness. The trial court examined the report in camera and issued an oral ruling noting that the report detailed a problem in the detective's life that could have affected his job performance. However, it found that there was no evidence that the detective was experiencing the problem at the time of the investigation in question. The trial court noted that the report suggests that the detective may not have been honest in his internal investigation disclosures but again found no connection to the case at hand. The court of appeals held that the trial court did not violate the defendant's constitutional rights by refusing to disclose the contents of the report to counsel. The court found that it was unable to conclude that the report was material "when the State was able to prove its case through the testimony of other law enforcement officers and without [the] Detective . . . ever taking the stand."

State v. Martinez, 212 N.C. App. 661 (June 21, 2011). In a child sex case, the trial court erred by

failing to require disclosure of material exculpatory information contained in privileged documents that were reviewed in camera by the trial court and pertained to the victim's allegations. The documents contained "sufficient exculpatory material to impeach the State's witnesses." The court instructed the trial judge to "review the material de novo to determine, in his or her discretion, what material should be made available to Defendant."

Notice of Witnesses

State v. Barnes, __ N.C. App. __, 741 S.E.2d 457 (April 2, 2013). In a murder case, the trial court did not violate the defendant's constitutional right to reasonable notice of evidence or his statutory right to discovery by allowing the State to present an expert toxicologist's testimony. As part of his investigation, Dr. Jordan, a local medical examiner, sent a specimen of the victim's blood to the Office of the Chief Medical Examiner for analysis. During trial, Jordan testified to the opinion that the cause of death was methadone toxicity and that this opinion was based upon the Chief Medical Examiner's Office's report. When defense counsel raised questions about the report, the trial court allowed the State to call as a witness Jarod Brown, the toxicologist at the State Medical Examiner's Officer who analyzed the victim's blood. The defendant objected to Brown's testimony on grounds that he had not been notified that Brown would be a witness. With respect to the alleged statutory discovery violation, the trial court did not abuse its discretion by allowing Brown to testify. The court noted that the defendant had the toxicology report for four years, had it reviewed by two experts, was afforded the opportunity to meet privately with Brown for over an hour prior to a voir dire hearing, and was afforded cross-examination on voir dire. As to the constitutional issues, the court noted that although the defendant argued that he was not afforded adequate time to prepare, he failed to show how his case would have been better prepared if he had more time or that he was materially prejudiced by Brown's testimony. Because the defendant had the report for four years, had two experts review it, was afforded an opportunity to confer with Brown prior to his testimony, and cross-examined Brown, the defendant failed to demonstrate that a constitutional error occurred.

Requiring Testing

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). The defendant was not entitled to a new trial on grounds that the SBI Crime Lab refused to test four hair and fiber lifts taken from an item of clothing. The defendant did not argue that the prosecutor failed to make the lifts available to him for testing. In fact, one of the defendant's previous attorneys made a motion for independent testing of the clothing item and received the results of the testing. Because police do not have a constitutional duty to perform particular tests on crime scene evidence, no error occurred.

Sanctions for Violations
Excluding Evidence

State v. Lane, 365 N.C. 7 (Mar. 11. 2011). In a capital murder case, the trial court did not abuse its discretion by excluding expert testimony by a neuropharmacologist and research scientist who studies the effects of drugs and alcohol on the brain, proffered by the defense as relevant to the jury's determination of the reliability of the defendant's confession. The trial court barred the expert's testimony on grounds that the expert's report provided to the State was insufficient to

satisfy the discovery rules; repeated requests were made by the State for the report and the trial court had ordered production. Relevant to the court's finding of no abuse of discretion was its separate conclusion that the expert's testimony was not relevant.

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013). (1) In this murder case, the trial court abused its discretion by excluding, as a discovery sanction, testimony by defense expert Masucci. The defendant offered Masucci after the trial court precluded the original defense expert, Ward, from testifying that incriminating computer files had been planted on the defendant's computer. The State made no pretrial indication that it planned to challenge Ward's testimony. At trial, the defendant called Ward to testify that based upon his analysis of the data recovered from the defendant's laptop, tampering had occurred with respect to the incriminating computer files. The State successfully moved to exclude this testimony on the basis that Ward was not an expert in computer forensic analysis. The defendant then quickly located Masucci, an expert in computer forensic analysis, to provide the testimony Ward was prevented from giving. The State then successfully moved to exclude Masucci as a sanction for violation of discovery rules. The only evidence directly linking the defendant to the murder was the computer files. Even if the defendant violated the discovery rules, the trial court abused its discretion with respect to the sanction imposed and violated the defendant's constitutional right to present a defense. (2) The trial court erred by failing to conduct an in camera inspection of discovery sought by the defense regarding information related to FBI analysis of the computer files. The trial court found that the FBI information was used in counterterrorism and counterintelligence investigations and that disclosure would be contrary to the public interest. The court held that the trial court's failure to do an in camera review constituted a violation of due process. It instructed that on remand, the trial court "must determine with a reasonable degree of specificity how national security or some other legitimate interest would be compromised by discovery of particular data or materials, and memorialize its ruling in some form allowing for informed appellate review."

State v. Aguilar-Ocampo, 219 N.C. App. 417 (Mar. 20, 2012). In a case in which the State conceded that a translator testified as an expert, the trial court erred by failing to recognize the State's violation of the discovery rules in G.S. 15A-903(a)(2). However, on the facts presented, the trial court did not abuse its discretion by refusing to exclude the evidence. The translator had translated a conversation occurring in a van and pertaining to a drug transaction. Among other things, the translator testified to where a speaker was sitting based on "tonal quality of the voice."

State v. Graham, 200 N.C. App. 204 (Oct. 6, 2009). The trial court did not abuse its discretion by denying the defendant's motion to bar the State from introducing forensic evidence related to his vehicle where the police impounded his vehicle during the investigation, but subsequently lost it. The State's evidence suggested that soil from the defendant's car matched soil where the victims were found. The State preserved the soil samples, the defendant had access to them and presented expert testimony that the soil was not a unique match, the defense informed the jury that the police lost the vehicle, and there was no evidence of bad faith by the police.

Continuance

State v. Ellis, 205 N.C. App. 650 (July 20, 2010). The trial court did not abuse its discretion by denying the defendant's motion to continue because of the State's alleged discovery violation. Although the State provided the defendant with a copy the robbery victim's pre-trial written statement and a composite sketch of the perpetrator based on the victim's description, the defendant argued that the State violated its continuing duty to disclose by failing to inform the defense of the victim's statement, made on the morning of trial, that she recognized the defendant as the robber when he entered in the courtroom. After the victim identified the defendant as the perpetrator, the defense moved to continue to obtain an eyewitness identification expert. Finding no abuse of discretion, the court relied, in part, on the timing of the events and that the defendant could have anticipated that the victim would be able to identify the defendant.

Recess

State v. Pender, 218 N.C. App. 233 (Jan. 17, 2012). The trial court did not abuse its discretion by denying the defendant's motion for a mistrial on grounds that the State failed to provide the defendant with additional discovery after a meeting with co-defendant William Brown gleaned new information. After recognizing potential discovery violations by the State, the trial court instructed defense counsel to uncover any discrepancies in Brown's testimony through cross-examination. After doing so, the defense renewed its mistrial motion. Although the trial court denied that motion, it granted the defense a recess "to delve into that particular matter" and ordered the State to memorialize all future discussions with Brown. All of the trial court's remedies were permissible and were not an abuse of discretion. Additionally, the trial court did not err by denying the defendant's mistrial motion; that remedy is appropriate only where the improprieties make it impossible to attain a fair and impartial verdict.

State v. Remley, 201 N.C. App. 146 (Nov. 17, 2009). The trial court did not abuse its discretion by granting a recess instead of dismissing the charges or barring admission of the defendant's statement to the police, when that statement was not provided to the defense until the second day of trial in violation of the criminal discovery rules. When making its ruling, the trial court said that it would "consider anything else that may be requested," short of dismissal or exclusion of the evidence, but the defense did not request other sanctions or remedies.

Dismissal

State v. Dorman, __ N.C. App. __, 737 S.E.2d 452 (Feb. 19, 2013). The trial court erred by dismissing with prejudice murder charges as a sanction for discovery violations where the record did not reveal a basis for the determination that dismissal was an appropriate sanction. Additionally, because the defendant actually received before trial the evidence the State initially failed to disclose, any harm was either speculative or moot.

State v. Allen, __ N.C. App. __, 731 S.E.2d 510 (Sept. 4, 2012). (1) The trial court erred by entering a pretrial order dismissing, under G.S. 15A-954(a)(4), murder, child abuse, and sexual assault charges against the defendant. The statute allows a trial court to dismiss charges if it finds that the defendant's constitutional rights have been flagrantly violated causing irreparable prejudice so that there is no remedy but to dismiss the prosecution. The court held that the trial

court erred by finding that the State violated the defendant's *Brady* rights with respect to: a polygraph test of a woman connected to the incident; a SBI report regarding testing for the presence of blood on the victim's underwear and sleepwear; and information about crime lab practices and procedures. It reasoned, in part, that the State was not constitutionally required to disclose the evidence prior to the defendant's plea. Additionally, because the defendant's guilty plea was subsequently vacated and the defendant had the evidence by the time of the pretrial motion, he received it in time to make use of it at trial. The court also found that the trial court erred by concluding that the prosecutor intentionally presented false evidence at the plea hearing by stating that there was blood on the victim's underwear. The court determined that whether such blood existed was not material under the circumstances, which included, in part, substantial independent evidence that the victim was bleeding and the fact that no one else involved was so injured. Also, because the defendant's guilty plea was vacated, he already received any relief that would be ordered in the event of a violation. Next, the court held that the trial court erred by concluding that the State improperly used a threat of the death penalty to coerce a plea while withholding critical information to which the defendant was entitled and thus flagrantly violating the defendant's constitutional rights. The court reasoned that the State was entitled to pursue the case capitally and no *Brady* violation occurred. (2) The trial court erred by concluding that the State's case should be dismissed because of statutory discovery violations. With regard to the trial court's conclusion that the State's disclosure was deficient with respect to the SBI lab report, the court rejected the notion that the law requires either an affirmative explanation of the extent and import of each test and test result. It reasoned: this "would amount to requiring the creation of an otherwise nonexistent narrative explaining the nature, extent, and import of what the analyst did." Instead it concluded that the State need only provide information that the analyst generated during the course of his or her work, as was done in this case. With regard to polygraph evidence, the court concluded that it was not discoverable.

State v. Pender, 218 N.C. App. 233 (Jan. 17, 2012). The trial court did not abuse its discretion by denying the defendant's motion for a mistrial on grounds that the State failed to provide the defendant with additional discovery after a meeting with co-defendant William Brown gleaned new information. After recognizing potential discovery violations by the State, the trial court instructed defense counsel to uncover any discrepancies in Brown's testimony through cross-examination. After doing so, the defense renewed its mistrial motion. Although the trial court denied that motion, it granted the defense a recess "to delve into that particular matter" and ordered the State to memorialize all future discussions with Brown. All of the trial court's remedies were permissible and were not an abuse of discretion. Additionally, the trial court did not err by denying the defendant's mistrial motion; that remedy is appropriate only where the improprieties make it impossible to attain a fair and impartial verdict.

State v. Williams, 362 N.C. 628 (Dec. 12, 2008). The trial judge properly dismissed a charge of felony assault on a government officer under G.S. 15A-954(a)(4) where the defendant established that the state flagrantly violated his constitutional rights and irreparably prejudiced preparation of the defense. The state willfully destroyed material evidence favorable to the defense. The destroyed evidence consisted of two photographs of the defendant that were displayed in the prosecutor's office, one taken of the defendant before the events in question, another taken after the events in question. The defendant was uninjured in the first photograph, which was captioned "Before he sued the D.A.'s office;" the defendant was injured in the second

photograph, which was “After he sued the D.A.’s office.”

Suppression

State v. Dorman, __ N.C. App. __, 737 S.E.2d 452 (Feb. 19, 2013). The trial court erred by ordering suppression as a sanction for the State’s failure to document and disclose various communications between agencies and individuals involved in the investigation. The court began by noting that G.S. 15A-903 requires production of already existing documents; it imposes no duty on the State to create or continue to develop additional documentation regarding an investigation. To the extent the trial court concluded that the State violated statutory discovery provisions because it failed to document the conversations, this was error. The trial court also erred by concluding that the State violated the discovery statutes by failing to provide other documented conversations. In addition to failing to make findings justifying the sanction on this basis, the defendant received the documentation prior to trial.

Precluding a Defense

State v. Foster, __ N.C. App. __, 761 S.E.2d 208 (Aug. 5, 2014). In a delivery of cocaine case the trial court abused its discretion by denying the defendant’s request for an entrapment instruction as a sanction under G.S. 15A-910(a) for failure to provide "specific information as to the nature and extent of the defense" as required by G.S. 15A-905(c)(1)(b). The trial court made no findings of fact to justify the sanction and the State did not show prejudice from the lack of detail in the notice filed eight months prior to trial. The court held:

> [I]n considering the totality of the circumstances prior to imposing sanctions on a defendant, relevant factors for the trial court to consider include without limitation: (1) the defendant's explanation for the discovery violation including whether the discovery violation constituted willful misconduct on the part of the defendant or whether the defendant sought to gain a tactical advantage by committing the discovery violation, (2) the State's role, if any, in bringing about the violation, (3) the prejudice to the State resulting from the defendant's discovery violation, (4) the prejudice to the defendant resulting from the sanction, including whether the sanction could interfere with any fundamental rights of the defendant, and (5) the possibility of imposing a less severe sanction on the defendant.

Slip op. at pp. 29-30. The court continued, holding that assuming that the defendant’s notice constituted a discovery violation, the trial court abused its discretion by refusing to instruct on entrapment as a sanction.

State v. Pender, 218 N.C. App. 233 (Jan. 17, 2012). The trial court did not err by denying the defendant’s request for a jury instruction on voluntary manslaughter based on imperfect self-defense where, among other things, the State filed a motion requesting that the defendant provide voluntary discovery outlining the defenses he intended to assert at trial but the defendant failed to provide the State with the defenses or the requisite notice required to assert a theory of self-defense under G.S. 15A-905(c)(1).

New Trial

State v. Ramseur, __ N.C. App. __, 739 S.E.2d 599 (April 2, 2013). The trial court did not err by failing to grant the defendant a new trial on his MAR where the State failed to disclose in discovery more than 1,800 pages of material to which the defendant was entitled. The court was unable to conclude that but for the nondisclosure a different result would have occurred at trial.

Immunity

Van de Kamp v. Goldstein, 555 U.S. 335 (Jan. 26, 2009). Supervisory prosecutors were entitled to absolute immunity in connection with the plaintiff's claims that prosecutors failed to disclose impeachment material due to the failure to train prosecutors, failure to supervise prosecutors, or failure to establish an information system in the district attorney's office containing potential impeachment material about informants. The plaintiff, whose murder conviction was later reversed, had sued prosecutors under § 1983 for the alleged suppression of potential impeachment information that could have been used against a state's witness in the defendant's murder trial. The conviction was allegedly based in critical part on the testimony of this witness, who was a jailhouse informant and had previously received reduced sentences for providing prosecutors with favorable testimony in other cases.

Appeal of Judge's Sanction Order

State v. Foushee, __ N.C. App. __, 758 S.E.2d 47 (May 20, 2014). Although the State had a right to appeal the trial court's order dismissing charges because of a discovery violation, it had no right to appeal the trial court's order precluding testimony from two witnesses as a sanction for a discovery violation.

Subpoenas

State v. Johnson, ___ N.C. App. ___, 767 S.E.2d 891 (Dec. 31, 2014). The trial court erred by ordering, under threat of contempt, that defense counsel's legal assistant appear as a witness for the State. The State served the assistant with a subpoena directing her to appear to testify on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014. However, the trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Because the assistant had not been properly subpoenaed to appear on Tuesday, November 19th, the trial court erred by ordering, under threat of contempt, that she appear on that day as a witness for the State. The court went on to find the error prejudicial and ordered a new trial.

Dismissal of Charges

State v. Joe, 365 N.C. 538 (Apr. 13, 2012). Disagreeing with the court of appeals' holding in *State v. Joe*, 213 N.C. App. 148 (2011), that the prosecutor's statements amounted to a dismissal in open court, the court also held that the trial court had no authority to enter an order dismissing the case on its own motion. The defendant was charged with resisting a public officer, felony possession of cocaine with intent to sell or deliver, and attaining habitual felon status. The

defendant filed a motion to dismiss the resisting charge and a motion to suppress all evidence seized during the search incident to arrest. The trial court granted both motions. The State then announced that it "would be unable to proceed with the case in chief" on the remaining charges and the other charges were dismissed. The State appealed and the court of appeals affirmed, reasoning that the prosecutor's statements constituted a dismissal in open court under G.S. 15A-931. The court disagreed with this conclusion and further held that the trial court had no authority to enter an order dismissing the case on its own motion. It remanded to the court of appeals for consideration of the State's argument regarding the motion to suppress.

State v. Dorman, __ N.C. App. __, 737 S.E.2d 452 (Feb. 19, 2013). The trial court erred by dismissing murder charges pursuant to G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice). The court first held that the trial court erred by finding that destruction of the victim's bones resulted in a flagrant violation of constitutional rights under *Brady*. An autopsy by the Medical Examiner's Office identified the victim and found that cause of death was blunt head trauma consistent with a shotgun wound. After the autopsy was complete, that office released most of the victim's remains to the family and they were cremated. A partial fragment of the victim's skull was retained by the office. Even if there was bad faith on the State's part, that alone cannot support a dismissal under G.S. 15A-954(a)(4); there also must be irreparable prejudice such that there is no remedy other than dismissal. In this respect, the court held that the trial court's ruling was premature given that no trial had occurred. It explained:

> The defense has yet to engage any expert, and has failed to attempt to conduct any tests, whether for DNA or to attempt to replicate the photographic identification of the decedent using the radiographs of her teeth. It may well be that upon the hiring of an expert and analyzing the partial skull remains which still are being held by the [Medical Examiner's Office], Defendant's expert may concur in the [autopsy results] that the jaw bone is indeed that of [the victim]. Until it can be established that the partial remains are untestable or that the identification of the deceased is somehow flawed or incapable of repetition, we fail to see how the defense has been irreparably prejudiced.

The court also disagreed with the trial court's conclusion that dismissal was the only appropriate remedy. Second, the court held that the trial court erred by determining that the State's failure to disclose "the role its agents took in assisting, facilitating, and paying for the permanent destruction" of the remains and the failure of Medical Examiner's Office staff to produce email records subject to subpoena supported dismissal. Because the defendant was provided with that information prior to trial, no *Brady* violation occurred. Third, trial court erred by concluding that three instances in which the State "fail[ed] to correct misrepresentations of material fact . . . flagrantly violated [the defendant's] constitutional rights[.]" Although the trial court cited *Napue v. Illinois*, 360 U.S. 264 (1959), in support of its ruling, the court found that case inapplicable given that no trial had occurred and no conviction had been obtained in the case at hand. Fourth, with respect to the trial court's conclusion that a flagrant violation of Eighth Amendment rights occurred, the court rejected this basis for dismissal, reasoning that it could not determine the precise factual or legal basis for the trial court's ruling.

State v. Wilson, __ N.C. App. __, 736 S.E.2d 614 (Jan. 15, 2013). The trial court erred by dismissing a misdemeanor DWI charge under G.S. 15A-954. The trial court erroneously

dismissed the charges under G.S. 15A-954(a)(1) (statute alleged to have been violated is unconstitutional on its face or as applied to the defendant) without making a finding that the DWI statute, G.S. 20-138.1, was unconstitutional as applied to the defendant. The fact that G.S. 20-139.1(d1) was violated was not a basis for dismissal under G.S. 15A-954. Nor did G.S. 15A-954(a)(4) (flagrant violation of constitutional rights causing irreparable prejudice) support dismissal of the charges where there was no finding that the defendant suffered irreparable prejudice. The court noted that the proper vehicle for the defendant to have asserted his arguments was a motion to suppress; since the State had stipulated that it would not seek to introduce the challenged blood evidence at trial, the trial court was required to summarily grant the defendant's suppression motion.

State v. Friend, 219 N.C. App. 338 (Mar. 6, 2012). (1) The State's dismissal of an impaired driving charge following the district court's denial of its motion to continue did not violate separation of powers. The defendant had argued that the district attorney is an executive branch official who was obligated to proceed with the trial when the trial court denied the State's motion to continue. He further argued that to allow the State to voluntarily dismiss the charge allowed the executive branch to subvert the court's authority. (2) No violation of due process occurred when the State refiled charges against the defendant after having taken a dismissal of them in response to the trial court's denial of its motion to continue.

DNA Testing (Pretrial)

State v. McLean, __ N.C. App. __, 753 S.E.2d 235 (Jan. 21, 2014). In a case involving attempted murder and other charges related to a discharge of a firearm, the court held that the trial court did not err by denying the defendant's pre-trial motion for DNA testing, pursuant to G.S. 15A-267(c), of shell casings recovered from the crime scene. The defendant's motion indicated that he wanted "to test the shell casings to see if there is any DNA material on the shell casings that may be compared to the Defendant." The defendant also moved for fingerprint testing on the shell casings. The trial court denied the motion for DNA testing but ordered that the shell casings be subjected to fingerprint testing. The casings were tested and no fingerprints were found. The court determined that the absence of the defendant's DNA on the shell casings, even if established, would not have a logical connection or be significant to the defendant's alibi defense. Additionally, the court noted that the purpose of the defendant's request was to demonstrate the absence of his DNA on the shell casings but the plain language of G.S. 15A-267(c) contemplates DNA testing for ascertained biological material—it is not intended to establish the absence of DNA evidence.

Double Jeopardy

Martinez v. Illinois, 572 U.S. __, 134 S. Ct. 2070 (May 27, 2014). Double jeopardy barred the State's appeal of a trial court order dismissing charges for insufficiency of the evidence. After numerous continuances granted to the State because of its inability to procure its witnesses for trial, the defendant's case was finally called for trial. When the trial court expressed its intention to proceed the prosecutor unsuccessfully asked for another continuance and informed the court that without a continuance "the State will not be participating in the trial." The jury was sworn and the State declined to make an opening statement or call any witnesses. The defendant then

moved for a directed not-guilty verdict, which the court granted. The State appealed. The Court held that double jeopardy barred the State's attempt to appeal, reasoning that jeopardy attached when the jury was sworn and that the dismissal constituted an acquittal.

Evans v. Michigan, 568 U.S. __, 133 S. Ct. 1069 (Feb. 20, 2013). When the trial court enters a directed verdict of acquittal based on a mistake of law the erroneous acquittal constitutes an acquittal for double jeopardy purposes barring further prosecution. After the State rested in an arson prosecution, the trial court entered a directed verdict of acquittal on grounds that the State had provided insufficient evidence of a particular element of the offense. However, the trial court erred; the unproven "element" was not actually a required element at all. The Court noted that it had previously held in *Arizona v. Rumsey*, 467 U. S. 203, 211 (1984), that a judicial acquittal premised upon a "misconstruction" of a criminal statute is an "acquittal on the merits . . . [that] bars retrial." It found "no meaningful constitutional distinction between a trial court's 'misconstruction' of a statute and its erroneous addition of a statutory element." It thus held that the midtrial acquittal in the case at hand was an acquittal for double jeopardy purposes.

Blueford v. Arkansas, 566 U.S. __, 132 S. Ct. 2044 (May 24, 2012). Double Jeopardy did not bar retrying the defendant on charges of capital and first-degree murder. Before the jury concluded deliberations, it reported that it was unanimous against guilt on charges of capital and first-degree murder but was deadlocked on manslaughter and had not voted on negligent homicide. The court instructed the jury to continue deliberations. However, when the jury still could not reach a verdict, the court declared a mistrial. The parties agreed that the defendant could be retried on manslaughter and negligent homicide. The issue presented was whether he could also be retried for capital and first-degree murder. Answering this question in the affirmative, the Court rejected the defendant's argument that by reporting its votes on capital and first-degree murder, the jury acquitted him of those charges. The Court reasoned that the fact that deliberations continued after the jury's report deprives the report of the finality necessary to constitute an acquittal on the murder offenses. The Court also rejected the defendant's argument that the trial court's declaration of a mistrial was improper. Specifically, the defendant argued that the trial court should have taken some action, whether through partial verdict forms or other means, to allow the jury to give effect to its votes on the murder charges and then considered a mistrial only as to the remaining charges. The Court rejected this argument, stating: "We have never required a trial court, before declaring a mistrial because of a hung jury, to consider any particular means of breaking the impasse—let alone to consider giving the jury new options for a verdict."

Bobby v. Bies, 556 U.S. 825 (June 1, 2009). Nearly ten years before the U.S. Supreme Court's decision in *Atkins v. Virginia*, 536 U.S. 304 (2002) (Eighth Amendment bars execution of mentally retarded defendants), the defendant was tried for murder and other crimes. The defendant was found guilty and, after being instructed to weigh mitigating circumstances (including evidence of the defendant's borderline mental retardation) against aggravating circumstances, the jury recommended a sentence of death. On direct review, the state supreme court noted that the defendant's mild to borderline mental retardation deserved some weight in mitigation but affirmed the conviction. However, on federal habeas, the Sixth Circuit upheld a lower court order vacating the death sentence, concluding that double jeopardy precluded an *Atkins* hearing on the defendant's mental retardation. The U.S. Supreme Court reversed, holding

that double jeopardy did not preclude an *Atkins* hearing on mental retardation.

Yeager v. United States, 557 U.S. 110 (June 18, 2009). An apparent inconsistency between a jury's verdict of acquittal on some counts and its failure to return a verdict on other counts does not affect the preclusive force of the acquittals under the double jeopardy clause. In this case, the defendant was charged with both fraud and insider trading. The charges were related in that the fraud counts involved a determination of whether the defendant possessed insider information. The jury acquitted on the fraud counts but hung on the insider trading counts. After the trial court declared a mistrial on the insider trading counts, the government obtained a new indictment on some of those counts. The Court reasoned that the Double Jeopardy Clause precludes the government from relitigating any issue that was necessarily decided by a jury's acquittal in a prior proceeding. The fact of the apparent inconsistency in the jury's verdict was immaterial because hung counts are not relevant to the issue preclusion analysis. If, in acquitting on the fraud counts, the jury concluded that the defendant did not possess insider information, the government would be barred from prosecuting the defendant again for insider information.

Renico v. Lett, 559 U.S. 766 (May 3, 2010). The Michigan Supreme Court's decision concluding that the defendant's double jeopardy rights were not violated by a second prosecution after a mistrial on grounds of jury deadlock was not an unreasonable application of federal law. The state high court had elaborated on the standard for manifest necessity and noted the broad deference to be given to trial court judges; it had found no abuse of discretion in light of the length of the deliberations after a short and uncomplicated trial, a jury note suggesting heated discussion, and the foreperson's statement that the jury would be unable to reach a verdict. In light of these circumstances, it was reasonable for that court to determine that the trial judge had exercised sound discretion.

State v. McKenzie, 367 N.C. 112 (Oct. 4, 2013). For the reasons stated in the dissenting opinion below, the court reversed *State v. McKenzie*, __ N.C. App. __, 736 S.E.2d 591 (Jan. 15, 2013), which had held, over a dissent, that prosecuting the defendant for DWI violated double jeopardy where the defendant previously was subjected to a one-year disqualification of his commercial driver's license under G.S. 20-17.4.

State v. Banks, ___ N.C. ___, 766 S.E.2d 334 (Dec. 19, 2014). Because the defendant was properly convicted and sentenced for both statutory rape and second-degree rape when the convictions were based on a single act of sexual intercourse, counsel was not ineffective by failing to make a double jeopardy objection. The defendant was convicted of statutory rape of a 15-year-old and second-degree rape of a mentally disabled person for engaging in a single act of vaginal intercourse with the victim, who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time, the defendant was 29 years old and the victim was 15. The court concluded that although based on the same act, the two offenses are separate and distinct under the *Blockburger* "same offense" test because each requires proof of an element that the other does not. Specifically, statutory rape involves an age component and second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. It continued:

> Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a

> victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. . . .
>
> Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

State v. Chamberlain, __ N.C. App. __, 753 S.E.2d 725 (Feb. 4, 2014). No double jeopardy violation occurs when the State retries a defendant on a charging instrument alleging the correct offense date after a first charge was dismissed due to a fatal variance.

State v. Rahaman, 202 N.C. App. 36 (Jan. 19, 2010). The trial court did not err by denying the defendant's pre-trial motion to dismiss a charge of felonious possession of stolen property on double jeopardy grounds. Although the defendant was indicted for felony possession of stolen property (a Toyota truck) under G.S. 14-71.1, at the first trial, the jury was instructed on felony possession of a stolen motor vehicle under G.S. 20-106. The defendant was found guilty and he successfully appealed on grounds that the trial judge erred by instructing the jury on an offense not charged in the indictment. When the defendant was retried for felony possession of stolen property, he moved to dismiss on double jeopardy grounds, arguing that by failing to instruct on felony possession of stolen property, the trial court effectively dismissed that charge and that dismissal constituted an acquittal. Relying on prior case law, the court agreed that the trial court effectively dismissed the crime of possession of stolen property. However, the court went on to hold that this effective dismissal did not amount to an acquittal for double jeopardy purposes because it was not a dismissal for insufficient evidence.

State v. Hunt, 221 N.C. App. 48 (June 5, 2012). The trial court did not err by entering a civil no contact order against the defendant pursuant to G.S. 15A-1340.50 (permanent no contact order prohibiting future contact by convicted sex offender with crime victim). The court held, among other things, that because the order was civil in nature, it presented no double jeopardy issues.

State v. Hargrove, 206 N.C. App. 591 (Aug. 17, 2010). Because the defendant failed to object to the declaration of a mistrial in his noncapital case, he failed to preserve his double jeopardy claim.

DWI Procedure

Blood Test Results

State v. Sisk, ___ N.C. App. ___, 766 S.E.2d 694 (Dec. 31, 2014). In this habitual impaired driving case, the trial court did not err in admitting the defendant's blood test results into evidence. The court rejected the defendant's argument that the officer's failure to re-advise him of his implied consent rights before the blood draw violated both G.S. 20-16.2 and 20-139.1(b5). Distinguishing *State v. Williams*, __ N.C. App. __, 759 S.E.2d 350 (2014), the court noted that in this case the defendant—without any prompting—volunteered to submit to a blood test. The

court concluded: "Because the prospect of Defendant submitting to a blood test originated with Defendant—as opposed to originating with [the officer]—we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered."

State v. Chavez, __ N.C. App. __, 767 S.E.2d 581 (Dec. 2, 2014). The court rejected the defendant's argument that the right to have a witness present for blood alcohol testing performed under G.S. 20-16.2 applies to blood draws taken pursuant to a search warrant. The court also rejected the defendant's argument that failure to allow a witness to be present for the blood draw violated his constitutional rights, holding that the defendant had no constitutional right to have a witness present for the execution of the search warrant.

State v. Shepley, ___ N.C. App. ___, 764 S.E.2d 658 (Nov. 4, 2014). Relying on *State v. Drdak*, 330 N.C. 587, 592-93 (1992), and *State v. Davis*, 142 N.C. App. 81 (2001), the court held that where an officer obtained a blood sample from the defendant pursuant to a search warrant after the defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under G.S. 20-139.1(a) and the procedures for obtaining the blood sample did not have to comply with G.S. 20-16.2.

State v. Williams, __ N.C. App. __, 759 S.E.2d 350 (June 17, 2014). In an impaired driving case involving a fatality, the trial court properly granted the defendant's motion to suppress blood test results. The defendant was transported an intoxilyzer room where an officer read and gave the defendant a copy of his implied consent rights. The defendant signed the implied consent rights form acknowledging that he understood his rights. After thirty minutes, the officer, a certified chemical analyst, asked the defendant to submit to a chemical analysis of his breath, but the defendant refused. The officer then requested that a blood testing kit be brought to the office. Although the officer did not re-advise the defendant of his implied consent rights for the blood test, he gave the defendant a consent form for the testing, which the defendant signed. The defendant's blood was then drawn. Challenging the trial court's suppression ruling, the State argued that evidence of the results of the blood test was admissible because the defendant signed a consent form for the testing. The court rejected this argument, concluding that although the State could seek to administer a blood test after the defendant refused to take a breath test, it was required, pursuant to G.S. 20-16.2(a) and G.S. 20-139.1(b5), to re-advise the defendant of his implied consent rights before requesting he take a blood test. The court also rejected the State's argument that any statutory violation was technical and not substantial and no prejudice occurred because the defendant had been advised of his implied consent rights as to the breath test less than an hour before the blood test. It reasoned: "A failure to advise cannot be deemed a mere technical and insubstantial violation."

Breath Tests

State v. Cathcart, __ N.C. App. __, 742 S.E.2d 321 (May 21, 2013). The trial court erred by granting the defendant's motion to suppress breath test results from an Intoximeter EC/IR II. The trooper administered the first breath test, which returned a result of .10. When the trooper asked for a second sample, the defendant did not blow hard enough and the machine produced an "insufficient sample" result. The machine then timed out and printed out the first test result ticket. The trooper reset the machine and asked the defendant for another breath sample; the

trooper did not wait before starting the second test. The next sample produced a result of .09. The sample was printed on a second result ticket. The trial court granted the defendant's motion to suppress, concluding that the trooper did not follow the procedures outlined in N.C. Admin. Code tit. 10A, r. 41B.0322 (2009) and because he did not acquire two sequential breath samples on the same test record ticket. Following *State v. White*, 84 N.C. App. 111 (1987), the court held that the trial court erred by concluding that the breath samples were not sequential. With respect to the administrative code, the court held that it was not necessary for the trooper to repeat the observation period.

State v. Shockley, 201 N.C. App. 431 (Aug. 8, 2009). Following *State v. White*, 84 N.C. App. 111 (1987), and holding that under the pre-December 1, 2006 version of G.S. 20-139.1(b3), the trial court did not err by admitting evidence of the lesser of the defendant's sequential, consecutive Intoxilyzer results, even though the defendant provided an invalid sample between the two tested samples.

Motions Practice

State v. Fowler, 197 N.C. App. 1 (May 19, 2009). A defendant, charged with DWI, made a pretrial motion in district court under G.S. 20-38.6(a) alleging that there was no probable cause for his arrest. The district court entered a preliminary finding granting the motion under G.S. 20-38.6(f) and ordering dismissal of the charge. When the state appealed to superior court under G.S. 20-38.7(a), that court found that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in its order. It also concluded that G.S. 20-38.6 and 20-38.7, which allow the state to appeal pretrial motions from district to superior court for DWI cases, violated various constitutional provisions. The superior court remanded to district court for the entry of an order consistent with the superior court's findings. The state gave notice of appeal and filed a petition for a writ of certiorari to the North Carolina Court of Appeals. (1) The court ruled that the state did not have a right to appeal the superior court's order to the court of appeals. The order was interlocutory and did not grant the defendant's motion to dismiss. However, it granted the state's petition for certiorari to review the issues. (2) The court rejected the defendant's constitutional and other challenges to G.S. 20-38.6(a) (requires defendant to submit motion to suppress or dismiss pretrial), 20-38.6(f) (requires district court to enter written findings of fact and conclusions of law concerning defendant's pretrial motion and prohibits court from entering final judgment granting the defendant's pretrial motion until after state has opportunity to appeal to superior court), and 20-38.7(a) (allows state to appeal to superior court district court's preliminary finding indicating it would grant defendant's pretrial motion). (3) The court stated that the legislature's intent was to grant the state a right to appeal to superior court only from a district court's preliminary determination indicating that it would grant a defendant's *pretrial* motion to suppress evidence or dismiss DWI charges which (i) is made and decided before jeopardy has attached (before the first witness is sworn for trial), and (ii) is entirely unrelated to the sufficiency of evidence concerning an element of the offense or the defendant's guilt or innocence. The court opined that the legislature intended pretrial motions to suppress evidence or dismiss charges under G.S. 20-38.6(a) to address only procedural matters including, but not limited to, delays in the processing of a defendant, limitations on a defendant's access to witnesses, and challenges to chemical test results. Separately, the court noted that G.S. 20-38.7(a) does not specify a time by which the state must appeal the district court's preliminary

finding to grant a motion to suppress or to dismiss. The court indicated that an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of the case. (4) Based on the record, the court inferred that the district court not only considered whether the officer had probable cause to arrest the defendant but also preliminarily determined whether there was insufficient evidence for the state to proceed against the defendant for DWI (the court noted that a motion to dismiss for insufficiency of evidence cannot be made pretrial). Because there was no indication that the state had an opportunity to present its evidence, the superior court erred when it concluded that it appeared that the district court's conclusions of law granting the motion to dismiss were based on findings of fact cited in the district court's order. Accordingly, the court remanded to superior court with instructions to remand to district court for a final order granting the defendant's motion to suppress evidence of his arrest for lack of probable cause. Only after the state has had an opportunity to establish a prima facie case may a motion to dismiss for insufficient evidence be made by the defendant and considered by the trial court, unless the state elects to dismiss the DWI charge. When the district court enters its final order on remand granting the defendant's pretrial motion to suppress, the state will have no further right to appeal from that order.

State v. Palmer, 197 N.C. App. 201 (May 19, 2009). The state's notice of appeal to superior court of the district court's preliminary notice of its intention to grant the defendant's motion to suppress in a DWI case was properly perfected. The court cited *Fowler* (discussed above), and noted that the procedures in G.S. 15A-1432(b) are a guide but not binding; an appeal must be taken and perfected within a reasonable time, which depends on the circumstances of each case.

State v. Mangino, 200 N.C. App. 430 (Oct. 20, 2009). Following *Fowler*, discussed above, and holding that G.S. 20-38.6(f) does not violate the defendant's substantive due process, procedural due process or equal protection rights. Also finding no violation of the constitutional provision on separation of powers.

State v. Rackley, 200 N.C. App. 433 (Oct. 20, 2009). Following *Fowler*, discussed above, and dismissing as interlocutory the State's appeal from a decision by the superior court indicating its agreement with the district court's pretrial indication pursuant to G.S. 20-38.6(f).

Pretrial Detention

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). The trial court properly denied the defendant's *Knoll* motion, in which the defendant argued that he was denied his right to communicate with counsel and friends. The defendant had several opportunities to call counsel and friends to observe him and help him obtain an independent chemical analysis, but the defendant failed to do so. In fact, the defendant asked that his wife be called, but only to tell her that he had been arrested. Thus, the defendant was not denied his rights under *Knoll*.

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). In this DWI case, the trial court did not err by denying the defendant's *Knoll* motion. The defendant argued that the magistrate violated his rights to a timely pretrial release by setting a $500 bond and holding him in jail for approximately three hours and 50 minutes. The court found that evidence supported the

conclusion that the magistrate properly informed the defendant of his rights and that the magistrate properly considered all of the evidence when setting the $500 bond.

State v. Daniel, 208 N.C. App. 364 (Dec. 7, 2010). Over a dissent, the court held that the trial court did not err by denying the defendant's *Knoll* motion in an impaired driving case in which the defendant was detained for almost 24 hours. The court upheld the trial court's finding that an individual who appeared to take responsibility for the defendant was not a sober responsible adult; a police officer smelled alcohol on the individual's breath and the individual indicated that he had been drinking. The only statutory violation alleged was a failure to release to a sober, responsible adult, but the individual who appeared was not a sober, responsible adult. The trial court's conclusions that no violation occurred or alternatively that the defendant failed to show irreparable prejudice was supported by the evidence. The defendant was advised that she could request an attorney or other witness to observe her Intoxilyzer test but she declined to request a witness. Also, the individual who appeared was allowed to see the defendant within 25 minutes of her exiting the magistrate's office, to meet personally with the defendant, and to talk with and observe the defendant for approximately eight minutes.

Revocation

State v. McKenzie, 367 N.C. 112 (Oct. 4, 2013). For the reasons stated in the dissenting opinion below, the court reversed *State v. McKenzie*, __ N.C. App. __, 736 S.E.2d 591 (Jan. 15, 2013), which had held, over a dissent, that prosecuting the defendant for DWI violated double jeopardy where the defendant previously was subjected to a one-year disqualification of his commercial driver's license under G.S. 20-17.4.

Lee v. Gore, 365 N.C. 227 (Aug. 26, 2011). Affirming a divided decision below, Lee v. Gore, 206 N.C. App. 374 (Aug. 17, 2010), the court held that the Division of Motor Vehicles (DMV) may not revoke driving privileges for a willful refusal to submit to chemical analysis absent receipt of an affidavit swearing that the refusal was indeed willful. The court reasoned that because G.S. 20-16.2(d) requires that the DMV first receive a "properly executed affidavit" from law enforcement swearing to a willful refusal to submit to chemical analysis before revoking driving privileges, DMV lacked the authority to revoke the petitioner's driving privileges. In this case, the officer swore out the DHHS 3907 affidavit and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." However, neither document indicated that the petitioner's refusal to participate in chemical analysis was willful.

Hoots v. Robertson, 214 N.C. App. 181 (Aug. 2, 2011). The trial court erred by determining that a clerical error on a law enforcement officer's affidavit under G.S. 20-16.2(d) divests the DMV of its authority to suspend the driving privileges of a person who has willfully refused to submit to a chemical analysis when charged with an implied consent offense where the error does not involve an element of the offense of willful refusal. The clerical error involved listing the time of refusal as 3:45 am instead of 3:47 am.

Hartman v. Robertson, 208 N.C. App. 692 (Dec. 21, 2010). (1) In an appeal of a driver's license revocation under G.S. 20-16.2(e), the court declined to consider the defendant's argument that the officer lacked reasonable and articulable suspicion to stop his vehicle. Reasonable and

articulable suspicion for the stop is not relevant to determinations in connection with a license revocation; the only inquiry with respect to the officer, the court explained, is that he or she have reasonable grounds to believe that the person has committed an implied consent offense. Here, the evidence supported that conclusion. (2) The exclusionary rule does not apply in a civil license revocation proceeding.

Violation of Statutory Procedures

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014), *temporary stay allowed*, __ N.C.__, 767 S.E.2d 53 (Dec. 2, 2014). The trial court properly denied the defendant's motion to suppress the results of the chemical analysis of his breath. The defendant argued that the officer failed to comply with the statutory requirement of a 15 minute "observation period" prior to the administration of the test. The observation period requirement ensures that "a chemical analyst observes the person or persons to be tested to determine that the person or persons has not ingested alcohol or other fluids, regurgitated, vomited, eaten, or smoked in the 15 minutes immediately prior to the collection of a breath specimen." However, that "nothing in the relevant regulatory language requires the analyst to stare at the person to be tested in an unwavering manner for a fifteen minute period prior to the administration of the test." Here, the officer observed the defendant for 21 minutes, during which the defendant did not ingest alcohol or other fluids, regurgitate, vomit, eat, or smoke; during this time the officer lost direct sight of the defendant only for very brief intervals while attempting to ensure that his right to the presence of a witness was adequately protected. As such, the officer complied with the observation period requirement.

State v. Buckheit, __ N.C. App. __, 735 S.E.2d 345 (Nov. 6, 2012). The trial court erred by denying the defendant's motion to suppress intoxilyzer results. After arrest, the defendant was informed of his rights under G.S. 20-16.2(a) and elected to have a witness present. The defendant contacted his witness by phone and asked her to witness the intoxilyzer test. Shortly thereafter his witness arrived in the lobby of the County Public Safety Center; when she informed the front desk officer why she was there, she was told to wait in the lobby. The witness asked the front desk officer multiple times if she needed to do anything further. When the intoxilyzer test was administered, the witness was waiting in the lobby. Finding the case indistinguishable from *State v. Hatley*, 190 N.C. App. 639 (2008), the court held that after her timely arrival, the defendant's witness made reasonable efforts to gain access to the defendant but was prevented from doing so and that therefore the intoxilyzer results should have been suppressed.

Willful Refusal

Steinkrause v. Tatum, 201 N.C. App. 289 (Dec. 8, 2009), *aff'd*, 364 N.C. 419 (Oct. 8, 2010). On the facts, the trial judge did not err in concluding that the petitioner willfully refused to submit to a breath test.

Miscellaneous Cases

State v. Petty, 212 N.C. App. 368 (June 7, 2011). (1) After accepting a defendant's guilty plea to DWI, the district court had no authority to arrest judgment. (2) Once the defendant appealed to

superior court from the district court's judgment for a trial de novo, the superior court obtained jurisdiction over the charge and the superior court judge erred by dismissing the charge based on alleged non-jurisdictional defects in the district court proceedings.

Entry of an Order

State v. Chavez, __ N.C. App. __, 767 S.E.2d 581 (Dec. 2, 2014). The trial court's oral, in-court denial of the defendant's motions, memorialized on form AOC-CR-305 (Judgment/order or other disposition) constituted entry of an order notwithstanding the fact that the trial judge stated that "ADA Mark Stevens will prepare the order" and no such order was prepared.

Extending the Session

State v. Hunt, 198 N.C. App. 488 (Aug. 4, 2009). Although the trial judge did not enter a formal order extending the session, the judgment was not null and void. The trial judge repeatedly announced that it was recessing court and the defendant made no objection at the time. On these facts there was sufficient compliance with G.S. 15-167.

False Evidence

State v. Phillips, 365 N.C. 103 (June 16, 2011). The court rejected the capital defendant's claim that the prosecution knowingly elicited or failed to correct false testimony. In victim Cooke's pretrial statements, she related that the defendant said that he had nothing to live for. When asked at trial whether the defendant made that statement, Cooke responded: "Not in those terms, no." The court concluded that it was not apparent that Cooke testified falsely or that her trial testimony materially conflicted with her pretrial statements. Moreover, it found that any inconsistency was addressed during cross-examination. Finally, the court concluded, even if Cooke perjured herself, there is no indication that the State knew her testimony was false.

Fifth Amendment Trial Issues

See Criminal Procedure, Jury Argument, Defendant's Failure to Testify; Criminal Procedure, Jury Instructions, Specific Instructions, Defendant's Failure to Testify; Evidence, Fifth-Amendment (Self-Incrimination) Issues.

Forfeiture of Property

Appeal

State v. Royster, ___ N.C. App. ___, 768 S.E.2d 196 (Feb 3, 2015). A defendant who pleaded guilty to felony possession of marijuana had no right to appeal the trial court's order forfeiting $400 in cash seized from his car under G.S. 90-112(a)(2).

Habitual Felon

See "Habitual Felon" under "Criminal Procedure," "Indictment Issues," "Specific Offenses" for cases pertaining to indictment issues.

Proceedings Required

State v. Wilkins, __ N.C. App. __, 737 S.E.2d 791 (Feb. 5, 2013). The trial court erred in sentencing the defendant as a habitual felon because the issue was neither submitted to the jury nor addressed by a guilty plea. A mere stipulation to the prior felonies is insufficient; there must be a jury verdict or a record of a guilty plea.

Evidence Issues

State v. Rogers, __ N.C. App. __, 762 S.E.2d. 511 (Sept. 2, 2014). The trial court committed reversible error by failing to instruct the jury to disregard evidence about the defendant's habitual felon indictment when that evidence was elicited during the trial on the underlying charges. Although the trial court sustained defense counsel's objection and instructed the jury to strike a portion of the testimony given by an officer, it was required to give a curative instruction as to additional testimony offered by the officer.

Prior and Predicate Offense Issues

State v. Hoskins, __ N.C. App. __, 736 S.E.2d 631 (Jan. 15, 2013). During the habitual felon trial stage, the jury may consider evidence of a prior felony presented during the trial for the principal offense. Evidence of one prior conviction was presented during the trial for the principal offense; evidence of two prior convictions was introduced in the habitual felon phase. The defendant argued that the evidence was insufficient because the State did not introduce evidence of all three priors at the habitual phase. There is no need to reintroduce evidence presented during the trial for the principal offense at the habitual felon hearing; evidence presented during the trial for the principal offense can be used to prove the habitual felon charge.

State v. Shaw, __ N.C. App. __, 737 S.E.2d 596 (Dec. 4, 2012). Habitual misdemeanor assault cannot serve as a prior felony for purposes of habitual felon.

State v. Holloway, 216 N.C. App. 412 (Oct. 18, 2011). A conviction for habitual misdemeanor assault can be used as a predicate felony for habitual felon status.

Sentencing Issues

State v. Duffie, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015). The court remanded for resentencing where the trial court imposed consecutive sentences based on a misapprehension of G.S. 14-7. The jury found the defendant guilty of multiple counts of robbery and attaining habitual felon status. The trial court sentenced the defendant as a habitual felon to three consecutive terms of imprisonment for his three common law robbery convictions, stating that "the law requires consecutive sentences on habitual felon judgments." However, under G.S. 14-7.6, a trial court only is required to impose a sentence consecutively to "any sentence being served by" the defendant. Thus, if the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences.

State v. Jarman, ___ N.C. App. ___, 767 S.E.2d 370 (Dec. 16, 2014). The trial court did not err by ordering the defendant to serve a habitual felon sentence consecutive to sentences already being served. The defendant argued that the trial court "misapprehend[ed]" the law "when it determined that it did not have the discretion to decide" to run the defendant's sentence concurrently with his earlier convictions. The court noted that G.S. 14-7.6 "has long provided" that habitual felon sentences "shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section."

State v. Eaton, 210 N.C. App. 142 (Mar. 1, 2011). A defendant may be sentenced as a habitual felon for an underlying felony of drug trafficking.

State v. Lackey, 204 N.C. App. 153 (May 18, 2010). Rejecting the defendant's argument that his sentence of 84-110 months in prison for possession of cocaine as a habitual felon constituted cruel and unusual punishment.

Judgment

State v. Haymond, 203 N.C. App. 151 (Apr. 6, 2010). Trial judge could have could have consolidated into a single judgment multiple offenses, all of which were elevated to a Class C because of habitual felon status.

Indictment and Pleading Issues

Bill of Particulars

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In this first-degree murder case, the trial court did not abuse its discretion by denying the defendant's motion for a bill of particulars. The defendant argued that because the State used a short-form indictment to charge murder, he lacked notice as to which underlying felony supported the felony murder charge. Although a defendant is entitled to a bill of particulars under G.S. 15A-925, the bill of particulars provides factual information not legal theories. The court concluded: "the State's legal theories are not 'factual information' subject to inclusion in a bill of particulars, and no legal mandate requires the State to disclose the legal theory it intends to prove at trial."

General Matters

Date of Offense

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). In a failing to register case the trial court did not err by allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. It reasoned that the amendment did not substantially alter the charge "because the specific date that defendant moved to Wilkes County was not an essential element of the crime."

State v. Avent, 222 N.C. App. 147 (Aug. 7, 2012). In a murder case in which the defendant relied on an alibi defense, the trial court did not err by allowing the State to amend the date of the offense stated in the indictment from December 28, 2009, to December 27, 2009. The court

noted that because the defendant's alibi witness's testimony encompassed December 27th the defendant was not deprived of his ability to present a defense. Additionally, the State's evidence included two eyewitness statements and an autopsy report, all of which noted the date of the murder as December 27; the defendant did not argue that he was unaware of this evidence well before trial.

State v. Friend, 219 N.C. App. 338 (Mar. 6, 2012). A criminal summons charging the defendant with impaired driving was not defective on grounds that it failed to allege the exact hour and minute that the offense occurred.

State v. Khouri, 214 N.C. App. 389 (Aug. 16, 2011). In sexual assault case involving a child victim, there was a fatal variance between the indictment, that alleged an offense date of March 30, 2000 – December 31, 2000, and the evidence, which showed that the conduct occurred in the Spring of 2001. The State never moved to amend the indictment.

In Re A.W., 209 N.C. App. 596 (Feb. 15, 2011). There was no fatal variance between a juvenile delinquency petition for indecent liberties alleging an offense date of November 14, 2008, and the evidence which showed an offense date of November 7-9, 2008. The juvenile failed to show that his ability to present an adequate defense was prejudiced by the variance.

State v. Hueto, 195 N.C. App. 67 (Jan. 20, 2009). No fatal variance between the period of time alleged in the indictment and the evidence introduced at trial. The defendant was indicted on six counts of statutory rape: two counts each for the months of June, August, and September 2004. Assuming that the victim's testimony was insufficient to prove that the defendant had sex with her twice in August, the court held that the state nevertheless presented sufficient evidence that the defendant had sex with her at least six times between June 2004 and August 12, 2004, including at least four times in July.

State v. Pettigrew, 204 N.C. App. 248 (June 1, 2010). In a child sex case, there was substantial evidence that the defendant abused the victim during the period alleged in the indictment and specified in the bill of particulars (Feb. 1, 2001 – Nov. 20, 2001) and at a time when the defendant was sixteen years old and thus could be charged as an adult. The evidence showed that the defendant abused the victim for a period of years that included the period alleged and that the defendant, who turned sixteen on January 23, 2001, was sixteen during the entire time frame alleged. Relying on the substantial evidence of acts committed while the defendant was sixteen, the court also rejected the defendant's argument that by charging that the alleged acts occurred "on or about" February 1, 2001 – November 20, 2001, the indictment could have encompassed acts committed before he turned sixteen.

Delay in Obtaining Indictment

State v. Martin, 195 N.C. App. 43 (Jan. 20, 2009). No due process violation resulted from the delay between commission of the offenses (2000) and issuance of the indictments (2007). Although the department of social services possessed the incriminating photos and instituted an action to terminate parental rights in 2001, the department did not then share the photos or report evidence of abuse to law enforcement or the district attorney. Law enforcement was not

informed about the photos until 2007. The department's delay was not attributable to the state.

Short Form Indictments

State v. Wilson, __ N.C. App. __, 762 S.E.2d 894 (Sept. 16, 2014). A short form indictment charging the defendant with attempted first degree murder was defective. The indictment failed to allege that the defendant acted with "malice aforethought" as required by G.S. 15-144 (short form murder indictment). The court remanded for entry of judgment on the lesser of voluntary manslaughter.

State v. Freeman, 202 N.C. App. 740 (Mar. 2, 2010). Short-form murder indictment put the defendant on notice that the State might proceed on a theory of felony-murder.

State v. Thomas, 196 N.C. App. 523 (May 5, 2009). The trial court did not err by denying the defendant's request to submit the lesser offense of assault on a female when the defendant was charged with rape using the statutory short form indictment. The defense to rape was consent. The defendant argued on appeal that the jury could have found that the rape was consensual but that an assault on a female had occurred. The court rejected that argument reasoning that the acts that the defendant offered in support of assault on a female occurred separately from those constituting rape.

Names

Generally

State v. Sullivan, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). The court rejected the defendant's argument that there was a fatal variance between a sale and delivery indictment which alleged that the defendant sold the controlled substance to "A. Simpson" and the evidence. Although Mr. Simpson testified at trial that his name was "Cedrick Simpson," not "A. Simpson," the court rejected the defendant's argument, stating:

> [N]either during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson's identity. The mere fact that the indictment named "A. Simpson" as the purchaser of the controlled substances is insufficient to require that defendant's convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation.

State v. Johnson, 202 N.C. App. 765 (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to "Detective Dunabro." The evidence at trial showed that the detective had gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both a married and maiden name, the indictment sufficiently identified the purchaser. The court noted that "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide."

Victim's Name

State v. Mason, 222 N.C. App. 223 (Aug. 7, 2012). By failing to assert fatal variance as a basis for his motion to dismiss, the defendant failed to preserve the issue for appellate review. Even if the issue had been preserved, it had no merit. Defendant argued that there was a fatal variance between the name of the victim in the indictment, You Xing Lin, and the evidence at trial, which showed the victim's name to be Lin You Xing. The variance was immaterial.

State v. McKoy, 196 N.C. App. 650 (May 5, 2009). Rape and sexual offense indictments were not fatally defective when they identified the victim solely by her initials, "RTB." The defendant was not confused regarding the victim's identity; because the victim testified at trial and identified herself in open court, the defendant was protected from double jeopardy.

In Re M.S., 199 N.C. App. 260 (Aug. 18, 2009). Distinguishing *McKoy* (discussed immediately above), the court held that juvenile petitions alleging that the juvenile committed first-degree sexual offense were defective because they failed to name a victim. The petitions referenced the victim as "a child," without alleging the victims' names.

Prior Convictions

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). Following *State v. Jeffers*, 48 N.C. App. 663, 665-66 (1980), the court held that G.S. 15A-928 (allegation and proof of previous convictions in superior court) does not apply to the crime of felon in possession of a firearm.

Theory of Liability

State v. Davis, __ N.C. App. __, 748 S.E.2d 189 (Oct. 1, 2013). In a food stamp fraud case, the State is not required to allege in the indictment that the defendant aided and abetted the crime; aiding and abetting is a theory of liability that need not be included in the indictment.

Punishment/Sentencing Issues

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). In this sexual assault case, the State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in the indictment the existence of the non-statutory aggravating factor that the defendant committed the sexual assault knowing that he was HIV positive. The court disagreed with the State's argument that alleging the non-statutory aggravating factor would have violated G.S. 130A-143. It explained:

> This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records and as such, may generally be made available upon request by a citizen. However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court

order." Alternatively, the State could have sought to seal the indictment. (citations omitted)

State v. Curry, 203 N.C. App. 375 (Apr. 20, 2010). Indictment alleging that the defendant discharged a barreled weapon into an occupied residence properly charged the Class D version of this felony (shooting into occupied dwelling or occupied conveyance in operation) even though it erroneously listed the punishment as the Class E version (shooting into occupied property).

State v. Carter, 212 N.C. App. 516 (June 21, 2011). Sentencing factors that might lead to an aggravated sentence need not be alleged in the indictment.

Statutory Reference

State v. Barnett, __ N.C. App. __, 733 S.E.2d 95 (Oct. 2, 2012). Although the indictment failed to specify G.S. 14-208.9(a) (sex offender registration violation) as the statute violated, this omission alone did not create a fatal defect.

State v. Collins, 221 N.C. App. 604 (July 17, 2012). There was no fatal defect in an indictment for felony assault on a handicapped person. The indictment alleged, in part, that the defendant unlawfully, willfully, and feloniously assaulted and struck "a handicapped person by throwing Carol Bradley Collins across a room and onto the floor and by striking her with a crutch on the arm. In the course of the assault the defendant used a deadly weapon, a crutch. This act was in violation of North Carolina General Statutes section 14-17." The court determined that the indictment was not defective because of failure to cite the statute violated. Although the indictment incorrectly cited G.S. 14-17, the statute on murder, the failure to reference the correct statute was not, by itself, a fatal defect.

State v. Burge, 212 N.C. App. 220 (May 17, 2011). Because an arrest warrant charged the defendant with a violation of G.S. 67-4.2 (failing to confine a dangerous dog), it could not support a conviction for a violation of G.S. 67-4.3 (attack by a dangerous dog). Even though the warrant cited G.S. 67-4.2, it would have been adequate if it had alleged all of the elements of a G.S. 67-4.3 offense. However, it failed to do so as it did not allege that the injuries required medical treatment costing more than $100.

Without Consent

State v. Mann, __ N.C. App. __, 768 S.E.2d 138 (Dec. 2, 2014). An indictment charging felony peeping was not defective. Rejecting the defendant's argument that the indictment was defective because it failed to allege that the defendant's conduct was done without the victim's consent, the court concluded that "any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person's consent." Moreover, the charging language, which included the word "surreptitiously" gave the defendant adequate notice. Further, the element of "without consent" is adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously.

Specific Offenses

Accessory After the Fact

State v. Cole, 209 N.C. App. 84 (Jan. 4, 2011). An indictment charging accessory after the fact to first-degree murder was sufficient to support a conviction of accessory after the fact to second-degree murder. The indictment alleged that a felony was committed, that the defendant knew that the person he assisted committed that felony, and that he rendered personal assistance to the felon; it thus provided adequate notice to prepare a defense and protect against double jeopardy.

Conspiracy

State v. Sergakis, __ N.C. App. __, 735 S.E.2d 224 (Nov. 20, 2012). The trial court committed plain error by instructing the jury that it could find the defendant guilty of conspiracy if the defendant conspired to commit felony breaking and entering or felony larceny where the indictment alleged only a conspiracy to commit felony breaking or entering.

State v. Billinger, 213 N.C. App. 249 (July 5, 2011). A conspiracy to commit armed robbery indictment was defective when it did not allege an agreement to commit an unlawful act. The court rejected the State's argument that the indictment's caption, which identified the charge as "Conspiracy to Commit Robbery with a Dangerous Weapon," and the indictment's reference to the offense being committed in violation of G.S. 14-2.4 (governing punishment for conspiracy to commit a felony) saved the indictment.

State v. Pringle, 204 N.C. App. 562 (June 15, 2010). When a conspiracy indictment names specific individuals with whom the defendant is alleged to have conspired and the evidence shows the defendant may have conspired with others, it is error for the trial court to instruct the jury that it may find the defendant guilty based upon an agreement with persons not named in the indictment. However, the jury instruction need not specifically name the individuals with whom the defendant was alleged to have conspired as long as the instruction comports with the material allegations in the indictment and the evidence at trial. In this case, the indictment alleged that the defendant conspired with Jimon Dollard and an unidentified male. The trial court instructed the jury that it could find the defendant guilty if he conspired with "at least one other person." The evidence showed that the defendant and two other men conspired to commit robbery. One of the other men was identified by testifying officers as Jimon Dollard. The third man evaded capture and was never identified. Although the instruction did not limit the conspiracy to those named in the indictment, it was in accord with the material allegations in the indictment and the evidence presented at trial and there was no error.

Assaults

Simple Assault

In Re D.S., 197 N.C. App. 598 (June 16, 2009). *rev'd on other grounds*, 364 N.C. 184 (2010). No fatal variance occurred when a juvenile petition alleged that the juvenile assaulted the victim with his hands and the evidence established that he touched her with an object.

Assault with a Deadly Weapon

State v. Lee, 218 N.C. App. 42 (Jan. 17, 2012). There was no fatal variance between an indictment charging assault with a deadly weapon with intent to kill inflicting serious injury and the evidence at trial. The indictment alleged the deadly weapon to be a handgun while the trial evidence showed it was an AK-47 rifle. The court reasoned: "both a handgun and an AK-47 rifle are a type of gun, are obviously dangerous weapons, and carry the same legal significance." Moreover, the defendant failed to demonstrate that the variance caused prejudice.

Assault by Strangulation

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). Even if there was a fatal variance between the indictment, which alleged that the defendant accomplished the strangulation by placing his hands on the victim's neck, and the evidence at trial, the variance was immaterial because the allegation regarding the method of strangulation was surplusage.

Assault on Government Officer

State v. Noel, 202 N.C. App. 715 (Mar. 2, 2010). Indictment charging assault on a government officer under G.S. 14-33(c)(4) need not allege the specific duty the officer was performing and if it does, it is surplusage.

State v. Roman, 203 N.C. App. 730 (May 4, 2010). There was no fatal variance between a warrant charging assault on a government officer under G.S. 14-33(c)(4) and the evidence at trial. The warrant charged that the assault occurred while the officer was discharging the duty of arresting the defendant for communicating threats but at trial the officer testified that the assault occurred when he was arresting the defendant for being intoxicated and disruptive in public. The pivotal element was whether the assault occurred while the officer was discharging his duties; what crime the arrest was for is immaterial.

Assault on Handicapped Person

State v. Collins, 221 N.C. App. 604 (July 17, 2012). There was no fatal defect in an indictment for felony assault on a handicapped person. The indictment alleged, in part, that the defendant unlawfully, willfully, and feloniously assaulted and struck "a handicapped person by throwing Carol Bradley Collins across a room and onto the floor and by striking her with a crutch on the arm. In the course of the assault the defendant used a deadly weapon, a crutch. This act was in violation of North Carolina General Statutes section 14-17." The court rejected the argument that the indictment was defective for failing to allege the specific nature of the victim's handicap. The court also rejected the defendant's argument that the indictment was defective by failing to allege that he knew or reasonably should have known of the victim's handicap. Citing *State v. Thomas*, 153 N.C. App. 326 (2002) (assault with a firearm on a law enforcement officer case), the court concluded that although the indictment did not specifically allege this element, its allegation that he "willfully" assaulted a handicapped person indicated that he knew that the victim was handicapped. Finally, the court determined that the indictment was not defective because of

failure to cite the statute violated. Although the indictment incorrectly cited G.S. 14-17, the statute on murder, the failure to reference the correct statute was not, by itself, a fatal defect.

Malicious Conduct by Prisoner

State v. Noel, 202 N.C. App. 715 (Mar. 2, 2010). Indictment charging malicious conduct by prisoner under G.S. 14-258.4 need not allege the specific duty the officer was performing and if it does, it is surplusage.

Child Abuse & Related Offenses

State v. Harris, __ N.C. App. __, 763 S.E.2d 302 (Sept. 16, 2014). Where the warrant charging contributing to the abuse or neglect of a juvenile alleged, in part, that the defendant knowingly caused, encouraged, and aided the child "to commit an act, consume alcoholic beverage," the State was not prohibited from showing that the defendant also contributed to the abuse or neglect of the juvenile by engaging her in sexual acts. The court noted that an indictment that fails to allege the exact manner in which the defendant contributed to the delinquency, abuse, or neglect of a minor is not fatally defective.

State v. Stevens, __ N.C. App. __, 745 S.E.2d 64 (July 16, 2013). (1) An indictment for contributing to the delinquency/neglect of a minor was not defective. The indictment tracked the statutory language but did not specify the specific acts at issue. An indictment for a statutory offense is sufficient if the offense is charged in the words of the statutes, or equivalent words. Any error in the caption of the indictment was immaterial. (2) With respect to assault on a child under 12, the trial court erred by permitting the jury to convict on a criminal negligence theory of intent, which was not alleged in the indictment.

State v. Lark, 198 N.C. App. 82 (July 7, 2009). An indictment charging felony child abuse by sexual act under G.S. 14-318.4(a2) is not required to allege the particular sexual act committed. Language in the indictment specifying the sexual act as anal intercourse was surplusage.

Maiming

State v. Coakley, ___ N.C. App. ___, 767 S.E.2d 418 (Dec. 31, 2014). In this malicious maiming case, the trial court did not err by instructing the jury on a theory that was not alleged in the indictment. The indictment alleged that the defendant "put out" the victim's eye. The jury instructions told the jury it could convict if it found that the defendant "disabled or put out" the victim's eye. Given the evidence in the case—that the victim suffered complete blindness—term "disabled" as used in the instructions can only be interpreted to mean total loss of sight.

Sexual Assaults and Related Offenses
Rape

State v. McDaris, 367 N.C. 115 (Oct. 4, 2013). The court per curiam affirmed the unpublished decision of a divided panel of the court of appeals in *State v. McDaris*, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 18, 2012) (No. COA12-476). The court of appeals had held that a variance

between the indictments and the jury instructions did not deprive the defendant of a defense. The indictments charged the defendant with statutory rape of a 13, 14, or 15 year old but specified that the victim was 15 years old at the time. Based on the evidence, the trial court instructed the jury that it could convict the defendant if the jury found that the victim was 14 or 15 years old. The jury found the defendant guilty. On appeal the defendant argued that the trial court committed reversible error by instructing the jury that it could convict if it found that the acts occurred when the victim was 14 or 15 years old, because the indictments alleged that she was 15 years old. At trial the defendant attempted to prove that the incidents occurred when the victim was 16, which would have been a complete defense. The jury rejected this defense. In light of this, the court of appeals determined that any error was not so prejudicial as to require a new trial.

State v. Pizano-Trejo, 367 N.C. 111 (Oct. 4, 2013). On review of a unanimous, unpublished decision of the court of appeals in *State v. Pizano-Trejo*, ___ N.C. App. ___, 723 S.E.2d 583 (2012), the members of the Supreme Court equally divided, leaving the decision below undisturbed and without precedential value. The court of appeals had held that the trial court committed plain error by instructing the jury and accepting its guilty verdict for the crimes of "sexual offense with a child," a crime for which the defendant was not indicted. The defendant was indicted for one count of first degree statutory sexual offense under G.S. 14–27.4(a)(1), and two counts of taking indecent liberties with a minor. However, the trial court instructed the jury on the crime of sexual offense with a child by an adult offender under G.S. 14–27.4A. The defendant was found guilty of both counts of taking indecent liberties with a child and one count of first degree statutory sex offense pursuant to G.S. 14–27.4(a)(1).

State v. Gibert, __ N.C. App. __, 747 S.E.2d 253 (Sept. 3, 2013). (1) A short form indictment under G.S. 15-144.1 was sufficient to charge the defendant with attempted statutory rape of a 13, 14, or 15 year old. The defendant had argued that the statutory short form does not apply to an indictment alleging statutory rape of a 13 year old. (2) The indictment conformed to the requirements of G.S. 15-144.1 even though it failed to allege that the act occurred "by force and against her will" or that the defendant attempted to "ravish and carnally know" the victim.

State v. Morgan, __ N.C. App. __, 741 S.E.2d 422 (Mar. 5, 2013). (1) An indictment charging statutory rape of a 13, 14, or 15 year old was not defective because it alleged that the defendant did "carnally know" the victim. The court rejected the argument that the indictment was required to allege that "vaginal intercourse" occurred, concluding that the two terms were synonymous. (2) The court rejected the defendant's argument that the same indictment was defective in that it failed to conform to the short form provided in G.S. 15-144.1. The court concluded that the short form did not apply to the crime charged and that the indictment alleged all material elements of the offense.

Sex Offense

State v. Hicks, ___ N.C. App. ___, 768 S.E.2d 373 (Feb. 17, 2015). The trial court committed plain error by instructing the jury on sexual offense with a child by an adult offender under G.S. 14-27.4A when the indictment charged the defendant with first-degree sexual offense in violation of G.S. 14-27.4(a)(1), a lesser-included of the G.S. 14-27.4A crime. The court vacated

defendant's conviction under G.S. 14-27.4A and remanded for resentencing and entry of judgment on the lesser-included offense. Additionally, the court appealed to the General Assembly to clarify the relevant law:

> This case illustrates a significant ongoing problem with the sexual offense statutes of this State: the various sexual offenses are often confused with one another, leading to defective indictments.
>
> Given the frequency with which these errors arise, we strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. For example, because "first degree sexual offense" encompasses two different offenses, a violation of N.C. Gen. Stat. § 14-27.4(a)(1) is often referred to as "first degree sexual offense with a child" or "first degree statutory sexual offense" to distinguish the offense from "first degree sexual offense by force" under N.C. Gen. Stat. § 14-27.4(a)(2). "First degree sexual offense with a child," in turn, is easily confused with "statutory sexual offense" which could be a reference to a violation of either N.C. Gen. Stat. § 14-27.4A (officially titled "[s]exual offense with a child; adult offender") or N.C. Gen. Stat. § 14-27.7A (2013) (officially titled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old"). Further adding to the confusion is the similarity in the statute numbers of N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.4A. We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses.

(citations omitted).

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). Noting that the sufficiency of a petition alleging a juvenile to be delinquent is evaluated by the same standards that apply to indictments, the court held that petitions alleging two acts of sexual offense and two acts of crime against nature were sufficient. In addition to tracking the statutory language, one sexual offense and one crime against nature petition alleged that the juvenile performed fellatio on the victim; the other sexual offense and crime against nature petitions alleged that the victim performed fellatio on the juvenile. The court rejected the defendant's argument that any more detail was required, noting that if the juvenile wanted more information about the factual circumstances underlying each charge he should have moved for a bill of particulars.

Crime Against Nature

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). Noting that the sufficiency of a petition alleging a juvenile to be delinquent is evaluated by the same standards that apply to indictments, the court held that petitions alleging two acts of sexual offense and two acts of crime against nature were sufficient. In addition to tracking the statutory language, one sexual offense and one crime against nature petition alleged that the juvenile performed fellatio on the victim; the other sexual offense and crime against nature petitions alleged that the victim performed fellatio on the juvenile. The court rejected the defendant's argument that any more

detail was required, noting that if the juvenile wanted more information about the factual circumstances underlying each charge he should have moved for a bill of particulars.

Indecent Liberties

State v. Comeaux, __ N.C. App. __, 741 S.E.2d 346 (Dec. 31, 2012). Five indecent liberties indictments were sufficient where they were couched in the language of the statute and specified different and non-overlapping time frames. The court rejected the defendant's argument that the indictments were insufficient because they included "non-specific allegations."

State v. Carter, 210 N.C. App. 156 (Mar. 1, 2011). In an indecent liberties case, the trial judge's jury instructions were supported by the indictment. The indictment tracked the statute and did not allege an evidentiary basis for the charge. The jury instructions, which identified the defendant's conduct as placing his penis between the child's feet, was a clarification of the evidence for the jury.

Peeping

State v. Mann, __ N.C. App. __, 768 S.E.2d 138 (Dec. 2, 2014). An indictment charging felony peeping was not defective. Rejecting the defendant's argument that the indictment was defective because it failed to allege that the defendant's conduct was done without the victim's consent, the court concluded that "any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person's consent." Moreover, the charging language, which included the word "surreptitiously" gave the defendant adequate notice. Further, the element of "without consent" is adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously.

Sex Offender Crimes

State v. James, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). Over a dissent, the court held that the indictment in a sex offender failure to notify of change of address case was not fatally defective. The indictment alleged that the defendant failed to notify the sheriff of a change of address "within three (3) days of the address change." The statute, however, requires that the notice be made within three *business* days. The defendant argued that omission of the word "business" rendered the indictment fatally defective. The court disagreed:

> While we agree that the better practice would have been for the indictment to have alleged … that Defendant failed to report his change of address within "three business days," … the superseding indictment nevertheless gave Defendant sufficient notice of the charge against him and, therefore, was not fatally defective.

Among other things, the court noted that the defendant did not argue that the omission prejudiced his ability to prepare for trial.

State v. Leaks, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). An indictment charging failing to notify the sheriff of a change in address was not defective. The indictment alleged, in relevant part, that the defendant "fail[ed] to register as a sex offender by failing to notify the

Forsyth County Sheriff's Office of his change of address." The defendant argued that the indictment was defective because it failed to allege that he was required to provide "written notice" of a change of address. The court held: "we consider the manner of notice, in person or in writing, to be an evidentiary matter necessary to be proven at trial, but not required to be alleged in the indictment."

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). (1) In a failing to register case the indictment was not defective. The indictment alleged that the defendant failed to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office." The defendant allegedly moved from Burke to Wilkes County. The court rejected the defendant's argument that the indictment was fatally defective for not alleging that he failed to provide "in-person" notice. It reasoned that the defendant was not prosecuted for failing to make an "in person" notification, but rather for failing to give 10 days of written notice, which by itself is a violation of the statute. The court also rejected the defendant's argument that an error in the indictment indicating that the Wilkes County Sheriff's Office was the "the last registering sheriff" (in fact the last registering sheriff was the Burke County sheriff), invalidated the indictment. (2) The trial court did not err by allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. It reasoned that the amendment did not substantially alter the charge "because the specific date that defendant moved to Wilkes County was not an essential element of the crime."

State v. Simpson, __ N.C. App. __, 763 S.E.2d 1 (Aug. 5, 2014). An indictment charging the defendant with violating G.S. 14-208.18(a) (prohibiting registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors") was not defective. The charges arose out of the defendant's presence at a Wilkesboro public park, specifically, sitting on a bench within the premises of the park and in close proximity to the park's batting cage and ball field. The indictment alleged, in relevant part, that the defendant was "within 300 feet of a location intended primarily for the use, care, or supervision of minors, to wit: a batting cage and ball field of Cub Creek Park located in Wilkesboro, North Carolina." The court rejected the defendant's argument that the indictment was defective because it failed to allege that the batting cages and ball field were located on a premise not intended primarily for the use, care, or supervision of minors.

State v. Barnett, __ N.C. App. __, 733 S.E.2d 95 (Oct. 2, 2012). An indictment charging failing to notify the sheriff's office of change of address by a registered sex offender under G.S. 14-208.9 was defective where it failed to allege that the defendant was a person required to register.

State v. Harris, 219 N.C. App. 590 (Apr. 3, 2012).
An indictment charging the defendant with being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of G.S. 14-208.18 was defective. According to the court the "essential elements" of the charged offense are that the defendant (1) knowingly is on the premises of any place intended primarily for the use, care, or supervision of minors (2) at a time when he or she was required by North Carolina law to register as a sex offender based upon a conviction for an offense enumerated in G.S. Ch. 14 Article 7A or

an offense involving a victim who was under the age of 16. The court rejected the defendant's argument that the indictment, which alleged that the defendant "did unlawfully, willfully and feloniously on the premises of Winget Park Elementary School," was defective because it omitted any affirmative assertion that he actually went on the school's premises. The court reasoned that although the indictment contained a grammatical error, it clearly charged the defendant with unlawfully being on the premises of the school. Next, the court rejected the defendant's argument that the indictment was defective because it failed to allege that he knowingly went on the school's premises. The court reasoned that the indictment's allegation that the defendant acted "willfully" sufficed to allege the requisite "knowing" conduct. However, the court found merit in the defendant's argument that the indictment was defective because it failed to allege that he had been convicted of an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under 16 years of age at the time of the offense.

State v. Herman, 221 N.C. App. 204 (June 5, 2012). Following *State v. Harris*, 219 N.C. App. 590 (Apr. 3, 2012) (an indictment charging the defendant with being a sex offender unlawfully on the premises of a place intended primarily for the use, care, or supervision of minors in violation of G.S. 14-208.18 was defective because it failed to allege that he had been convicted of an offense enumerated in G.S. Ch. 14 Article 7A or an offense involving a victim who was under 16 years of age at the time of the offense), the court held that the indictment at issue was defective.

Injury to Real Property

State v. Lilly, 195 N.C. App. 697 (Mar. 17, 2009). No fatal variance between an indictment charging injury to real property and the evidence at trial. The indictment incorrectly described the lessee of the real property as its owner. The indictment was sufficient because it identified the lawful possessor of the property.

Kidnapping

State v. McRae, __ N.C. App. __, 752 S.E.2d 731 (Jan. 7, 2014). The trial court erred by denying the defendant's motion to dismiss a charge of first-degree kidnapping where the indictment alleged that the confinement, restraint, and removal was for the purpose of committing a felony larceny but the State failed to present evidence of that crime. Although the State is not required to allege the specific felony facilitated, when it does, it is bound by that allegation.

State v. Yarborough, 198 N.C. App. 22 (July 7, 2009). Although a kidnapping indictment need not allege the felony intended, if it does, the State is bound by that allegation. Here, the indictment alleged confinement and restraint for the purpose of committing murder, but the evidence showed that the confinement or restraint was for the purpose of a committing a robbery. The State was bound by the allegation and had to prove the confinement and restraint was for the purposes of premeditated and deliberate murder (it could not rely on felony-murder).

Larceny

Person Who Owned/Possessed the Property

State v. Campbell, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that a larceny indictment was not fatally flawed even though it failed to specifically allege that a church, the co-owner of the property at issue, was an entity capable of owning property. The indictment named the victim as Manna Baptist Church. The court held: "[A]lleging ownership of property in an entity identified as a church or other place of religious worship, like identifying an entity as a 'company' or 'incorporated,' signifies an entity capable of owning property, and the line of cases from the Court of Appeals that has held otherwise is overruled."

In re D.B., 214 N.C. App. 489 (Aug. 16, 2011). A juvenile petition alleging felony larceny was fatally defective because it contained no allegation that the alleged victim, the Crossings Golf Club, was a legal entity capable of owning property.

State v. McNeil, 209 N.C. App. 654 (Mar. 1, 2011). An indictment for felonious larceny that failed to allege ownership in the stolen handgun was fatally defective.

State v. Patterson, 194 N.C. App. 608 (Jan 6, 2009). Larceny indictment alleging victim's name as "First Baptist Church of Robbinsville" was fatally defective because it did not indicate that the church was a legal entity capable of owning property.

State v. Gayton-Barbosa, 197 N.C. App. 129 (May 19, 2009). Fatal variance in larceny indictment alleging that the stolen gun belonged to an individual named Minear and the evidence showing that it belonged to and was stolen from a home owned by an individual named Leggett. Minear had no special property interest in the gun even though the gun was kept in a bedroom occupied by both women.

Description of Property Taken

State v. Sheppard, __ N.C. App. __, 744 S.E.2d 149 (July 2, 2013). The trial court lacked jurisdiction to sentence the defendant for larceny of goods worth more than $1,000 when the indictment charged that the defendant stole "property having a value of $1,000."

Larceny from a Merchant

State v. Justice, 219 N.C. App. 642 798 (Apr. 3, 2012). An indictment charging the defendant with larceny from a merchant by removal of antitheft device in violation of G.S. 14-72.11 was defective in two respects. The elements of this offense include a larceny (taking the property of another, carrying it away, without the consent of the possessor, and with the intent to permanently deprive) and removal of an antishoplifting or inventory control device. In this case, the defendant was alleged to have taken clothing from a department store. The court determined that the indictment's description of the property taken as "merchandise" was "too general to identify the property allegedly taken." Additionally, the indictment alleged that the defendant "did remove a component of an anti-theft or inventory control device . . . . in an effort to steal" property. This language, the court determined, alleged only an attempted larceny not the completed offense.

Embezzlement & Larceny by Employee

State v. Tucker, __ N.C. App. __, 743 S.E.2d 55 (June 4, 2013). The trial court did not err by allowing the State to amend an embezzlement indictment. The indictment originally alleged that "the defendant . . . was the employee of MBM Moving Systems, LLC . . . ." The amendment added the words "or agent" after the word "employee." The court rejected the defendant's argument that the nature of his relationship to the victim was critical to the charge and thus that the amendment substantially altered the charge. The court held that the terms "employee" and "agent" "are essentially interchangeable" for purposes of this offense. The court noted that the defendant was not misled or surprised as to the charges against him.

State v. Warren, __ N.C. App. __, 738 S.E.2d 225 (Mar. 5, 2013). In an embezzlement case, no fatal variance occurred where the indictment alleged that Smokey Park Hospitality, Inc., d/b/a Comfort Inn had an interest in the property. Although the evidence showed that Smokey Park Hospitality never owned the hotel, it acted as a management company and ran the business. Smokey Park Hospitality thus had a special property interest in the embezzled money.

State v. Abbott, 217 N.C. App. 614 (Dec. 20, 2011). (1) In a larceny by employee case, the trial court erred by allowing the State to amend the bill of indictment. The indictment stated that the defendant was an employee of "Cape Fear Carved Signs, Incorporated." The State moved to amend by striking the word "Incorporated," explaining that the business was a sole proprietorship of Mr. Neil Schulman. The amendment was a substantial alteration in the charge. (2) The court rejected the State's argument that the defendant waived his ability to contest the indictment by failing to move to dismiss it at trial, reiterating that jurisdictional issues may be raised at any time.

Robbery

State v. Lovette, __ N.C. App. __, 737 S.E.2d 432 (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that a robbery indictment was not fatally defective. The indictment alleged that the defendant:

> unlawfully, willfully and feloniously did steal, take, and carry away and attempt to steal, take and carry away another's personal property, A 2005 TOYOTA HIGHLANDER AUTOMOBILE (VIN: JTEDP21A250047971) APPROXIMATE VALUE OF $18,000.00; AND AN LP FLIP PHONE, HAVING AN APPROXIMATE VALUE OF $100.00: AND A BANK OF AMERICA ATM CARD, HAVING AN APPROXIMATE VALUE OF $1.00; AND APPROXIMATELY $700.00 IN U.S. CURRENCY of the value of $18,801.00 dollars, from the presence, person, place of business, and residence of _____. The defendant committed this act having in possession and with the use and threatened use of firearms and other dangerous weapons, implements, and means, A SAWED OFF HARRINGTON & RICHARDSON TOPPER MODEL 158, 12 GAUGE SHOTGUN (SERIAL # L246386) AND AN EXCAM GT-27 .25 CALIBER SEMI-AUTOMATIC PISTOL (SERIAL # M11062) whereby the life of EVE MARIE CARSON was endangered and threatened.

The defendant argued that the indictment was defective because it failed to name the person from whose presence property was taken. The court reasoned that Carson's life could not have been endangered and threatened unless she was the person in the presence of the property.

Burglary and Related Offenses

State v. McCormick, 204 N.C. App. 105 (May 18, 2010). No fatal variance existed when a burglary indictment alleged that defendant broke and entered "the dwelling house of Lisa McCormick located at 407 Ward's Branch Road, Sugar Grove Watauga County" but the evidence at trial indicated that the house number was 317, not 407. On this point, the court followed *State v. Davis*, 282 N.C. 107 (1972) (no fatal variance where indictment alleged that the defendant broke and entered "the dwelling house of Nina Ruth Baker located at 840 Washington Drive, Fayetteville, North Carolina," but the evidence showed that Ruth Baker lived at 830 Washington Drive). The court also held that the burglary indictment was not defective on grounds that it failed to allege that the breaking and entering occurred without consent. Following, *State v. Pennell*, 54 N.C. App. 252 (1981), the court held that the indictment language alleging that the defendant "unlawfully and willfully did feloniously break and enter" implied a lack of consent.

State v. Rogers, __ N.C. App. __, 742 S.E.2d 622 (June 4, 2013). Although the trial court erred when instructing the jury on first-degree burglary, no plain error occurred. The first-degree burglary indictment alleged that the defendant entered the dwelling with intent to commit larceny. The trial court instructed the jury that it could find the defendant guilty if at the time of the breaking and entering he intended to commit robbery with a dangerous weapon. Citing *State v. Farrar*, 361 N.C. 675 (2007) (burglary indictment alleged larceny as underlying felony but jury instructions stated that underlying felony was armed robbery; reviewing for plain error, the court held that the defendant had not been prejudiced by the instruction; because larceny is a lesser-included of armed robbery, the jury instructions benefitted defendant by adding an additional element for the State to prove), the court found that the defendant was not prejudiced by the error.

State v. Chillo, 208 N.C. App. 541 (Dec. 21, 2010). (1) An indictment for breaking or entering a motor vehicle alleging that the vehicle was the personal property of "D.L. Peterson Trust" was not defective for failing to allege that the victim was a legal entity capable of owning property. The indictment alleged ownership in a trust, a legal entity capable of owning property. (2) Because the State indicted the defendant for breaking or entering a motor vehicle with intent to commit larceny therein, it was bound by that allegation and had to prove that the defendant intended to commit larceny.

State v. Clagon, 207 N.C. App. 346 (Oct. 5, 2010). A burglary indictment does not need to identify the felony that the defendant intended to commit inside the dwelling.

State v. Speight, 213 N.C. App. 38 (June 21, 2011). A burglary indictment alleging that the defendant intended to commit "unlawful sex acts" was not defective.

State v. Clark, 208 N.C. App. 388 (Dec. 7, 2010). (1) Although the State is not required to allege the felony or larceny intended in an indictment charging breaking or entering a vehicle, if it does so, it will be bound by that allegation. (2) An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Trespass & Injury to Property Offenses

State v. Spivey, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) An indictment charging injury to real property was fatally defective where it alleged the property owner as "Katy's Great Eats" but failed to allege that this entity was one capable of owning property. The court explained that for this offense, "where the victim is not a natural person, the indictment must allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity unless the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity." (2) The trial court did not err by allowing the State to amend the victim's name as stated in an indictment for assault with a deadly weapon from "Christina Gibbs" to "Christian Gibbs."

State v. Ellis, __ N.C. App. __, 763 S.E.2d 574 (Oct. 7, 2014), *review allowed*, __ N.C. __, 766 S.E.2d 631 (Dec. 18, 2014). An information charging injury to personal property was fatally flawed where it failed to allege that one of the victims was a legal entity capable of owning property. The information alleged the victims as: "North Carolina State University (NCSU) and NCSU High Voltage Distribution." Noting that G.S. 116-4 provides that NCSU is a constituent institution of UNC, "a body politic and corporate" expressly authorized under G.S. 116-3 to own property, the court found that the words "North Carolina State University" sufficiently allege a legal entity capable of owning property. However, the allegation "NCSU High Voltage Distribution" "does not identify a legal entity necessarily capable of owning property because the additional words after 'NCSU' do not indicate what type of organization it is."

Resisting an Officer

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). There was no fatal variance in a resisting an officer case where the indictment alleged that the defendant refused to drop what was in his hands (plural) and the evidence showed that he refused to drop what was in his hand (singular). The variance was not material.

State v. Hemphill, 219 N.C. App. 50 (Feb. 21, 2012). An indictment for resisting an officer was not defective. The indictment alleged that the defendant resisted "by not obeying [the officer's] command [to stop]." The court rejected the defendant's argument that the indictment failed to state with sufficient particularity the manner in which the defendant resisted.

Gambling Offenses

State v. Carlton, __ N.C. App. __, 753 S.E.2d 203 (Jan. 21, 2014). The superior court lacked jurisdiction to try the defendant for possession of lottery tickets in violation of G.S. 14-290. An

officer issued the defendant a citation for violating G.S. 14-291 (acting as an agent for or on behalf of a lottery). The district court allowed the charging document to be amended to charge a violation of G.S. 14-290. The defendant was convicted in district court, appealed, and was again convicted in superior court. The court held that the district court improperly allowed the charging document to be amended to charge a different crime.

Weapons Offenses

Carrying Concealed

State v. Bollinger, 363 N.C. 251 (May 1, 2009). No fatal variance between indictment and the evidence in a carrying a concealed weapon case. After an officer discovered that the defendant was carrying knives and metallic knuckles, the defendant was charged with carrying a concealed weapon. The indictment identified the weapon as "a Metallic set of Knuckles." The trial court instructed the jury concerning "one or more knives." The court, per curiam and without an opinion, summarily affirmed the ruling of the North Carolina Court of Appeals that the charging language, "a Metallic set of Knuckles," was unnecessary surplusage, and even assuming the trial court erred in instructing on a weapon not alleged in the charge, no prejudicial error required a reversal where there was evidence that the defendant possessed knives.

State v. Mather, 221 N.C. App. 593 (July 17, 2012). When charging carrying a concealed gun under G.S. 14-269, the exception in G.S. 14-269(a1)(2) (having a permit) is a defense not an essential element and need not be alleged in the indictment.

Discharging Weapon Into Property

State v. Galloway, __ N.C. App. __, 738 S.E.2d 412 (Mar. 19, 2013). The trial court erred by instructing the jury on the offense of discharging a firearm into a vehicle that is in operation under G.S. 14-34.1(b) where the indictment failed to allege that the vehicle was in operation. However, because the indictment properly charged discharging a firearm into an occupied vehicle under G.S. 14-34.1(a), the court vacated the conviction under G.S. 14-34.1(b) and remanded for entry of judgment under G.S. 14-34.1(a).

State v. Curry, 203 N.C. App. 375 (Apr. 20, 2010). Fact that indictment charging discharging a barreled weapon into an occupied dwelling used the term "residence" instead of the statutory term "dwelling" did not result in a lack of notice to the defendant as to the relevant charge.

Felon in Possession

State v. Taylor, 203 N.C. App. 448 (Apr. 20, 2010). Felon in possession indictment that listed the wrong date for the prior felony conviction was not defective, nor was there a fatal variance on this basis (indictment alleged prior conviction date of December 8, 1992 but judgment for the prior conviction that was introduced at trial was dated December 18, 1992).

State v. Wilkins, __ N.C. App. __, 737 S.E.2d 791 (Feb. 5, 2013). An indictment for felon in possession of a firearm was fatally defective because the charge was included as a separate count in a single indictment also charging the defendant with assault with a deadly weapon. G.S. 14-

415.1(c) requires that possession of a firearm by a felon be charged in a separate indictment from other related charges.

Possession of Weapons on School Grounds

State v. Huckelba, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). In a carrying a weapon on educational property case, the court rejected the defendant's argument that there was a fatal variance between the indictment, which alleged that the defendant possessed weapons at "High Point University, located at 833 Montlieu Avenue" and the evidence, which showed that the conduct occurred at "1911 North Centennial Street." The court concluded: "The indictment charged all of the essential elements of the crime: that Defendant knowingly possessed a Ruger pistol on educational property—High Point University. We agree with the State that the physical address for High Point University listed in the indictment is surplusage because the indictment already described the 'educational property' element as 'High Point University.'"

In Re J.C., 205 N.C. App. 301 (July 6, 2010). A juvenile petition sufficiently alleged that the juvenile was delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The petition alleged that the juvenile possessed an "other weapon," specified as a "steel link from chain." The evidence showed that the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed with a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide his fingers through the link so that 3-4 inches of the bar could be held securely across his knuckles and used as a weapon. Finding the petition sufficient the court stated: "the item . . . is sufficiently equivalent to what the General Assembly intended to be recognized as 'metallic knuckles' under [the statute]."

Drug Offenses
Drug Name

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). (1) Count 1 of an indictment charging the defendant with possessing a Schedule I controlled substance, "Methylethcathinone," with intent to manufacture, sell or deliver was fatally defective. Although 4-methylethcathinone falls within the Schedule I catch-all provision in G.S. 90-89(5)(j), "Methylethcathinone" does not. Therefore, even though 4-methylethcathinone is not specifically named in Schedule I, the trial court erred by allowing the State to amend the indictment to allege "4-Methylethcathinone" and the original indictment was fatally defective. (2) Noting that the indictment defect was a jurisdictional issue, the court rejected the State's argument that the defendant waived the previous issue by failing to object to the amendment. (3) Count two of the indictment charging the defendant with possessing a Schedule I controlled substance, "Methylone," with intent to manufacture, sell or deliver was not fatally defective. The court rejected the defendant's argument that the indictment was required to allege that methylone, while not expressly mentioned by name in G.S. 90-89, falls within the "catch-all" provision subsection (5)(j).

State v. Sullivan, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). Indictments charging the defendant with drug crimes were fatally defective where they did not name controlled substances

listed in Schedule III. The possession with intent and sale and delivery indictments alleged the substances at issue to be "UNI-OXIDROL," "UNIOXIDROL 50" and "SUSTANON" and alleged that those substances were "included in Schedule III of the North Carolina Controlled Substances Act." Neither Uni-Oxidrol, Oxidrol 50, nor Sustanon are included in Schedule III and none of these names are trade names for substances so included.

State v. LePage, 204 N.C. App. 37 (May 18, 2010). Indictments charging the defendant with drug crimes and identifying the controlled substance as "BENZODIAZEPINES, which is included in Schedule IV of the North Carolina Controlled Substances Act[.]" were defective. Benzodiazepines is not listed in Schedule IV. Additionally, benzodiazepine describes a category of drugs, some of which are listed in Schedule IV and some of which are not.

Amount of Drugs

State v. Glenn, 221 N.C. App. 143 (June 5, 2012). In a felony possession of cocaine case, the defendant waived the issue of fatal variance by failing to raise it at trial. The court however went on summarily reject the defendant's argument on them merits. The defendant had argued that there was a fatal variance between the indictment, which alleged possession of .1 grams of cocaine and the evidence, which showed possession of 0.03 grams of cocaine.

Sale and Delivery of a Controlled Substance

State v. Land, 366 N.C. 550 (June 13, 2013). The court, per curiam, affirmed the decision below in *State v. Land*, __ N.C. App. __, 733 S.E.2d 588 (2012), holding that a drug indictment was not fatally defective. Over a dissent, the court of appeals had held that when a defendant is charged with delivering marijuana and the amount involved is less than five grams, the indictment need not allege that the delivery was for no remuneration. Relying on G.S. 90-95(b)(2) (transfer of less than five grams of marijuana for no remuneration does not constitute a delivery in violation of G.S. 90-95(a)(1)), the defendant argued that the statute "creates an additional element for the offense of delivering less than five grams of marijuana -- that the defendant receive remuneration -- and that this additional element must be alleged." Relying on *State v. Pevia*, 56 N.C. App. 384, 387 (1982), the court of appeals held that an indictment is valid under G.S. 90-95 even without that allegation.

State v. Sullivan, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). The court rejected the defendant's argument that there was a fatal variance between a sale and delivery indictment which alleged that the defendant sold the controlled substance to "A. Simpson" and the evidence. Although Mr. Simpson testified at trial that his name was "Cedrick Simpson," not "A. Simpson," the court rejected the defendant's argument, stating:

> [N]either during trial nor on appeal did defendant argue that he was confused as to Mr. Simpson's identity or prejudiced by the fact that the indictment identified "A. Simpson" as the purchaser instead of "Cedric Simpson" or "C. Simpson." In fact, defendant testified that he had seen Cedric Simpson daily for fifteen years at the gym. The evidence suggests that defendant had no question as to Mr. Simpson's identity. The mere fact that the indictment named "A. Simpson" as the purchaser

of the controlled substances is insufficient to require that defendant's convictions be vacated when there is no evidence of prejudice, fraud, or misrepresentation.

State v. Johnson, 202 N.C. App. 765 (Mar. 2, 2010). No fatal variance where an indictment charging sale and delivery of a controlled substance alleged that the sale was made to "Detective Dunabro." The evidence at trial showed that the detective had since gotten married and was known by the name Amy Gaulden. Because Detective Dunabro and Amy Gaulden were the same person, known by both married and maiden name, the indictment sufficiently identified the purchaser. The court noted that "[w]here different names are alleged to relate to the same person, the question is one of identity and is exclusively for the jury to decide."

Manufacture of a Controlled Substance

State v. Miranda, __ N.C. App. __, 762 S.E.2d 349 (Aug. 19, 2014). An indictment charging trafficking by manufacturing was not defective. The court rejected the defendant's argument that the indictment was fatally defective because it did not adequately describe the manner in which the defendant allegedly manufactured cocaine. It reasoned: "Although Defendant is correct in noting that the indictment does not explicitly delineate the manner in which he manufactured cocaine or a cocaine-related mixture, the relevant statutory language creates a single offense consisting of the manufacturing of a controlled substance rather than multiple offenses depending on the exact manufacturing activity in which Defendant allegedly engaged."

State v. Hinson, 364 N.C. 414 (Oct. 8, 2010). For the reasons stated in the dissenting opinion below, the court reversed *State v. Hinson*, 203 N.C. App. 172 (Apr. 6, 2010). The defendant was indicted for manufacturing methamphetamine by "chemically combining and synthesizing precursor chemicals to create methamphetamine." However, the trial judge instructed the jury that it could find the defendant guilty if it found that he produced, prepared, propagated, compounded, converted or processed methamphetamine, either by extraction from substances of natural origin or by chemical synthesis. The court of appeals held, over a dissent, that this was plain error as it allowed the jury to convict on theories not charged in the indictment. The dissenting judge concluded that while the trial court's instructions used slightly different words than the indictment, the import of both the indictment and the charge were the same. The dissent reasoned that the manufacture of methamphetamine is accomplished by the chemical combination of precursor elements to create methamphetamine and that the charge to the jury, construed contextually as a whole, was correct.

Maintaining a Dwelling

State v. Garnett, 209 N.C. App. 537 (Feb. 15, 2011). Theories included in the trial judge's jury instructions were supported by the indictment. The indictment charged the defendant with maintaining a dwelling "for keeping *and* selling a controlled substance." The trial court instructed the jury on maintaining a dwelling "for keeping *or* selling marijuana." The use of the conjunctive "and" in the indictment did not require the State to prove both theories alleged.

Trafficking

State v. Davis, __ N.C. App. __, 733 S.E.2d 191 (Nov. 6, 2012). In a trafficking case, there was no fatal variance between the indictment, alleging that the defendant trafficked in opium, and the evidence at trial, showing that the substance was an opium derivative. G.S. 90-95(h)(4) "does not create a separate crime of possession or transportation of an opium derivative, but rather specifies that possession or transportation of an opium derivative is trafficking in opium," as alleged in the indictment.

State v. Whittington, 221 N.C. App. 403 (June 19, 2012), *rev'd in part on other grounds*, 367 N.C. 186 (Jan. 24, 2014). (1) The State conceded and the court held that an indictment for trafficking in opium by sale was fatally defective because it failed to name the person to whom the defendant allegedly sold or delivered the controlled substance. The indictment stated that the sale was "to a confidential informant[.]" It was undisputed that the name of the confidential informant was known. (2) An indictment for trafficking by delivery was defective for the same reason.

State v. Cobos, 211 N.C. App. 536 (May 3, 2011). The trial court committed reversible error by allowing the State to amend an indictment charging conspiracy to engage in "trafficking to deliver Cocaine" to add the following language: "to deliver 28 grams or more but less than 200 grams of cocaine." To allege all of the essential elements, an indictment for conspiracy to traffic in cocaine must allege that the defendant facilitated the transfer of 28 grams or more of cocaine. Here, the indictment failed to specify the amount of cocaine. The court also concluded that a defendant cannot consent to an amendment that cures a fatal defect; the issue is jurisdictional and a party cannot consent to subject matter jurisdiction.

Motor Vehicle Offenses

Impaired Driving

State v. Clowers, 217 N.C. App. 520 (Dec. 20, 2011). In an impaired driving case, citation language alleging that the defendant acted "willfully" was surplusage.

Felony Speeding to Elude

State v. Leonard, 213 N.C. App. 526 (July 19, 2011). An indictment charging felonious speeding to elude arrest and alleging an aggravating factor of reckless driving was not required to specify the manner in which the defendant drove recklessly.

Habitual Impaired Driving

State v. White, 202 N.C. App. 524 (Feb. 16, 2010). The trial court did not err by allowing the State to amend a habitual impairing driving indictment that mistakenly alleged a seven-year look-back period (instead of the current ten-year look-back), where all of the prior convictions alleged in the indictment fell within the ten-year period. The language regarding the seven-year look-back was surplusage.

Fraud & Forgery

State v. Jones, 367 N.C. 299 (Mar. 7, 2014). (1) Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that an indictment charging obtaining property by false pretenses was defective where it failed to specify with particularity the property obtained. The indictment alleged that the defendant obtained "services" from two businesses but did not describe the services. (2) The court also held that an indictment charging trafficking in stolen identities was defective because it did not allege the recipient of the identifying information or that the recipient's name was unknown.

State v. Holanek, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the defendant waived the issue of fatal variance by failing to raise it at trial. (2) Counsel rendered ineffective assistance by failing to move to dismiss on grounds of fatal variance. The indictment alleged that the defendant submitted fraudulent invoices for pet boarding services by Meadowsweet Pet Boarding which caused the insurance company to issue payment to her in the amount of $11,395.00. The evidence at trial, however, showed that the document at issue was a valid estimate for future services, not an invoice. Additionally, the document was sent to the insurance company three days after the company issued a check to the defendant. Therefore the insurance company's payment could not have been triggered by the defendant's submission of the document. Additionally, the State's evidence showed that it was not the written estimate that falsely led the insurance company to believe that the defendant's pets remained at Meadowsweet long after they had been removed from that facility, but rather the defendant's oral representations made later. (3) The court rejected the defendant's argument that false pretenses indictments pertaining to moving expenses were fatally defective because they did not allege the exact misrepresentation with sufficient precision. The indictments were legally sufficient: each alleged both the essential elements of the offense and the ultimate facts constituting those elements by stating that the defendant obtained money from the insurance company through a false representation made by submitting a fraudulent invoice which was intended to, and did, deceive the insurance company.

State v. Barker, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Indictments charging obtaining property by false pretenses were not defective. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. At trial, three other witnesses testified to similar incidents. On appeal, the defendant argued that the indictments failed to "intelligibly articulate" his misrepresentations. The court disagreed:

> The indictments clearly state that defendant, on separate occasions, obtained property (money) from Ms. Hoenig and Ms. Harward by convincing each victim to believe that their roofs needed extensive repairs when in fact their roofs were not in need of repair at all. In each indictment, the State gave the name of the victim, the monetary sum defendant took from each victim, and the false representation used by defendant to obtain the money: by defendant "approaching [Ms. Hoenig] and claiming that her roof needed repair, and then overcharging [Ms. Hoenig] for either work that did not need to be done, or damage that was

> caused by the defendant[.]" As to Ms. Harward, the false representation used by defendant to obtain the money was "by . . . claiming that her shed roof needed repair, [with defendant knowing] at the time [that he] intended to use substandard materials and construction to overcharge [Ms. Harward]." Each indictment charging defendant with obtaining property by false pretenses was facially valid, as each properly gave notice to defendant of all of the elements comprising the charge, including the element defendant primarily challenges: the alleged misrepresentation (i.e., that defendant sought to defraud his victims of money by claiming their roofs needed repair when in fact no repairs were needed, and that defendant initiated these repairs but either failed to complete them or used substandard materials in performing whatever work was done).

State v. Pendergraft, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014). Over a dissent the court held that an indictment alleging obtaining property by false pretenses was not fatally defective. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court rejected the defendant's argument that the indictment was deficient because it failed to allege that he made a false representation. The indictment alleged that the false pretense consisted of the following: "The defendant moved into the house . . . with the intent to fraudulently convert the property to his own, when in fact the defendant knew that his actions to convert the property to his own were fraudulent." Acknowledging that the indictment did not explicitly charge the defendant with having made any particular false representation, the court found that it "sufficiently apprise[d] the defendant about the nature of the false representation that he allegedly made," namely that he falsely represented that he owned the property as part of an attempt to fraudulently obtain ownership or possession of it. The court also rejected the defendant's argument that the indictment was defective in that it failed to allege the existence of a causal connection between any false representation by him and the attempt to obtain property, finding the charging language sufficient to imply causation.

State v. Seelig, __ N.C. App. __, 738 S.E.2d 427 (Mar. 19, 2013). (1) Indictments charging the defendant with obtaining property by false pretenses were not defective. The indictments alleged in part that "[t]he defendant sold bread products to the victim that were advertised and represented as Gluten Free when in fact the defendant knew at the time that the products contained Gluten." The court rejected the argument that the indictments were defective because they failed to sufficiently allege that he himself made a false representation. (2) There was no fatal variance between an indictment alleging that the defendant obtained value from the victim and the evidence, which showed that he obtained value from the victim's husband. Citing G.S. 14-100(a), the court concluded that because an indictment for obtaining property by false pretenses need not allege any person's ownership of the thing of value obtained, the allegation was surplusage.

State v. Jones, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), *affirmed on other grounds* 367 N.C. 299 (Mar. 7, 2014). No fatal variance occurred in an identity theft case. The defendant argued that there was a fatal variance between the indictment, which alleged that he possessed credit card numbers belonging to four natural persons and the evidence, which showed that three of the credit cards were actually business credit cards issued in the names of the natural persons.

The court explained: "[N]o fatal variance exists when the indictment names an owner of the stolen property and the evidence discloses that that person, though not the owner, was in lawful possession of the property at the time." Here the victims were the only authorized users of the credit cards and no evidence suggested they were not in lawful possession of them.

State v. Moore, 209 N.C. App. 551 (Feb. 15, 2011), *rev'd in part on other grounds*, 365 N.C. 283 (2011). Stating in dicta that an indictment alleging obtaining property by false pretenses need not identify a specific victim.

State v. Guarascio, 205 N.C. App. 548 (July 20, 2010). There was no fatal variance between a forgery indictment and the evidence presented at trial. The indictment charged the defendant with forgery of "an order drawn on a government unit, STATE OF NORTH CAROLINA, which is described as follows: NORTH CAROLINA UNIFORM CITATION." The evidence showed that the defendant, who was not a law enforcement officer, issued citations to several individuals. The court rejected the defendant's arguments that the citations were not "orders" and were not "drawn on a government unit" because he worked for a private police entity.

G.S. 14-3 Misdemeanor Sentencing Enhancement

State v. Blount, 209 N.C. App. 340 (Jan. 18, 2011). An obstruction of justice indictment properly charged a felony when it alleged that the act was done "with deceit and intent to interfere with justice." G.S. 14-3(b) provides that a misdemeanor receives elevated punishment when done with "deceit and intent to defraud." The language "deceit and intent to interfere with justice" adequately put the defendant on notice that the State intended to seek a felony conviction. Additionally, the indictment alleged that the defendant acted "feloniously."

Habitual Felon

State v. Ross, 221 N.C. App. 185 (June 5, 2012). The trial court lacked jurisdiction over a habitual felon charge where the habitual felon indictment was returned before the principal felonies occurred.

State v. Griffin, 213 N.C. App. 625 (July 19, 2011). A habitual felon indictment was not defective where it described one of the prior felony convictions as "Possess Stolen Motor Vehicle" instead of Possession of Stolen Motor Vehicle. The defendant's argument was "hypertechnical;" the indictment sufficiently notified the defendant of the elements of the offense. Moreover, it referenced the case number, date, and county of the prior conviction.

State v. Flint, 199 N.C. App. 709 (Sept. 15, 2009). Although a habitual felon indictment may be returned before, after, or simultaneously with a substantive felony indictment, it is improper where it is issued before the substantive felony even occurred.

Waiver

Of Fatal Variance

State v. Hester, __ N.C. App. __, 736 S.E.2d 571 (Dec. 18, 2012), *aff'd per curiam*, 367 N.C. 119 (Oct. 4, 2013). Where a defendant failed to make a motion to dismiss on the basis of fatal variance at trial, the issue was waived for purposes of appeal.

State v. Redman, __ N.C. App. __, 736 S.E.2d 545 (Dec. 18, 2012). Where a defendant failed to make a motion to dismiss on the basis of fatal variance at trial, the issue was waived for purposes of appeal.

State v. Mason, 222 N.C. App. 223 (Aug. 7, 2012). (1) By failing to assert fatal variance as a basis for his motion to dismiss, the defendant failed to preserve the issue for appellate review.

State v. Glenn, 221 N.C. App. 143 (June 5, 2012). In a felony possession of cocaine case, the defendant waived the issue of fatal variance by failing to raise it at trial.

State v. Curry, 203 N.C. App. 375 (Apr. 20, 2010). On appeal, the defendant argued that there was a fatal variance between the indictment charging him with possession of a firearm and the evidence introduced at trial. Specifically, the defendant argued there was a variance as to the type of weapon possessed. By failing at the trial level to raise fatal variance or argue generally about insufficiency of the evidence as to the weapon used, the defendant waived this issue for purposes of appeal.

Of Fatal Defect

State v. Blount, 209 N.C. App. 340 (Jan. 18, 2011). A defendant may challenge the sufficiency of an indictment even after pleading guilty to the charge at issue.

Retrial/Trial De Novo

State v. Chamberlain, __ N.C. App. __, 753 S.E.2d 725 (Feb. 4, 2014). No double jeopardy violation occurs when the State retries a defendant on a charging instrument alleging the correct offense date after a first charge was dismissed due to a fatal variance.

State v. Rahaman, 202 N.C. App. 36 (Jan. 19, 2010). Citing *State v. Johnson*, 9 N.C. App. 253 (1970), and noting in dicta that the granting of a motion to dismiss due to a material fatal variance between the indictment and the proof presented at trial does not preclude a retrial for the offense alleged on a proper indictment.

Superseding Indictment

State v. Fox, 216 N.C. App. 144 (Oct. 4, 2011) (COA10-1485). Because the defendant was never arraigned on a second indictment (that did not indicate that it was a superseding indictment), the second indictment did not supersede the first indictment.

State v. Twitty, 211 N.C. App. 100 (May 17, 2011). The trial court's failure to dismiss the original indictment after a superseding indictment was filed did not render the superseding

indictment void or defective.

Citation

State v. Wainwright, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). In this DWI case, the court rejected the defendant's argument that the trial court erred by denying his motion to quash a citation on grounds that he did not sign that document and the charging officer did not certify delivery of the citation. Specifically, the defendant argued that the officer's failure to follow the statutory procedure for service of a citation divested the court of jurisdiction to enter judgment. The court found that the citation, which was signed by the charging officer, was sufficient. [Author's note: The court's opinion indicates that the citation was converted to a Magistrate's Order and that Order was served on the defendant. Thus, the Magistrate's Order, not the citation, was the relevant charging document and it is not clear why any defect with respect to the defendant's and officer's signatures on the citation was material.]

Misdemeanor Statement of Charges

State v. Wall, __ N.C. App. __, 760 S.E.2d 386 (July 15, 2014). The superior court lacked jurisdiction to try the defendant for resisting arrest where the defendant was tried on a misdemeanor statement of charges filed in superior court. The State filed the statement of charges on its own, without an objection to the magistrate's order having been made by the defendant. Under G.S. 15A-922, "the State has a limited window in which it may file a statement of charges on its own accord, and that is prior to arraignment" in district court. After arraignment, the State may only file a statement of charges when the defendant objects to the sufficiency of the pleading and the trial court rules that the pleading is insufficient.

Presentment

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014), *temporary stay allowed*, __ N.C.__, 767 S.E.2d 53 (Dec. 2, 2014). In this DWI case, the court rejected the defendant's argument that the State deprived him of equal protection by initiating the proceeding using a presentment instead of a citation. A rational basis (judicial economy) supported use of a presentment.

Time to Challenge Indictment

State v. Hunnicutt, __ N.C. App. __, 740 S.E.2d 906 (April 2, 2013). A defendant may not challenge the validity of an indictment in an appeal challenging revocation of probation. In such circumstances, challenging the validity of the original judgment is an impermissible collateral attack.

Indigents

State v. Tyson, 220 N.C. App. 517 (May 15, 2012). The trial court committed reversible error by denying the defendant's request for a trial transcript for use in his retrial. After a mistrial, the trial court set a retrial for the following day. The defendant objected, arguing that he needed a

trial transcript before the retrial. The trial court denied the defendant's request and the defendant was convicted at the retrial. Equal protection requires the State to provide indigent defendants with the basic tools of an adequate defense—including a trial transcript—when those tools are available for a price to other defendants. A two-step test applies for determining whether a transcript must be provided to an indigent defendant: (a) whether the transcript is necessary for an effective defense and (b) whether there are alternative devices available to the defendant that are substantially equivalent to a transcript. Here, the trial judge stated in part that he did "not find that the anticipation or the speculation that a witness may get on the stand and alter their testimony to be sufficient basis to delay a trial so that a transcript can be produced." These findings are insufficient. The trial court's ruling that the defendant's asserted need constituted mere speculation that a witness might change his or her testimony would apply in almost every case and a defendant would rarely if ever be able to show that a witness would in fact change his or her testimony. The trial court's ruling makes no determination why this defendant had no need for a transcript, especially in light of the fact that the State's case rested entirely on the victim's identification of the defendant as the perpetrator. Although the trial court indicated that it could take "measures" or had "means" to protect the defendant's rights, without any explanation of what those measures or means would be, this is insufficient to establish that there were alternative devices available that were substantially equivalent to a transcript.

Initial Appearance Procedure

State v. Caudill, __ N.C. App. __, 742 S.E.2d 268 (May 7, 2013). (1) The trial court did not err by denying the defendant's motion to suppress statements to officers on grounds that they were obtained in violation of G.S. 15A-501(2) (arrested person must be taken before a judicial official without unnecessary delay). After a consensual search of his residence produced controlled substances, the defendant and three colleagues were arrested for drug possession. The defendant, who previously had waived his *Miranda* rights, was checked into the County jail at 11:12 am. After again being informed of his rights, the defendant was interviewed from 1:59 pm to 2:53 pm and made incriminating statements about a murder. After the interview the defendant was taken before a magistrate and charged with drug offenses and murder. The defendant argued that the delay between his arrival at the jail and his initial appearance required suppression of his statements regarding the murder. The court noted that under G.S. 15A-974(2), evidence obtained as a result of a substantial violation of Chapter 15A must be suppressed upon timely motion; the statutory term "result" indicates that a causal relationship between a violation of the statute and the acquisition of the evidence to be suppressed must exist. The court concluded that the delay in this case was not unnecessary and there was no causal relationship between the delay and defendant's incriminating statements made during his interview. The court rejected the defendant's constitutional arguments asserted on similar grounds.

Interpreters

State v. Mohamed, 205 N.C. App. 470 (July 20, 2010). The court rejected the defendant's claim that inadequacies with his trial interpreters violated his constitutional rights. The court held that because the defendant did not challenge the adequacy of the interpreters at trial, the issue was waived on appeal and that plain error review did not apply. The court further held that because the defendant selected the interpreters, he could not complain about their adequacy. Finally, the

court concluded that the record did not reveal inadequacies, given the interpreters' limited role and the lack of translation difficulties.

Involuntary Commitment

In Re Hayes, 199 N.C. App. 69 (Aug. 18, 2009). At a recommitment hearing for an involuntarily-committed respondent based on a verdict of not guilty by reason of insanity, the trial court may order conditional release as an alternative to unconditional release or recommitment.

Joinder

Of Offenses

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). The trial court did not abuse its discretion by denying the defendant's motion to sever where the offenses had a transactional connection (he was charged with breaking into three beachfront residences within 2.5 miles of each other and within a three-day span).

State v. Jenrette, __ N.C. App. __, 763 S.E.2d 404 (Oct. 7, 2014). The trial court did not abuse its discretion by joining charges for trial. The defendant was indicted for: two counts of possession of a firearm by a felon; first-degree murder of Frink; two counts of assault with a deadly weapon with intent to kill inflicting serious injury; two counts of conspiracy to commit first-degree murder; first-degree murder of Jones; first-degree kidnapping; conspiracy to commit first-degree kidnapping; possession with intent to sell and/or deliver cocaine; and possession of a stolen firearm. Although the charges stemmed from a series of events that occurred over two months, they were factually related. The defendant participated in the shooting of Frick, with two accomplices, Reaves and Jones. The next night the defendant and Reaves were pulled over, and two firearms were recovered from their possession, one of which turned out to have been used in the earlier shooting. This evidence shows a direct link between the possession of a firearm by a felon charges and the charges arising directly out of the shooting. The discovery of the cocaine forming the basis for the drug charge occurred during the traffic stop. The charges related to the Jones murder were connected where the evidence showed that the defendant killed Jones to prevent Jones from implicating him in the earlier Frink murder.

State v. McCanless, __ N.C. App. __, 758 S.E.2d 474 (June 3, 2014). The trial court did not err by joining for trial offenses committed on two different child victims. The State alleged that on 3 September 2010, the defendant committed indecent exposure by showing his privates to a child victim, M.S., and committed indecent liberties with M.S. It also alleged that on 1 July 2011 he engaged in a sexual act with a child victim, K.C., committed first-degree kidnapping, and committed indecent liberties on K.C. The evidence in the cases was similar with respect to victim, location, motive, and modus operandi. Both victims were prepubescent girls, the acts occurred within months of one another in a donation store while the girls were momentarily alone, and in both cases the defendant immediately fled the scene and engaged in sexual misconduct.

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). The court rejected the defendant's argument that he received ineffective assistance of counsel when his lawyer failed to object to joinder of the defendant's charges of armed robbery and possession of a firearm by a felon. The defendant argued that the felon in possession statute was a "civil regulatory measure" that could not be joined with a criminal charge. The court held that felon in possession is a criminal offense that was properly joined for trial.

State v. Guarascio, 205 N.C. App. 548 (July 20, 2010). The trial court did not err by joining charges of impersonating a law enforcement officer and felony forgery that occurred in March 2006 with charges of impersonating a law enforcement officer that occurred in Apr. 2006. The offenses occurred approximately one month apart. Additionally, on both occasions the defendant acted as a law enforcement officer (interrogating individuals and writing citations for underage drinking), notified the minors' family members that they were in his custody for underage drinking, and identified himself as a law enforcement officer to family members. His actions evidence a scheme or plan to act under the guise of apparent authority as a law enforcement officer to interrogate, belittle, and intimidate minors.

State v. Peterson, 205 N.C. App. 668 (July 20, 2010). The trial court did not abuse its discretion by joining charges of felony assault with a deadly weapon and possession of stolen firearms. There was a sufficient transactional connection (a firearm that was the basis of the firearm charge was used in the assault) and joinder did not prejudicially hinder the defendant's ability to receive a fair trial.

State v. Anderson, 194 N.C. App. 292 (Dec. 16, 2008). The trial court did not abuse its discretion in granting the state's motion to join ten counts of third-degree sexual exploitation of a minor and ten counts of second-degree sexual exploitation of a minor with an appeal for trial de novo of misdemeanor peeping.

Of Defendants

State v. Privette, 218 N.C. App. 459 (Feb. 7, 2012). The trial court did not abuse its discretion by joining charges against two defendants for trial, where joinder did not impede the defendant's ability to receive a fair trial.

State v. Ellison, 213 N.C. App. 300 (July 19, 2011), *aff'd on other grounds* 366 N.C. 439 (Mar. 8, 2013). The trial court did not abuse its discretion by granting the State's motion to join charges against two defendants. The defendant had argued that as a result of joinder, the jury was allowed to consider against him "other crimes" evidence introduced against a co-defendant. The court rejected this argument, concluding that the no prejudice occurred; the defendant was clearly not involved in the other crime and the trial court gave an appropriate limiting instruction.

Judge's Expression of Opinion

State v. Berry, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015), In this child sexual assault case and for the reasons stated in the dissenting opinion below, the supreme court reversed *State v. Berry*, __ N.C. App. __, 761 S.E.2d 700 (2014), which had held that the trial court did not

express an opinion on a question of fact to be decided by the jury in violation of G.S. 15A-1222 or express an opinion as to whether a fact had been proved in violation of G.S. 15A-1232 when instructing the jury on how to consider a stipulation. In the opinion below the dissenting judge believed that the trial court's instruction could have been reasonably interpreted by the jury as a mandate to accept certain disputed facts in violation of G.S. 15A-1222 and 15A-1232. The stipulation at issue concerned a report by a clinical social worker who had interviewed the victim; in it the parties agreed to let redacted portions of her report come in for the purpose of corroborating the victim's testimony. The dissenting judge interpreted the trial court's instructions to the jury as requiring them to accept the social worker's report as true.

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014), *temporary stay allowed*, __ N.C.__, 767 S.E.2d 53 (Dec. 2, 2014). In this DWI case, the trial court did not impermissibly express an opinion when instructing the jury regarding the admissibility of breath test results.

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). In a first-degree murder case, the court rejected the defendant's argument that the trial court made an improper judicial comment on his dangerousness in violation G.S. 15A-1222 and -1232. The defendant had argued that the trial court's decision to order additional security after his mid-trial escape attempt, including physical restraints and an escort for the jury, was akin to a statement that defendant was highly dangerous and probably guilty. The court rejected this argument, concluding that the trial court did not abuse its discretion or violate the defendant's constitutional rights by ordering additional security measures after the defendant attempted to escape, causing a lockdown of the courthouse. The court also rejected the defendant's argument that the trial court should have instructed the jury that they should not consider the fact that they had been escorted to their cars or the additional security personnel in the courtroom.

State v. Summey, __ N.C. App. __, 746 S.E.2d 403 (Aug. 6, 2013). (1) In a statutory rape case, the trial court committed reversible error by expressing an opinion regarding the victim's age--an element of the offense--when responding to a note from the jury. During deliberations, the jury sent a note asking: "May we please have the date and age of [the victim] when she was raped the first time regarding the first-degree rape?" The trial court informed the jurors that the information they sought was in the victim's testimony and that it was their duty to recall that testimony from memory. Juror number 5 then immediately asked: "[W]ould it be an accurate statement that the Court would not be able to charge him with that particular charge if it were not in corroboration with the age reference?" The trial court answered: "You're correct." (2) The trial court did not commit plain error by referring to the prosecuting witnesses as "victims" in its jury instructions. The trial court's statements did not constitute an opinion.

State v. Sessoms, __ N.C. App. __, 741 S.E.2d 449 (April 2, 2013). No plain error occurred when the trial court referred to the prosecuting witness as "the victim." The court rejected the defendant's argument that a different result should obtain because he asserted self-defense.

State v. Carter, 216 N.C. App. 453 (Nov. 1, 2011), *rev. on other grounds*, 366 N.C. 496 (Apr. 12, 2013). In a child sexual assault case, the trial court did not commit plain error by impermissibly expressing an opinion when it described the child as the "victim" in its jury instructions.

State v. Herrin, 213 N.C. App. 68 (June 21, 2011). The trial court did not commit prejudicial error in violation of G.S. 15A-1222 (judge may not express an opinion) by laughing in the presence of the jury upon hearing a witness's testimony that defendant "ran like a bitch all the way, way down past his house." The court concluded that "[a]lthough the judge's outburst may have been ill-advised and did not exemplify an undisturbed atmosphere of judicial calm" (quotation omitted) any resulting error was harmless.

State v. Springs, 200 N.C. App. 288 (Oct. 6, 2009). The trial judge impermissibly expressed an opinion during the defendant's testimony that tended to discredit the defense theory and required a new trial. In this drug case, the defense's principal theory was that the defendant did not possess the controlled substance and paraphernalia because her boyfriend brought the items to her apartment while she was at work. During her testimony, the defendant was questioned about how often her boyfriend went to her apartment. The State objected. The trial court sustained the objection, and stated: "Let's move on to another area. He has no involvement with these charges."

State v. Jackson, 202 N.C. App. 564 (Feb. 16, 2010). The trial court did not err by using the word "victim" in the jury charge in a child sex offense case.

Judgment/Entry of Order

State v. Hadden, __ N.C. App. __, 741 S.E.2d 466 (April 2, 2013). The trial court's order requiring the defendant to enroll in SBM, although signed and dated by the trial court, was never filed with the clerk of court and therefore was a nullity.

State v. Kerrin, 209 N.C. App. 72 (Jan. 4, 2011). In a criminal case, entry of judgment occurs when a judge announces the ruling in open court or signs the judgment containing the ruling and files it with the clerk. A trial judge is not required to announce all of the findings and details of its judgment in open court, provided they are included in the signed judgment filed with the clerk. Based on these rules, a written order on form AOC-CR-317 (Forfeiture of Licensing Privileges Felony Probation Revocation) was not invalid for failure to announce the order's details in open court.

Jurisdiction

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *temporary stay allowed*, ___ N.C. ___, 768 S.E.2d 551 (Dec. 31, 2014). Because attempted assault with a deadly weapon inflicting serious injury is not a recognized offense in North Carolina, the trial court erred by denying the defendant's motion to dismiss a charge of felon in possession when it was based on a felony conviction for attempted assault. The court noted that prior cases—*State v. Currence*, 14 N.C. App. 263 (1972), and *State v. Barksdale*, 181 N.C. App. 302 (2007)—held that attempted assault is not a crime. It concluded that the trial court lacked jurisdiction to enter judgment on the attempted assault conviction and that therefore that judgment was void. The court rejected the State's argument that a different result should obtain because the defendant plead guilty to attempted assault as part of a plea agreement, stating: "The fact that Defendant's attempted

assault conviction stemmed from a guilty plea rather than a jury verdict does not . . . affect the required jurisdictional analysis." The court also rejected the State's argument that the defendant cannot collaterally attack the validity of his attempted assault conviction in an appeal on the felon in possession case; the State had argued that the appropriate procedural mechanism was a motion for appropriate relief. Finally, the court held that for the reasons noted above, the attempted assault conviction could not support a determination that the defendant attained habitual felon status.

State v. Tucker, __ N.C. App. __, 743 S.E.2d 55 (June 4, 2013). (1) North Carolina had territorial jurisdiction to prosecute the defendant for embezzlement. The defendant was a long distance driver employed by a North Carolina moving company. The defendant was charged with having received funds from a customer out-of-state and having converted them to his own use instead of transmitting the funds to his employer. The court adopted a "duty to account" theory under which territorial jurisdiction for embezzlement may be exercised by the state in which the accused was under a duty to account for the property. In this case, the court found that the duty to account was to the victim in North Carolina. (2) Because the defendant's argument about territorial jurisdiction was a legal and not a factual one, the trial court did not err by declining to submit the issue to the jury.

State v. Reeves, 218 N.C. App. 570 (Feb. 7, 2012). Where the defendant was charged with impaired driving and reckless driving and the State took a voluntary dismissal of the reckless driving charge in district court, that charge was not properly before the superior court on appeal for trial de novo and judgment on that offense must be vacated. The court noted that the dismissal was not pursuant to a plea agreement.

Jury Selection

***Batson* Issues**

Rivera v. Illinois, 556 U.S. 148 (March 31, 2009). During a state murder trial, the defendant was denied the opportunity to exercise a peremptory challenge against a female juror because the trial judge erroneously, but in good faith, believed that the defendant's use of a peremptory challenge violated *Batson*. The Due Process Clause does not require an automatic reversal of a conviction when a state trial court committed a good-faith error in denying the defendant's peremptory challenge of a juror and all jurors seated in the trial were qualified and unbiased.

Thaler v. Haynes, 559 U.S. 43 (Feb. 22, 2010). When an explanation for a peremptory challenge is based on a prospective juror's demeanor, the trial judge should consider, among other things, any observations the judge made of the prospective juror's demeanor during the voir dire. However, no previous decisions of the Court have held that a demeanor-based explanation must be rejected if the judge did not observe or cannot recall the prospective juror's demeanor.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). (1) The trial court did not err in denying a capital defendant's *Batson* challenge when the defendant failed to established a prima facie case that the prosecutor's use of a peremptory challenge against Juror Rogers, an African-American female, was motivated by race. Because Ms. Rogers was the first prospective juror peremptorily challenged, there was no pattern of disproportionate use of challenges against African-

Americans. Ms. Rogers was the only juror who stated, when first asked, that she was personally opposed to the death penalty. (2) The trial court did not err in denying a capital defendant's *Batson* challenge to the State's peremptory challenge of a second juror. There did not appear to be a systematic effort by the State to prevent African-Americans from serving when the State accepted 50% of African-American prospective jurors. The prosecutor's race-neutral reasons were that the juror had not formulated views on the death penalty, did not read the newspaper or watch the news, had been charged with a felony, and gave information regarding disposition of that charge that was inconsistent with AOC records. Considering these reasons in the context of the prosecutor's examination of similarly situated whites who were not peremptorily challenged, the court found they were not pretextual and that race was not a significant factor in the strike. (3) The court rejected the defendant's argument that a remand was required for further findings of fact under *Snyder v. Louisiana*, 552 U.S. 472 (2008). Unlike in *Snyder*, the case at hand did not involve peremptory challenges involving demeanor or other intangible observations that cannot be gleaned from the record. However, the court stated that "[c]onsistent with *Snyder*, we encourage the trial courts to make findings . . . to elucidate aspects of the jury selection process that are not preserved on the cold record so that review of such subjective factors as nervousness will be possible."

State v. James, __ N.C. App. __, 750 S.E.2d 851 (Nov. 5, 2013). The trial court did not err by dismissing the defendant's *Batson* objection. The prosecutor's explanation for its peremptory challenge to the black juror was that she was unemployed and that the prosecutor recognized the juror's name, possibly from a prior domestic violence case. The court noted that the State accepted a white juror who was unemployed. However, a review of the record revealed that the trial court conducted a full *Batson* inquiry and its conclusion that there was no purposeful discrimination was not erroneous.

State v. Mills, __ N.C. App. __, 741 S.E.2d 427 (Mar. 5, 2013). The trial court did not err by failing to conduct a *Batson* hearing where the defendant failed to establish a prima facie case of discrimination. At the time the defendant objected, the State's acceptance rate, excluding jurors dismissed for cause, was 25% for African Americans, and 80% for whites. This was the only factor asserted by the defendant. The court noted that the defendant and both murder victims were African American and that the State questioned all the prospective jurors in the same manner, there were no racially motivated comments made or questions asked during jury selection, and the responses of the prospective jurors provided reasonable justification for exclusion.

State v. Pender, 218 N.C. App. 233 (Jan. 17, 2012). The court rejected the defendant's argument that the State used six of its peremptory challenges to excuse prospective African-American jurors in violation of *Batson.* At a *Batson* hearing, the State offered race-neutral explanations as to why it excused each juror, including unresponsiveness, deceit, failure to make eye contact, alleged acquaintance with the defendant's former girlfriend, an extensive history of purchasing pawn tickets, and prior employment at the store where the crime occurred. After weighing these race-neutral explanations, the trial court found that the defendant had not demonstrated purposeful discrimination. The court concluded that "[a]fter careful review, we cannot find error that would justify overturning the trial court's ruling."

State v. Carter, 212 N.C. App. 516 (June 21, 2011). The trial court did not err by rejecting the defendant's *Batson* challenge as to two black jurors. The prosecutor's explanation with respect to both jurors included the fact that both had a close family member who was incarcerated and had not been "treated fairly." The court rejected the defendant's argument that the State accepted a white male juror whose father had been incarcerated, noting that the white juror indicated that he was not close to his father and that his father had been treated fairly. The court also rejected the defendant's argument that the State's peremptory challenges left the defendant, who was black, with an all-white jury, concluding that *Batson* requires purposeful discrimination; it is not enough that the effect of the challenge was to eliminate all or some African-American jurors.

State v. Headen, 206 N.C. App. 109 (Aug. 3, 2010). The trial court did not err by overruling the defendant's *Batson* objection to the State's peremptory challenge of an African-American juror. The defendant, who is African-American, was tried for murder. In response to the defendant's *Batson* objection, the prosecutor explained to the trial court that the juror was challenged because he was heavily tattooed and dressed in baggy, low hanging jeans decorated with a blood-red colored splatter. The prosecutor expressed concern over what the juror chose to wear to court and "his choice of applying . . . that much ink." The court found the State's reason for striking the juror to be race-neutral. It also held that the trial court did not err by finding that the defendant failed to prove purposeful discrimination. The court determined that the defendant's statistical evidence was not helpful because the jury pool contained only one or two African-Americans. Although defense counsel had suggested to the trial court that there were "racial overtones" in the defendant's prior trials, no evidence of this was presented. The court also rejected the defendant's argument that the State's explanation for excluding the juror was pretextual. Finally, the court noted that both the victim and the defendant were African-American, the State asked no racially motivated questions, the State's method of questioning the juror did not differ from its method of questioning other jurors, the State used only two peremptory challenges and contemporaneously challenged both a black and white prospective juror, the defendant left unresolved the question whether one of the jurors accepted by the State was African-American, and the defendant failed to show that any other prospective jurors wore clothing or had tattooing similar to that displayed by the juror in question.

Challenges for Cause

State v. Sherman, __ N.C. App. __, 752 S.E.2d 782 (Jan. 7, 2014). The trial court did not abuse its discretion by denying the defendant's challenges for cause of two prospective jurors. The defendant asserted that the first juror stated that he would form opinions during trial. Because the juror stated upon further questioning that he would follow the judge's instructions, the trial court did not abuse its discretion by denying the challenge of this juror. Next, the defendant argued that the trial court erred when it denied his for-cause challenge to a second juror who was a Marine with orders to report to Quantico, Virginia, before the projected end of trial. The trial court did not abuse its discretion in refusing to allow the for-cause challenge where the juror twice asserted that despite his orders to report, he could focus on the trial if he was selected as a juror.

State v. Carr, __ N.C. App. __, 747 S.E.2d 904 (Sept. 17, 2013). The trial court did not abuse its discretion by denying the defendant's challenge for cause. Although the juror initially voiced

sentiments that would normally make her vulnerable to a challenge for cause, she later confirmed that she would put aside prior knowledge and impressions, consider the evidence presented with an open mind, and follow the applicable law.

State v. Lovette, __ N.C. App. __, 737 S.E.2d 432 (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the trial court did not abuse its discretion by denying three of the defendant's challenges for cause during jury selection. The defendant failed to preserve for appellate review challenges as to two of the jurors. As to the third, his challenge was based on the juror's hearing problems. However, the trial court obtained a hearing device for the juror's use and tested its effectiveness in court.

State v. Pender, 218 N.C. App. 233 (Jan. 17, 2012). The trial court did not abuse its discretion by denying the defendant's motion to strike a juror for cause or his request for an additional peremptory challenge. The defendant argued that a juror should have been excused for cause based on his comments during voir dire that he knew "things that [he] probably shouldn't know, knowing some of the details." Asked to elaborate, he indicated that he had read about the case in the newspaper. The trial court and the defendant then inquired further as to whether the juror could follow the law and be impartial. The juror indicated that he could put aside what he had read and make a decision based on the evidence. The court noted that the trial court was very careful to give considerable attention to its determination of whether the juror's prior knowledge of the case would impair his ability to fairly evaluate the evidence and in accordance with trial court's instructions.

State v. Simmons, 205 N.C. App. 509 (July 20, 2010). In an impaired driving case, the trial court did not abuse its discretion by allowing the State's challenge for cause of a juror while denying a defense challenge for cause of another juror. The juror challenged by the State had a pending impaired driving case in the county and admitted to consuming alcohol at least three times a week, and stated that despite his pending charge, he could be fair and impartial. The juror challenged by the defense was employed with a local university police department as a traffic officer. He had issued many traffic citations, worked closely with the District Attorney's office to prosecute those and other traffic cases, including impaired driving cases, and had never testified for the defense. He indicated that he could be fair and impartial. Distinguishing *State v. Lee*, 292 N.C. 617 (1977), the court noted that the juror challenged by the defense did not have a personal relationship with any officer involved in the case and never indicated he might not be able to be fair and impartial. The court rejected the notion that a juror must be excused solely on the grounds of a close relationship with law enforcement.

Fair Cross Section Claims

Berghuis v. Smith, 559 U.S. 314 (Mar. 30, 2010). The state supreme court did not unreasonably apply clearly established federal law with respect to the defendant's claim that the method of jury selection violated his sixth amendment right to be tried by an impartial jury drawn from sources reflecting a fair cross-section of the community. The state supreme court assumed that African-Americans were underrepresented in venires from which juries were selected but went on to conclude that the defendant had not shown the third prong of the *Duren* prima facie case for fair cross section claims: that the underrepresentation was due to systemic exclusion of the

group in the jury-selection process. The Court expressly declined to address the methods or methods by which underrepresentation is appropriately measured. For a more detailed discussion of this case, see the blog post.

State v. Jackson, 215 N.C. App. 339 (Sept. 6, 2011). The trial court did not err by denying the defendant's motion to discharge the jury venire on grounds that the defendants' race (African-American) was disproportionately underrepresented. To establish a prima facie violation for disproportionate representation in a venire, a defendant must show that: (1) the group alleged to be excluded is a "distinctive" group in the community; (2) the representation of this group in venires from which juries are selected is not fair and reasonable in relation to the number of such persons in the community; and (3) this underrepresentation is due to systematic exclusion of the group in the jury selection process. Although the defendants met their burden with respect to the first prong, they failed to satisfy the other prongs. As to the second prong, the defendants failed to produce any evidence that the representation African-Americans was not fair and reasonable in relation to the number of such persons in the community. Defendants stated that the African-American population in the county was "certainly greater than . . . five percent" but produced no supporting evidence. As to the third prong, the defendants presented no evidence showing that the alleged deficiency of African-Americans in the venire was because of the systematic exclusion. Although the defendants noted that only three out of 60 potential jurors were African-American, this fact was insufficient to show systematic exclusion.

Notice of Asserted Defenses

State v. Clark, __ N.C. App. __, 752 S.E.2d 709 (Dec. 17, 2013). The trial court did not err by informing prospective jurors, pursuant to G.S. 15A-1213, that the defendant had given notice of self-defense. Specifically, during jury selection, the trial court stated: "Defendant, ladies and gentlemen, has entered a plea of not guilty and given the affirmative defense of self-defense." The court rejected the defendant's argument that this was error under G.S. 15A-905(c), a discovery statute providing that on the State's motion, the defendant must give notice of an intent to offer certain defenses at trial, including self-defense, and that the defendant's notice of defense is inadmissible at trial.

Procedure

State v. Gurkin, __ N.C. App. __, 758 S.E.2d 450 (June 3, 2014). Although the trial court erred by failing to follow the statutory procedure for jury selection in G.S. 15A-1214 (specifically, that the prosecutor must pass 12 jurors to the defense), the defendant failed to show prejudice. The court rejected the defendant's argument that the error was reversible per se.

Peremptories

State v. Thomas, __ N.C. App. __, 748 S.E.2d 620 (Oct. 15, 2013). Following *State v. Holden*, 346 N.C. 404 (1997), the court held that the trial court erred by refusing to allow the defendant to use a remaining peremptory challenge when a juror revealed mid-trial that she knew one of the State's witnesses from high school. After re-opening voir dire on the juror, the trial court determined that there was no cause to remove her. The defendant then requested that he be

allowed to use his remaining peremptory challenge, but this request was denied. The court reasoned that the trial court has discretion to re-open voir dire even after the jury has been empaneled. If that happens, each side has an absolute right to exercise any remaining peremptory challenges to excuse the juror.

State v. Thomas, 195 N.C. App. 593 (Mar. 3, 2009). The trial court erred by denying the defendant the opportunity to use his one remaining peremptory challenge after voir dire was reopened. After the jury was impaneled, the judge learned that a seated juror had attempted to contact an employee in the district attorney's office before impanelment. The trial judge reopened voir dire, questioned the juror, allowed the parties to do so as well, but denied the defendant's request to remove the juror. The court of appeals noted that after a jury has been impaneled, further challenge of a juror is in the trial court's discretion. However, once the trial court reopens examination of a juror, each party has an absolute right to exercise any remaining peremptory challenges.

Right to an Impartial Jury

Skilling v. United States, 561 U.S. 358 (June 24, 2010). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

Voir Dire

Generally

State v. Maness, 363 N.C. 261 (June 18, 2009). Trial court did not err in sustaining the prosecutor's objection to an improper stake-out question by the defense. Defense counsel wanted to ask the juror in this capital case whether the juror could, if convinced that life imprisonment was the appropriate penalty, return such a verdict even if the other jurors were of a different opinion.

State v. Lovette, __ N.C. App. __, 737 S.E.2d 432 (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the trial court did not abuse its discretion by overruling the defendant's objections to the State's questions during jury selection. The defendant objected to questions about whether jurors could consider testimony by witnesses who had criminal records, had received immunity deals for their testimony, and/or were uncharged participants in some of the criminal activities described at trial. The defendant also objected to questions about the jurors' understanding of and feelings about the substantive law on felony murder.

State v. Johnson, 209 N.C. App. 682 (Mar. 1, 2011). The trial court did not improperly limit the defendant's voir dire questioning with respect to assessing the credibility of witnesses and the

jurors' ability to follow the law on reasonable doubt. Because the trial judge properly sustained the State's objections to the defendant's questions, no abuse of discretion occurred. Even if any error occurred, the defendant suffered no prejudice.

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). In a case in which the defendant was charged with various crimes related to his shooting of his pregnant wife, the trial court did not err by limiting the defendant's voir dire of prospective jurors. The charges against the defendant included first-degree murder of his child, who was born alive after the defendant's attack on her mother but died one month later. Defense counsel attempted to ask prospective jurors about their views on abortion and when life begins, and whether they held such strong views on those subjects that they would be unable to apply the law. The trial court sustained the State's objection to this questioning. These questions apparently confused prospective jurors as several inquired about the relevancy of their opinions on abortion. The trial court did not abuse its discretion by sustaining the State's objection to questioning that was confusing and irrelevant.

Providing Jury Instructions Prior to Voir Dire

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). The trial court did not abuse its discretion by denying the defendant's request to be provided, prior to voir dire, with the trial court's intended jury instructions regarding the killing of an unborn fetus. The defendant wanted the instruction to "clarify the law" before questioning of the jurors. The trial court properly instructed the jury on the born alive rule and killing of an unborn fetus was not an issue in the case.

Reopening Voir Dire

State v. Thomas, __ N.C. App. __, 748 S.E.2d 620 (Oct. 15, 2013). Following *State v. Holden*, 346 N.C. 404 (1997), the court held that the trial court erred by refusing to allow the defendant to use a remaining peremptory challenge when a juror revealed mid-trial that she knew one of the State's witnesses from high school. After re-opening voir dire on the juror, the trial court determined that there was no cause to remove her. The defendant then requested that he be allowed to use his remaining peremptory challenge, but this request was denied. The court reasoned that the trial court has discretion to re-open voir dire even after the jury has been empaneled. If that happens, each side has an absolute right to exercise any remaining peremptory challenges to excuse the juror.

State v. Hammonds, 218 N.C. App. 158 (Jan. 17, 2012). The trial court committed reversible error by refusing to allow the defendant, after the jury was impanelled, to exercise a remaining peremptory challenge to excuse a juror who had lunch with a friend who was a lawyer in the district attorney's office. Citing *State v. Holden*, 346 N.C. 404 (1997), and *State v. Thomas*, 195 N.C. App. 593 (2009), the court held that because the trial court reopened voir dire and because the defendant had not exhausted all of his peremptory challenges, the trial court was required to allow the defendant to exercise a peremptory challenge to excuse the juror. After a lunch break at trial, defense counsel reported that he had seen juror number 8 having lunch with a lawyer from the district attorney's office. Counsel said that if he had known of the juror's connection with that office, he "probably would have used one of [his] strikes against them." The jurors were returned

to the courtroom and asked whether any of them had lunch with a member of the district attorney's office. Juror number 8 indicated that he had done so, but that they had not discussed the case. After removing the other jurors, the trial judge allowed both sides to question juror number 8. Thereafter defense counsel asked that the juror be removed, noting that he had two strikes left. The trial court denied the motion. The court noted that after a jury has been impaneled, further challenge of a juror is a matter within the trial court's discretion. However, when the trial court reopens voir dire, each party has the absolute right to exercise any remaining peremptory challenges. In this case, because the trial court reopened voir dire, the defendant had an absolute right to exercise his remaining challenges.

Miscellaneous Issues

State v. Gurkin, __ N.C. App. __, 758 S.E.2d 450 (June 3, 2014). In this murder case, the trial court did not err by failing to make further inquiry when a prospective juror revealed during voir dire that prospective jurors were discussing the case in the jury room. Questioning of the juror revealed that "a few" prospective jurors spoke about whether they knew the defendant, what had happened, and news coverage of the crime. The juror indicated that no one knew the defendant or anything about the case. The trial court acted within its discretion by declining to conduct any further examination and limiting its inquiry to the juror's voir dire.

Jury Argument

Animal References

State v. Foust, 220 N.C. App. 63 (Apr. 17, 2012). In a rape case, the trial court was not required to intervene ex mero motu when the State asserted in closing: "What happened . . . is no different than a hunter in the field, a beast in the field sitting [sic] a prey, stalking the prey, learning the prey, and at some point in time, eventually taking what he wants, and that's what happened here."

State v. Teague, 216 N.C. App. 100 (Oct. 4, 2011). In a case involving attempted murder and other charges, the prosecutor's reference to the victims as sheep and the defendant as a "predator" did not require the trial court to intervene ex mero motu. However, the court stated that comparisons between criminal defendants and animals are strongly disfavored.

State v. Oakes, 209 N.C. App. 18 (Jan. 4, 2011). The prosecutor's statements during closing argument were not so grossly improper as to require the trial court to intervene ex mero motu. Although disapproving a prosecutor's comparisons between criminal defendants and animals, the court concluded that the prosecutor's statements equating the defendant's actions to a hunting tiger were not grossly improper; the statements helped to explain the State's theory of premeditated and deliberate murder.

Defendant's Failure to Testify

State v. Harris, 221 N.C. App. 548 (July 17, 2012). In this sexual assault trial, the prosecutor's comment during closing argument was not a comment on the defendant's failure to testify. The prosecutor stated: "There are only two people in this courtroom as we sit here today that actually

know what happened between the two people, and that's [the victim] and the defendant." The comment was made in the context of an acknowledgement that while the SANE nurse who examined the victim testified to abrasions and tears indicative of vaginal penetration, the nurse could not tell if the victim's vagina was penetrated by a penis. The prosecutor went on to recount evidence that semen containing the defendant's DNA was found on the victim's vaginal swabs and on cuttings from her panties. The comment emphasized the limitations of the physical evidence and was not a comment on the defendant's decision not to testify.

State v. Foust, 220 N.C. App. 63 (Apr. 17, 2012). The prosecutor did not improperly refer to the defendant's failure to testify but rather properly commented on the defendant's failure contradict or challenge the State's evidence.

State v. Anderson, 200 N.C. App. 216 (Oct. 6, 2009). The prosecutor did not improperly comment on the defendant's failure to testify by pointing out to the jury in closing that the defense had not put on any mental health evidence as forecasted in its opening statement; however, the court disapproved of the prosecutor's statement that this constituted "[b]roken promises from the defense." The prosecutor did not comment on the defendant' failure to testify by stating in closing that there was no evidence regarding accident.

State v. Graham, 200 N.C. App. 204 (Oct. 6, 2009). The prosecutor's comments during closing did not constitute a reference to the defendant's failure to testify; the comments responded to direct attacks on the State's witnesses and pertained to the defendant's failure to produce witnesses or exculpatory evidence.

Suggesting that Witness/Defendant Is Lying

State v. Sargent, __ N.C. App. __, 755 S.E.2d 91 (Mar. 18, 2014). Where the defendant opened the door to the credibility of a defense witness, the prosecutor's possibly improper comments regarding the witness's credibility were not so grossly improper as to require intervention by the trial court ex mero motu. Among other things, the prosecutor stated: "that man would not know the truth if it came up and slapped him in the head."

State v. Gillikin, 217 N.C. App. 256 (Dec. 6, 2011). Although reversing on other grounds, the court characterized the prosecutor's closing argument as "grossly improper." The prosecutor repeatedly engaged in abusive name-calling of the defendant and expressed his opinion that defendant was a liar and was guilty. The entire tenor of the prosecutor's argument was undignified and solely intended to inflame the passions of the jury. The court noted that had the trial court not issued a curative instruction to the jury, it would have been compelled to order a new trial on this basis.

State v. Hunter, 208 N.C. App. 506 (Dec. 21, 2010). The prosecutor's characterization of the defendant's statements as lies, while "clearly improper," did not require reversal. The court noted that the trial court's admonition to the prosecutor not to so characterize the defendant's statements neutralized the improper argument.

State v. Sanders, 201 N.C. App. 631 (Jan. 5, 2010). The trial court did not err by failing to

intervene ex mero motu when, in closing argument, the prosecutor suggested that the defendant was lying. The comments were not so grossly improper as to constitute reversible error.

Attacking Integrity of Counsel & Suggesting Witness Changed Story After Speaking With a Lawyer

State v. Hembree, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). During closing arguments at the guilt-innocence phase of this capital murder trial, the State improperly accused defense counsel of suborning perjury. The prosecutor argued in part: "Two years later, after [the defendant] gives all these confessions to the police and says exactly how he killed [the victims] . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story." Although the trial court sustained the defendant's objection to this statement it gave no curative instruction to the jury. The prosecutor went to argue that the defendant lied on the stand in cooperation with defense counsel. These latter statements were grossly improper and the trial court erred by failing to intervene ex mero motu.

State v. Riley, 202 N.C. App. 299 (Feb. 2, 2010). Prosecutor's comment during jury argument was improper. The comment attacked the integrity of defense counsel and was based on speculation that the defendant changed his story after speaking with his lawyer.

Regarding Facts and Proceedings of Prior Case

State v. Simmons, 205 N.C. App. 509 (July 20, 2010). The trial court abused its discretion when it allowed the prosecutor, in closing argument and over the defendant's objection, to compare the defendant's impaired driving case to a previous impaired driving case litigated by the prosecutor. The prosecutor discussed the facts of the case, indicated that the jury had returned a guilty verdict, and quoted from the appellate decision finding no reversible error. Reversed for a new trial.

Disparaging the Opponent's Case

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor asserted that defense counsel's mitigation case was a "lie" based on "half-truths" and omitted information.

Disparaging a Witness

State v. Phillips, 365 N.C. 103 (June 16, 2011). The court rejected the capital defendant's argument that the trial court erred by failing to intervene ex mero motu during the State's argument in the guilt-innocence phase. The defendant argued that the trial court should have intervened when the prosecutor commented about a defense expert on diminished capacity. Although the court found the prosecutor's statement that the expert's testimony was "wholly unbelievable" to be error, that error was not so egregious as to warrant intervention on the court's own motion. Similarly, the prosecutor's comment about the "convenience" of the expert's testimony (she opined that the defendant suffered from diminished capacity for a portion

of time that coincided with when the crime occurred), was not so grossly improper as to require intervention ex mero motu.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor used the words "laugh, laugh" when impeaching the credibility of a defense expert.

Expression of Personal Beliefs

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) improperly expressed his personal belief that there was overwhelming evidence of guilt; (b) improperly injected his personal opinion that a stab wound to the victim's neck showed intent. (2) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor improperly injected his personal beliefs, repeatedly using the words, "I think" and "I believe." (3) The collective impact of these arguments did not constitute reversible error.

State v. Salentine, __ N.C. App. __, 763 S.E.2d 800 (Oct. 21, 2014). In this murder case, the trial court did not abuse its discretion by overruling the defendant's objections to the State's closing argument. Although the prosecutor's remarked that the case was one of "the most gruesome and violent murders this community has ever seen," the comment related directly to the State's theory of the case--that the defendant acted intentionally and with premeditation and deliberation.

State v. Hartley, 212 N.C. App. 1 (May 17, 2011). The trial court did not err by failing to intervene ex mero motu when, in a triple homicide case, the prosecutor argued, among other things, "If that . . . isn't murder, I don't know what is" and "I know when to ask for the death penalty and when not to. This isn't the first case, it's the ten thousandth for me."

Name Calling

State v. Johnson, 217 N.C. App. 605 (Dec. 20, 2011). In a drug trafficking case, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. The prosecutor asserted: "Think about the type of people who are in that world and who would be able to testify and witness these type of events. I submit to you that when you try the devil, you have to go to hell to get your witness. When you try a drug case, you have to get people who are involved in that world. Clearly the evidence shows that [the defendant] was in that world. He's an admitted drug dealer and admitted drug user." Citing *State v. Willis*, 332 N.C. 151, 171 (1992), the court concluded that the prosecutor was not characterizing the defendant as the devil but rather was using this phrase to illustrate the type of witnesses which were available in this type of case.

State v. Gillikin, 217 N.C. App. 256 (Dec. 6, 2011). Although reversing on other grounds, the court characterized the prosecutor's closing argument as "grossly improper." The prosecutor repeatedly engaged in abusive name-calling of the defendant and expressed his opinion that

defendant was a liar and was guilty. The entire tenor of the prosecutor's argument was undignified and solely intended to inflame the passions of the jury. The court noted that had the trial court not issued a curative instruction to the jury, it would have been compelled to order a new trial on this basis.

State v. Twitty, 212 N.C. App. 100 (May 17, 2011). The trial court did not err by failing to intervene ex mero motu when the prosecutor referred to the defendant as a con man, liar, and parasite. The defendant was charged with obtaining property by false pretenses, an offense committed by deceiving or lying to win the confidence of victims. Given that the defendant lied to a church congregation in order to convince them to give him money, there was no impropriety in the State's reference to the defendant as a liar and con man; the terms accurately characterize the charged offense and the evidence presented at trial. As for the term "parasite," the court concluded: "this name-calling by the State was unnecessary and unprofessional, but does not rise to the level of gross impropriety."

General Deterrence

State v. Privette, 218 N.C. App. 459 (Feb. 7, 2012). While the prosecutor would have been better advised to have refrained from making comments that might have encouraged the jury to lend an ear to the community and engage in general deterrence, any impropriety did not render the trial fundamentally unfair.

Lend an Ear to the Community

State v. Privette, 218 N.C. App. 459 (Feb. 7, 2012). While the prosecutor would have been better advised to have refrained from making comments that might have encouraged the jury to lend an ear to the community and engage in general deterrence, any impropriety did not render the trial fundamentally unfair.

Regarding Aggravating Factors

State v. Lopez, 363 N.C. 535 (Aug. 28, 2009). The trial judge abused her discretion in overruling a defense objection to the State's jury argument regarding the effect of an aggravating factor on the sentence. Although the jury's understanding of aggravating factors is relevant to sentencing, the prosecutor's argument introduced error because it was inaccurate and misleading. The court indicated that consistent with G.S. 7A-97, parties may explain to a jury the reasons why it is being asked to consider aggravating factors and may discuss and illustrate the general effect of finding such factors, such as the fact that a finding of an aggravating factor may allow the trial court to impose a more severe sentence or that the court may find mitigating factors and impose a more lenient sentence.

Referring to Complainant as "Victim"

State v. Jones, __ N.C. App. __, 752 S.E.2d 212 (Dec. 17, 2013). In this child sex case, the trial court did not err by failing to intervene ex mero motu when the prosecutor referred to the complainants as "victims."

Right to Final Argument

State v. Hogan, 218 N.C. App. 305 (Jan. 17, 2012). The trial court committed reversible error by denying the defendant the right to the final argument based on its ruling that he had "introduced" evidence within the meaning of Rule 10 of the General Rules of Practice for the Superior and District Courts during his cross-examination of the victim. During that cross defense counsel read aloud several portions of the victim's earlier statement to an officer, in what appears to have been an attempt to point out inconsistencies between the victim's trial testimony and his prior statement; defense counsel also asked the victim questions, including whether he had told the officer everything that happened when he provided his statement. The statements read and referenced by defense counsel directly related to the victim's testimony on direct examination. Furthermore, defense counsel never formally introduced the statement into evidence. Thus, the defendant never "introduced" evidence within the meaning of Rule 10.

State v. Matthews, 218 N.C. App. 277 (Jan. 17, 2012). Because the defendant did not present any evidence at trial, the trial court committed reversible error by denying the defendant final closing argument. Defense counsel cross-examined an officer who responded to a call about the break-in and identified defense Exhibit 2, a report made by that officer following his investigation. During cross defense counsel elicited the officer's confirmation that, after viewing video surveillance footage, a man named Basil King was identified as a possible suspect. The trial court denied the defendant's motion to make the final closing argument because it believed this cross-examination constituted the introduction of evidence pursuant to Rule 10 of the General Rules of Practice for the Superior and District Courts. Although the defendant introduced for the first time evidence in the officer's report that Basil King was a suspect, the defendant did not introduce the officer's actual report into evidence, nor did he have the officer read the report to the jury. Furthermore, this evidence was relevant to the investigation and was contained in the officer's own report. It was the State, the court noted, that first introduced testimony by the officer and other witnesses concerning the investigation and the evidence leading the police to identify the defendant as a suspect. It concluded: "We cannot say that the identification of other suspects by the police constituted new evidence that was not relevant to any issue in the case." (quotation omitted). Therefore, this testimony cannot be considered the introduction of evidence pursuant to Rule 10.

State v. English, 194 N.C. App. 314 (Dec. 16, 2008). The trial judge erred in denying the defendant final jury argument. The defendant did not introduce evidence under Rule 10 of the General Rules of Practice when cross-examining an officer. Defense counsel referred to the contents of the officer's report when cross-examining the officer. However, the officer's testimony on cross-examination did not present "new matter" to the jury when considered with the state's direct examination of the officer.

Curative Instructions

State v. Barbour, __ N.C. App. __, 748 S.E.2d 59 (Sept. 17, 2013). The trial court did not err by failing to intervene ex mero motu during that State's closing argument. Even if the prosecutor misstated the evidence, the trial court's jury instruction cured any defect. The trial court

instructed the jury that if their "recollection of the evidence differs from that of the attorneys, you are to rely solely upon your recollection of the evidence."

Miscellaneous Cases

State v. Phillips, 365 N.C. 103 (June 16, 2011). (1) The court rejected the capital defendant's argument that the trial court erred by failing to intervene ex mero motu at several points during the State's argument in the guilt-innocence phase. The defendant argued that the trial judge should have intervened when the prosecutor mischaracterized defense counsel's statements. Although the prosecutor overstated the extent of defense counsel's concessions, the statements constituted a lapsus linguae that were neither calculated to mislead nor prejudicial. The defendant argued that the trial court should have intervened when the prosecutor remarked about the defendant's failure to introduce evidence supporting his diminished capacity defense. The court concluded that the State is free to point out the defendant's failure to produce evidence to refute the State's case. Furthermore, it rejected the defendant's contention that the prosecutor's statements misstated the law on diminished capacity. The defendant argued that the prosecutor's statement about diminished capacity misled the jury into believing that the defense was not established because the defense failed to prove remorse or efforts to help the victims. Any impropriety in this argument, the court concluded, was cured by the trial court's correct instructions on the defense. The defendant argued that the prosecutor misstated the law as to the intent required for first-degree murder. However, the prosecutor's statement was not improper. In sum, the court concluded that the prosecutor's statements, both individually and cumulatively, were not so grossly improper as to have required the trial court to intervene ex mero motu. (2) The court rejected the defendant's argument that during the State's closing argument in the sentencing phase the prosecutor erroneously called upon the jury to disregard mercy altogether. The court found that the arguments in question, cautioning jurors against reaching a decision on the basis of their "feelings" or "hearts," did not foreclose considerations of mercy or sympathy; instead, the prosecutor asked the jury not to impose a sentence based on emotions divorced from the facts presented in the case.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). (1) No gross impropriety occurred in closing argument in the guilt-innocence phase of a capital trial when the prosecutor (a) asserted that a mark on the victim's forehead was caused by the defendant's shoe and evidence supported the statement; (b) suggested that the defendant's accomplice committed burglary at the victim's home; the comment only referred the accomplice, neither the defendant nor the accomplice were charged with burglary, and the trial court did not instruct the jury to consider burglary; or (c) suggested that the victim was killed to eliminate her as a witness when the argument was a reasonable extrapolation of the evidence made in the context of explaining mental state. (2) The trial court did not err by failing to intervene ex mero motu during the State's opening statement during the sentencing phase of a capital trial when the prosecutor stated that the "victim and the victim's loved ones would not be heard from." According to the defendant, the statement inflamed and misled the jury. The prosecutor's statement described the nature of the proceeding and provided the jury a forecast of what to expect. (3) The trial court did not err by failing to intervene ex mero motu during closing argument in the sentencing phase of a capital trial when the prosecutor (a) made statements regarding evidence of aggravating circumstances; the court rejected the argument that the prosecutor asked the jury to use the same evidence to find more

than one aggravating circumstance; (b) properly used a neighbor's experience to convey the victim's suffering and nature of the crime; (c) offered a hypothetical conversation with the victim's father; (d) referred to "gang life" to indicate lawlessness and unstrained behavior, and not as a reference to the defendant being in a gang or that the killing was gang-related; also the prosecutor's statements were supported by evidence about the defendant's connection to gangs.

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014), *temporary stay allowed*, __ N.C.__, 767 S.E.2d 53 (Dec. 2, 2014). In this DWI case, the court rejected the defendant's argument that comments made during the prosecutor's final argument and detailed in the court's opinion were so grossly improper that the trial court should have intervened ex mero motu. Among the challenged comments were those relating to the defendant's status as an alcoholic and the extent to which he had developed a tolerance for alcoholic beverages. Finding that "the prosecutor might have been better advised to refrain from making some of the challenged comments," the court declined to find that the arguments were so grossly improper that the trial court should have intervened ex mero motu.

State v. Harris, __ N.C. App. __, 763 S.E.2d 302 (Sept. 16, 2014). In a case where the defendant was convicted of sexual battery and contributing to the abuse or neglect of a juvenile, the trial court did not err by failing to intervene ex mero motu during the prosecutor's final argument to the jury. The defendant challenged the prosecutor's statement that he had ruined the victim's childhood and that if it failed to find the victim's testimony credible, it would be sending a message that she would need to be hurt, raped, or murdered before an alleged abuser could be convicted.

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 392 (July 1, 2014) (No. COA13-925). Although the prosecutor's statements during closing argument in a robbery case were improper, a new trial was not required. The prosecutor argued that if the defendant "had gotten hold" of a rifle loaded with 14 rounds, "one each for you jurors," "this might have been an entirely different case." The court held that "the remarks by the State were improper, and should have been precluded by the trial court." However, under the appropriate standards of review, a new trial was not required.

State v. Marino, __ N.C. App. __, 747 S.E.2d 633 (Aug. 20, 2013). In this DWI case, the trial court did not err by failing to intervene ex mero motu to the State's closing arguments. The defendant argued that certain remarks were improper because they speculated that he had driven impaired on other occasions; were sarcastic and provoked a sense of class envy; tended to shift the burden of proof to the defendant; and indicated that the defendant's witnesses were hypocrites and liars. Without discussing the specific remarks, the court held that "although the State pushed the bounds of impropriety" the remarks were not so grossly improper as to require intervention ex mero motu.

State v. Storm, __ N.C. App. __, 743 S.E.2d 713 (July 2, 2013). In a murder case, the trial court was not required to intervene ex mero motu when the prosecutor argued to the jury that depression might make you suicidal but it "doesn't make you homicidal." The defendant's witness had testified that depression can make a person suicidal. In context, the prosecutor's argument attacked the relevance, weight, and credibility of that testimony.

State v. Johnson, 214 N.C. App. 436 (Aug. 16, 2011). The trial court did not abuse its discretion by allowing the State to display an enhanced version (frame-by-frame presentation) of a video recording during closing argument and jury deliberations. The trial court correctly determined that the enhanced version was not new evidence since the original video had been presented in the State's case.

State v. Edmonds, 212 N.C. App. 575 (June 21, 2011). In a child sex case, the court rejected the defendant's argument that the trial court erred by ruling that the defendant could not argue that his nephew or someone else had assaulted the victim. It concluded: "Although defendant argues that he was improperly prevented from arguing that someone else raped the victim, defendant is unable to point to specific portions of his closing argument which were limited by the trial court's ruling, as closing arguments in this case were not recorded. Therefore, defendant has not met his burden of establishing the trial court's alleged error within the record on appeal. This court will not 'assume error by the trial judge when none appears on the record before [it].'"

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). The court rejected the defendant's argument that plain error occurred when the prosecutor misrepresented the results of the SBI Crime Lab phenolphthalein blood tests. At trial, a SBI agent explained that a positive test result would provide an indication that blood could be present. On cross-examination, he noted that certain plant and commercially produced chemicals may give a positive result. The defendant argued that the prosecutor misrepresented the results of the phenolphthalein blood tests during closing argument by stating that the agent tested the clothes and they tested positive for blood. Based on the agent's testimony, this argument was proper.

State v. Mills, 205 N.C. App. 577 (July 20, 2010). The trial court did not abuse its discretion by denying the defendant's mistrial motion based on the prosecutor's closing statement. During closing arguments in this murder case, defense counsel stated that "a murder occurred" at the scene in question. In his own closing, the prosecutor stated that he agreed with this statement by defense counsel. Although finding no abuse of discretion, the court "remind[ed] the prosecutor that the State's interest in a criminal prosecution is not that it shall win a case, but that justice shall be done."

Jury Deliberations

Deadlock/Coerced Verdict

State v. May, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). The court reversed *State v. May*, __ N.C. App. __, 749 S.E.2d 483 (2013), which had held that the trial court committed reversible error when charging a deadlocked jury. The court of appeals held that the trial court erred when it instructed the deadlocked jury to resume deliberations for an additional thirty minutes, stating: "I'm going to ask you, since the people have so much invested in this, and we don't want to have to redo it again, but anyway, if we have to we will." The court of appeals concluded that instructing a deadlocked jury regarding the time and expense associated with the trial and a possible retrial resulted in coercion of a deadlocked jury in violation of the N.C. Constitution.

The court of appeals went on to hold that the State had failed to show that the error was harmless beyond a reasonable doubt. The State petitioned for discretionary review on whether the court of appeals had erred in holding that the State had the burden of proving that the purported error in the trial court's instructions was harmless beyond a reasonable doubt. The supreme court reversed, distinguishing *State v. Wilson*, 363 N.C. 478, 484 (2009) (claim that instructions given to less than the full jury violated the constitution was preserved as a matter of law), and concluding that because the defendant failed to raise the constitutional coercive verdict issue below, it was waived on appeal. Nevertheless, the supreme court continued, because the alleged constitutional error occurred during the trial court's instructions to the jury, it could review for plain error. The court also concluded that because the defendant failed to assert at trial his argument that the instructions violated G.S. 15A-1235 and because the relevant provisions in G.S. 15A-1235 were permissive and not mandatory, plain error review applied to that claim as well. Turning to the substance of the claims, the court concluded that the trial court's instructions substantially complied with G.S. 15A-1235. It further held that "Assuming without deciding that the court's instruction to continue deliberations for thirty minutes and the court's isolated mention of a retrial were erroneous, these errors do not rise to the level of being so fundamentally erroneous as to constitute plain error."

State v. Massenburg, __ N.C. App. __, 759 S.E.2d. 703 (July 1, 2014). Where the trial court's *Allen* charge was in substantial compliance with G.S. 15A-1235, no coercion of the verdict occurred. The defendant argued that because the *Allen* charge failed to instruct the jury in accordance with section G.S. 15A-1235(b)(3) that "a juror should not hesitate to reexamine his own views and change his opinion if convinced it is erroneous," he was entitled to a new trial. Acknowledging that the charge failed to repeat G.S. 15A-1235(b)(3) verbatim, the court concluded that the trial court's instructions contained the substance of the statute and fairly apprised the jurors of their duty to reach a consensus after open-minded debate and examination without sacrificing their individually held convictions merely for the sake of returning a verdict.

State v. Blackwell, __ N.C. App. __, 747 S.E.2d 137 (Aug. 6, 2013). (1) The trial court did not coerce a verdict by giving an *Allen* charge pursuant to G.S. 15A-1235. The jury sent the judge a note at 3:59 pm, after 70 minutes of deliberations, indicating that they were split 11-to-1 and that the one juror "will not change their mind." The court rejected the defendant's argument that a jury's indication that it may be deadlocked requires the trial court to immediately declare a mistrial, finding it inconsistent with the statute and NC case law. (2) The trial court did not coerce a verdict when it told the deliberating jury, in response to the same note about deadlock, that if they did not reach a verdict by 5 pm, he would bring them back the next day to continue deliberations. Although threatening to hold a jury until they reach a verdict can under some circumstances coerce a verdict, that did not happen here. After receiving the note at approximately 4:00 pm, the trial judge told the jurors that although they were divided, they had been deliberating for only approximately 75 minutes. The judge explained that he was going to have them continue to deliberate for the rest of the afternoon and that if they needed more time they could resume deliberations the next day. The trial judge further emphasized that the jurors should not rush in their deliberations and reminded them that it was "important that every view of the jury be considered, and that you deliberate in good faith among yourselves." The court found that these statements cannot be viewed as coercive.

State v. Summey, __ N.C. App. __, 746 S.E.2d 403 (Aug. 6, 2013). The trial court did not coerce a verdict by instructing the jurors to continue deliberating after they three times indicated a deadlock. Although the trial court did not give an *Allen* instruction every time, G.S. 15A-1235 does not require the trial court to do so every time the jury indicates that it is deadlocked.

State v. Mason, 222 N.C. App. 223 (Aug. 7, 2012). The trial court did not impermissibly coerce a verdict. While deliberating, the jury asked to hear certain trial testimony again. The trial judge initially denied the request. After the jury indicated that it could not reach a verdict, the trial judge asked if it would be helpful to have the testimony played back. This was done and the trial judge gave an *Allen* instruction.

State v. Lee, 218 N.C. App. 42 (Jan. 17, 2012). The court rejected the defendant's argument that the trial court's instructions to the jury coerced a verdict. The jury retired to begin deliberations at 3:38 p.m. At 5:51 p.m., the trial judge brought the jury into the courtroom to inquire about its progress. The jury indicated that it had reached unanimous verdicts on two of the four charges. The trial judge then allowed a twenty-minute recess, giving the following challenged instruction:

> What I am going to do at this point is allow you to take a recess for about 20 minutes[.] If anyone needs during this 15 or 20 minute recess to call someone, a family member, to let them know that you are going to be delayed – but we are going to stay here this evening with a view towards reaching a unanimous verdict on the other two. That's where we are. I want everyone to know that. If you need to call someone to let them know you will be delayed, that's fine.

After the recess, the jury resumed its deliberations. Eleven minutes later the jury returned unanimous verdicts in all four cases. Considering the totality of the circumstances, the instructions were not coercive.

State v. Phillpott, 213 N.C. App. 468 (July 19, 2011). The trial court did not abuse its discretion by refusing to declare a mistrial and instead allowing the jury to go home and return the next day to continue deliberating. The jury deliberated approximately 7 hours over the course of two days; at the end of the day, when asked whether they wished to continue deliberating or come back the next day, a juror indicated that nothing would "change[.]" The trial judge ordered the jury to return the next day. They did so and reached a verdict.

Non-Juror Entry into Jury Room

State v. Ross, 27 N.C. App. 379 (Oct. 19, 2010). The trial court's entry into the jury room during deliberations to determine the jury's progress was not subject to plain error review. However, the court admonished the trial court that it should refrain from such conduct "to avoid the possibility of improperly influencing the jury and to avoid disruptions in the juror's deliberation process."

Request for Transcripts/Exhibits & Related Issues

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). The trial court did not violate G.S. 15A-1233 by providing a preemptive instruction that denied the jury an opportunity to make any evidentiary requests. The court concluded that no such preemptive instruction was given; the

trial court instructed that although no transcript existed, it would consider requests to review testimony on a case by case basis and attempt to accommodate requests if necessary.

State v. Hinton, __ N.C. App. __, 738 S.E.2d 241 (Mar. 19, 2013). The trial court committed prejudicial error by failing to exercise discretion in responding to the deliberating jury's request to review evidence. The trial court indicated that the requested information was "not in a form which can be presented to [the jury.]" The court found that this statement "demonstrated a belief that [the trial court] was not capable of complying with the jury's transcript request" and that as a result the trial court failed to exercise discretion in responding to the jury's request. [Author's note: For the proper procedure for responding to such a request by the jury, see my Bench Book section here.]

State v. Hatfield, __ N.C. App. __, 738 S.E.2d 236 (Mar. 5, 2013). The court reversed and remanded for a new trial where the trial court failed to exercise its discretion regarding the jury's request to review the victim's testimony and the error was prejudicial. Responding to the jury's request, the trial court stated, in part, "We can't do that." This statement suggests that the trial court did not know its decision was discretionary.

State v. Mason, 222 N.C. App. 223 (Aug. 7, 2012). Although the trial court erred by sending exhibits to the jury deliberation room over objection of defense counsel, the error was not prejudicial. The deliberating jury asked to review a number of exhibits. After consulting with counsel outside of the presence of the jury the trial court directed that certain items be sent back to the jury. Defense counsel objected. Under G.S. 15A-1233, it was error for the court to send the material to the jury room over the defendant's objection.

State v. Harrison, 218 N.C. App. 546 (Feb. 7, 2012). (1) The trial court erred when it responded to the deliberating jury's request to review evidence by sending the requested evidence back to the jury room instead of conducting the jury to the courtroom, as required by G.S. 15A-1233. The defendant however suffered no prejudice. (2) The trial court erred when it allowed the jury to review a statement that had not been admitted in evidence. The defendant however suffered no prejudice.

State v. Garcia, 216 N.C. App. 176 (Oct. 4, 2011). The trial court properly exercised its discretion when denying the jury's request to review testimony. Although the trial court's statements to the jury indicate it thought that a review of that testimony was not possible (statements that normally suggest a failure to exercise discretion), the trial court had previously discussed with counsel the possibility of having the testimony read to the jury. The trial court was aware it had the ability to grant the request, but exercised its discretion in declining to do so.

State v. Williams, 215 N.C. App. 412 (Sept. 6, 2011). The trial court violated G.S. 15A-1233 by responding to a jury request to review evidence and sending the evidence back to the jury room instead of bringing the jury into the courtroom. However, no prejudice resulted.

State v. Johnson, 214 N.C. App. 436 (Aug. 16, 2011). The trial court did not abuse its discretion by allowing the State to display an enhanced version (frame-by-frame presentation) of a video recording during closing argument and jury deliberations. The trial court correctly determined

that the enhanced version was not new evidence since the original video had been presented in the State's case.

State v. Stevenson, 211 N.C. App. 583 (May 3, 2011). The trial court did not abuse its discretion by denying the jury's request, made during deliberations, for a transcript of a witness's testimony. The trial court expressly denied the request in its discretion; there is no requirement that the trial judge provide any further explanation to demonstrate that he or she is in fact exercising discretion.

State v. Starr, 365 N.C. 314 (Dec. 9, 2011). The court modified and affirmed a decision of the court of appeals in *State v. Starr*, 209 N.C. App. 106 (Jan. 4, 2011) ((1) although the trial judge did not explicitly state that he was denying, in his discretion, the jury's request to review testimony, the judge instructed the jurors to rely on their recollection of the evidence that they heard and therefore properly exercised discretion in denying the request and (2) when defense counsel consents to the trial court's communication with the jury in a manner other than in the courtroom, the defendant waives his right to appeal the issue; here, although the trial judge failed to bring the jurors to the courtroom in response to their request to review testimony and instead instructed them from the jury room door, prior to doing so he asked for and received counsel's permission to instruct at the jury room door). The supreme court determined that the trial court violated G.S. 15A-1233(a) by failing to exercise its discretion in deciding whether to allow the jury to review testimony. The court noted that as a general rule, when the trial court gives no reason for a ruling that must be discretionary, it is presumed that the court exercised its discretion. However, when the trial court's statements show that it did not exercise discretion, the presumption is overcome. Here, the trial court's statement that "we don't have the capability . . . so we cannot provide you with that" overcomes the presumption the court exercised its discretion. However, the court found that the error was not prejudicial. The court provided the following guidance to trial court judges to ensure compliance with G.S. 15A-1233(a): The trial court must exercise its discretion to determine whether the transcript should be made available to the jury but it is not required to state a reason for denying access to the transcript. The trial judge may simply say, "In the exercise of my discretion, I deny the request," and instruct the jury to rely on its recollection of the trial testimony.

State v. Long, 196 N.C. App. 22 (Apr. 7, 2009). The trial court erred in not exercising its discretion when denying the jury's request for transcripts of testimony of the victim and the defendant.

State v. Ross, 207 N.C. App. 379 (Oct. 19, 2010). The bailiff's delivery of an exhibit to the jury, with an instruction from the trial judge that it would need to be returned to the trial court did not prejudice the defendant, even though the trial court violated G.S. 15A-1233(a) by failing to bring the jury into the courtroom when the jury's asked to review the exhibit. As to the instruction delivered by the bailiff, the court distinguished prior case law, in part, because the communication did not pertain to matters material to the case.

Questions from Jury

State v. Mackey, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). (1) In this murder and discharging a barreled weapon case in which the jury heard some evidence that the defendant was affiliated with a gang, the trial court did not deprive the defendant of his constitutional right to a fair and impartial jury by failing to question jurors about a note they sent to the trial court. The note read as follows:

> (1) Do we have any concern for our safety following the verdict? Based on previous witness gang [information] and large [number] of people in court during the trial[.] Please do not bring this up in court[.]
> (2) We need 12 letters—1 for each juror showing we have been here throughout this trial[.]

According to the defendant, the note required the trial court to conduct a voir dire of the jurors. The court disagreed, noting that the cases cited by the defendant dealt with the jurors being exposed to material not admitted at trial constituting "improper and prejudicial matter." Here, the information about gang affiliation was received into evidence and the number of people in the courtroom cannot be deemed "improper and prejudicial matter." (2) The trial court violated the defendant's constitutional right to presence at every stage of the trial by failing to disclose the note to the defendant. However, the error was harmless beyond a reasonable doubt. (3) Although the court agreed that the trial court should disclose every jury note to the defendant and that failing to do so violates the defendant's right to presence, it rejected the defendant's argument that such disclosure is required by G.S. 15A-1234. That statute, the court explained, addresses when a trial judge may give additional instructions to the jury after it has retired for deliberations, including in response to an inquiry by the jury. It continued: "nothing in this statute *requires* a trial judge to respond to a jury note in a particular way."

State v. Harvell, __ N.C. App. __, 762 S.E.2d 659 (Sept. 5, 2014). In this felony breaking and entering and larceny case the trial court did not violate G.S. 15A-1234 when responding to a question by the deliberating jury. The defendant argued that the trial failed to afford counsel an opportunity to be heard before responding the jury's question about the difference between "taking" and "carrying away." After receiving the question from the jury, the trial court told the parties that it was "going to tell [the jury] the definition of taking is to lay hold of something with one's hands;" neither party objected to the proposed instructions. The trial court then instructed the jury on this definition, demonstrated the difference between the two terms with a coffee cup, and repeated the elements of felony larceny. Although the trial court did not inform the parties of its visual demonstration, the statute only requires that the trial court inform the parties "generally" of the instruction that it intends to give, as was done here.

State v. Snelling, __ N.C. App. __, 752 S.E.2d 739 (Jan. 7, 2014). Distinguishing *State v. Hockett*, 309 N.C. 794, 800 (1983) (trial court erred by refusing to answer deliberating jury's question), the court held that the trial court properly answered the jury's question about the State's proof regarding the weapon in a robbery charge.

Jury Misconduct/Improper Contact with Jurors

State v. Salentine, __ N.C. App. __, 763 S.E.2d 800 (Oct. 21, 2014). In a case where the defendant was convicted of first-degree murder and sentenced to life in prison, the trial court did not abuse its discretion by denying the defendant's mistrial motions based on juror misconduct

and refusing the defendant's request to make further inquiry into whether other jurors received prejudicial outside information. During the sentencing phase of the trial, the trial court received a letter from juror Lloyd's brother-in-law claiming that Lloyd contacted his sister and said that one juror failed to disclose information during voir dire, that he went online and found information about the defendant, and that he asked his sister the meaning of the term malice. Upon inquiry by the court Lloyd denied that he conducted online research or asked about the meaning of the term malice. The trial court removed Lloyd from the jury and replaced him with an alternate. The defendant moved for a mistrial before and after removal of Lloyd and asked the trial court to make further inquiry of the other jurors to determine if they were exposed to outside information. Given the trial court's "searching" inquiry of Lloyd, the court found no abuse of discretion. With regard to the trial court's failure to inquire of the other jurors, the court emphasized that there is no rule that requires a court to hold a hearing to investigate juror misconduct when an allegation is made.

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). In a first-degree murder case where the defendant attempted to escape mid-trial, causing a lockdown of the courthouse and the trial court to order a security escort for the jury, the trial court's procedure for inquiring about the juror's exposure to media coverage was adequate. When court reconvened the next day, the trial court had the bailiff ask the jurors whether any of them had seen any reports about the events of the previous day. None indicated that they had. The trial court decided that it was unnecessary to individually inquire of the jurors and once the jury was back in the courtroom, the trial court asked them, as a whole, whether they had followed the court's instructions to avoid any coverage of the trial. None indicated that they had violated the court's instructions.

State v. Gurkin, __ N.C. App. __, 758 S.E.2d 450 (June 3, 2014). In this murder case, the trial court did not err by failing to make further inquiry when a prospective juror revealed during voir dire that prospective jurors were discussing the case in the jury room. Questioning of the juror revealed that "a few" prospective jurors spoke about whether they knew the defendant, what had happened, and news coverage of the crime. The juror indicated that no one knew the defendant or anything about the case. The trial court acted within its discretion by declining to conduct any further examination and limiting its inquiry to the juror's voir dire.

State v. Hester, 212 N.C. App. 286 (Oct. 4, 2011). In a case involving first-degree murder and other charges, the trial court did not err by denying the defendant's mistrial motion. On July 16th the trial court learned that while two jurors were leaving the courthouse the previous day after the verdict was rendered in the guilt phase, they saw and heard a man thought to be the defendant's brother, cursing and complaining about the trial. The two jurors informed the other jurors about this incident. On July 20th, the trial court learned that over the weekend juror McRae had discussed the trial with a spectator at the defendant's trial. The trial court removed McRae and replaced him with an alternate juror. The court concluded that there was no evidence of jury misconduct prior to or during deliberations as to guilt and that there was no prejudice as to sentencing because the defendant received a sentence of life imprisonment not death.

State v. Oliver, 210 N.C. App. 609 (Apr. 5, 2011). The trial court did not abuse its discretion by denying the defendant's mistrial motion. During a recess at trial, a juror was approached by a man who said, "Just quit, and I'll let you go home." Upon return to the courtroom, the trial court

inquired and determined that six jurors witnessed the incident. The trial court examined each juror individually and each indicated that the incident would not affect his or her ability to follow the trial court's instructions or review of the evidence. Given the trial court's response and the lack of evidence showing that the jurors were incapable of impartially rendering their verdict, the trial court did not abuse its discretion by denying the motion.

State v. Patino, 207 N.C. App. 322 (Oct. 5, 2010). The trial court did not abuse its discretion by failing to conduct an inquiry into allegations of jury misconduct or by denying the defendant's motion for a new trial. The day after the verdict was delivered in the defendant's sexual battery trial and at the sentencing hearing, defense counsel moved for a new trial, arguing that several jurors had admitted looking up, on the Internet during trial, legal terms (sexual gratification, reasonable doubt, intent, etc.) and the sexual battery statute. The trial court did not conduct any further inquiry and denied defendant's motion. Because definitions of legal terms are not extraneous information under Evidence Rule 606 and did not implicate defendant's constitutional right to confront witnesses against him, the allegations were not proper matters for an inquiry by the trial court.

State v. Boyd, 207 N.C. App. 632 (Nov. 2, 2010). The trial court did not abuse its discretion by denying a defense motion to dismiss a juror, made after the juror sent a letter to the trial judge requesting to see a DVD that had been played the previous day in court and stating that she thought the defendant's accent was fabricated. Despite being presented with only a suspicion of potential misconduct, the court made inquiry and determined that the juror had not made up her mind as to guilt or innocence and that she was willing to listen to the remainder of the evidence before considering guilt or innocence. The juror did not indicate that she was unable to accept a particular defense or penalty or abide by the presumption of innocence. Nothing suggested that the juror had spoken with other jurors about her thoughts, shared the note with anyone, or participated in any kind of misconduct. Given the trial court's examination, it was not required to allow the defense to examine the juror.

Jury Instructions

Charge Conference

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). Although the trial court erred by failing to fully comply with the statutory requirements regarding a charge conference at the sentencing phase of this felony child abuse case, no material prejudice resulted. The court noted that G.S. 15A-1231(b) requires the trial court to hold a charge conference, regardless of whether a party requests one, before instructing the jury on aggravating factors during the sentencing phase of a non-capital case. Here, the trial court informed the parties of the aggravating factors that it would charge, gave counsel a general opportunity to be heard at the charge conference, and gave counsel an opportunity to object at the close of the instructions. However, because the trial court failed to inform counsel of the instructions that it would provide the jury, it deprived the parties of the opportunity to know what instructions would be given, and thus did not comply fully with the statute.

State v. Hill, __ N.C. App. __, 760 S.E.2d 85 (July 15, 2014) (2014). Remanding for a new sentencing hearing, the court held that the trial court erred when it failed to hold a charge

conference before instructing the jury during the sentencing phase of the trial, as required by G.S. 15A-1231(b). The court concluded that holding a charge conference is mandatory, and a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial. The court rejected the State's argument that the statute should not apply to sentencing proceedings in non-capital cases. It concluded:

> If, as occurred in this case, the trial court decides to hold a separate sentencing proceeding on aggravating factors as permitted by [G.S.] 15A-1340.16(a1), and the parties did not address aggravating factors at the charge conference for the guilt-innocence phase of the trial, [G.S.] 15A-1231 requires that the trial court hold a separate charge conference before instructing the jury as to the aggravating factor issues.

Although G.S. 15A-1231(b) provides that "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant," in this case, the court noted, the trial court did not comply with the statute at all.

Additional Instructions

State v. Combs, 739 N.C. App. 584 (Mar. 19, 2013). The court rejected the defendant's argument that the trial court erred by failing to give additional jury instructions in open court and make them a part of the record as required by G.S. 15A-1234. Where, as here, the trial judge simply repeats or clarifies instructions previously given and does not add substantively to those instructions, the court's instructions are not "additional instructions" within the meaning of the statute.

Written Copies

State v. Haire, 205 N.C. App. 436 (July 20, 2010). The trial court did not abuse its discretion by declining to provide the jury with a written copy of the jury instructions when asked to do so by the jury.

In Response to Notes/Questions from the Jury

State v. Perry, __ N.C. App. __, 731 S.E.2d 714 (Sept. 18, 2012). Based on the circumstances of this felon in possession case, the trial court's failure to further inquire into and answer the jury's questions regarding constructive possession of the gun constituted plain error. The circumstances included the fact that the jury was instructed on actual possession even though the State had argued to the jury that there was no evidence of actual possession and that the jury was instructed on constructive possession when no evidence supported such an instruction.

State v. Price, 201 N.C. App. 153 (Nov. 17, 2009). The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by

informing the jury that the law prohibits replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Failure to Request in Writing

State v. Starr, 209 N.C. App. 106 (Jan. 4, 2011), *aff'd on other grounds*, 364 N.C. 314 (Dec. 9, 2011). In an assault on a firefighter with a firearm case, the trial court did not err by denying the defendant's request for a jury instruction on the elements of assault where the defendant failed to submit his requested instruction in writing.

State v. Bivens, 204 N.C. App. 350 (June 1, 2010). In a counterfeit controlled substance case, the trial court did not err by failing to give a jury instruction where the defense failed to submit the special instruction in writing.

Final Mandate

State v. Calderon, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this robbery case, no plain error occurred with respect to the trial court's not guilty mandate. The jury instructions for the offenses of armed and common law robbery conformed to the pattern jury instructions with one exception: the court did not expressly instruct the jury that it had a "duty to return a verdict of not guilty" if it had a reasonable doubt as to one or more of the enumerated elements of the offenses. Instead, for the offense of armed robbery, the court ended its charge to the jury with the following instruction: "If you do not so find or have a reasonable doubt as to one or more of these things, then you will not return a verdict of guilty of robbery with a firearm as to that defendant." For the offense of common law robbery, the court ended its charge similarly, substituting the words "common law robbery" for robbery with a firearm. Citing *State v. McHone*, 174 N.C. App. 289 (2005) (trial court erred by failing to instruct the jury that "it would be your duty to return a verdict of not guilty" if the State failed to meet one or more of the elements of the offense), the court held that the trial court's instructions were erroneous. However, it went on to hold that no plain error occurred, reasoning in part that the verdict sheet provided both guilty and not guilty options, thus clearly informing the jury of its option of returning a not guilty verdict.

State v. Jenrette, __ N.C. App. __, 763 S.E.2d 404 (Oct. 7, 2014). No plain error occurred with respect to the trial court's final mandate to the jury on a first-degree murder charge. The trial court instructed the jury that it could find the defendant guilty of first-degree murder as to victim Frink under the following theories: premeditation and deliberation, felony-murder, and lying in wait. After instructing the jury on all theories, the trial court continued: "If you do not so find or have a reasonable doubt as to one or more of these things, it would be your duty to return a verdict of not guilty." The defendant argued that the jury could have construed this not guilty mandate as applying solely to the theory of lying in wait—the last theory explained in the instructions--as opposed to the overall charge of first-degree murder. The court rejected that argument, concluding first that "[w]hile the better practice would have been for the trial court to

make clear to the jury that its final not guilty mandate applied to all three theories of first-degree murder, this — by itself — is not sufficient to establish plain error." Next the court examined the verdict sheet and concluded that it "clearly informed the jury of its option of returning a not guilty verdict regarding this charge." Finally, the court compared the not guilty mandate at issue with the analogous mandate regarding the first-degree murder charge as to a second victim, Jones. In the course of this examination, the court noted that "the final not guilty mandate in the Frink instruction is worded more appropriately than that in the Jones instruction," because the "former informed the jury of its 'duty' to return a verdict of not guilty while the latter merely stated that the jury 'would' return a not guilty verdict if the State failed to prove the defendant's guilt beyond a reasonable doubt." In the end, the court concluded that even if the trial court erred, the error did not rise to the level of plain error.

State v. Gosnell, __ N.C. App. __, 750 S.E.2d 593 (Dec. 3, 2013). Distinguishing *State v. McHone*, 174 N.C. App. 289, 294 (2005), the court held that no plain error occurred when the trial court failed to instruct that the jury must return a "not guilty" verdict if it was unable to conclude that the defendant committed first-degree murder on the basis of premeditation and deliberation. The court noted that the verdict sheet provided a space for a "not guilty" verdict and the trial court's instructions on second-degree murder and the theory of lying in wait comported with the *McHone* final mandate requirement. With respect to premeditation and deliberation, the instruction stated, in part: "If you do not so find or have a reasonable doubt as to one or more of these things you would not return a verdict of "guilty of first-degree murder" on the basis of malice, premeditation and deliberation."

State v. Boyd, 214 N.C. App. 294 (Aug. 2, 2011). Although the trial judge did not expressly instruct the jury that if it failed to find the required elements it must find the defendant not guilty, the defendant was not prejudiced by the trial court's alternative final mandate language ("If you do not so find . . . you will not return a verdict of guilty"). Notably, the verdict sheet provided an option of returning a not guilty verdict.

State v. Wright, 210 N.C. App. 697 (Apr. 5, 2011). Although the trial court erred by failing to give the final not guilty mandate, under the circumstances presented the error did not rise to the level of plain error.

Unanimous Verdict Issues

State v. Crockett, ___ N.C. App. ___, 767 S.E.2d 78_ (Dec. 16, 2014). In a failure to register (change of address) case, the court rejected the defendant's argument that the trial court violated his right to a unanimous verdict because it was not possible to determine the theory upon which the jury convicted. The trial court instructed the jury, in part, that the State must prove "that the defendant willfully changed his address and failed to provide written notice of his new address in person at the sheriff's office not later than three days after the change of address to the sheriff's office in the county with which he had last registered." The defendant argued that, based on this instruction, it was impossible to determine whether the jury based his conviction on his failure to register upon leaving the county jail, failure to register upon changing his address, registering at an invalid address, or not actually living at the address he had registered. The court concluded: "because any of these alternative acts satisfies the . . . jury instruction — that Defendant changed

his address and failed to notify the sheriff within the requisite time period — the requirement of jury unanimity was satisfied."

State v. Comeaux, __ N.C. App. __, 741 S.E.2d 346 (Dec. 31, 2012). In a case involving five counts of indecent liberties, no unanimity issue arose where the trial court framed the jury instructions in terms of the statutory requirements and referenced the indictments, each of which specified a different, non-overlapping time frame. The trial court's instructions distinguished among the five charges, directed the jurors to find the defendant guilty on each count only if they found that he committed the requisite acts within the designated time period, and each verdict sheet was paired with a particular indictment.

State v. Davis, 214 N.C. App. 175 (Aug. 2, 2011). In a case in which the defendant was indicted on 24 counts of indecent liberties, 6 counts of first-degree statutory sex offense, and 6 counts of second-degree sex offense, the court cited *State v. Lawrence*, 360 N.C. 368 (2006), and rejected the defendant's argument that because the indictments did not distinguish the separate acts, there was a possibility that the jury verdicts were not unanimous as to all of the convictions.

State v. Boyd, 214 N.C. App. 294 (Aug. 2, 2011). The defendant's right to a unanimous verdict was violated in a kidnapping case where the trial judge instructed on the theories of restraint, confinement and removal but no evidence supported a theory of removal.

State v. Wilson, 363 N.C. 478 (Aug. 28, 2009). The trial court violated the defendant's constitutional right to a unanimous verdict by instructing the jury foreperson during recorded and unrecorded bench conferences, out of the presence of the other jurors. The error was preserved for appeal notwithstanding the defendant's failure to object at trial.

State v. Price, 201 N.C. App. 153 (Nov. 17, 2009). The trial court did err by failing to ex mero motu investigate the competency of a juror after the juror sent two notes to the trial court during deliberations. After the juror sent a note saying that the juror could not convict on circumstantial evidence alone, the trial judge re-instructed the whole jury on circumstantial evidence and reasonable doubt. After resuming deliberations, the juror sent another note saying that the juror could not apply the law as instructed and asked to be removed. The trial judge responded by informing the jury that the law prohibits replacing a juror once deliberations have begun, sending the jury to lunch, and after lunch, giving the jury an *Allen* charge. The court found no abuse of discretion and noted that if the judge had questioned the juror, the trial judge would have been in the position of instructing an individual juror in violation of the defendant's right to a unanimous verdict.

Multiple Charges

State v. Jenrette, __ N.C. App. __, 763 S.E.2d 404 (Oct. 7, 2014). (1) Where the defendant was charged with two counts of felony assault on two separate victims, no error occurred where in its jury instruction the trial court referred to "the victim." The defendant argued that the trial court erred by failing to instruct the jury to consider each offense individually. The court disagreed, noting that the charges were clearly separated on the verdict sheets and the trial court referred to the two victims by name and stated that they were separate victims of two different counts of

assault. (2) The court came to the same conclusion with respect to two counts of conspiracy to commit murder.

State v. Barr, 218 N.C. App. 329 (Feb. 7, 2012). The trial court did not commit plain error by categorizing multiple identical charges in one instruction. The trial court gave the jury a copy of the instructions and separate verdict sheets clearly identifying each charge.

Multiple Defendants

State v. Oliphant, __ N.C. App. __, 747 S.E.2d 117 (Aug. 6, 2013). In a case involving two defendants, no plain error occurred where the trial court's instructions referred to the defendant and his accomplice collectively as "defendants." The court noted that when two or more defendants are tried jointly for the same offense, a charge that is susceptible to the construction that the jury should convict all if it finds one guilty is reversible error. However, it noted, it is not necessary to give wholly separate instructions as to each defendant when the charges and the evidence as to each defendant are identical, provided that the trial court either gives a separate final mandate as to each defendant or otherwise clearly instructs the jury that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant. Noting that the trial court failed to give a separate mandate as to each defendant or a separate instruction clarifying that the guilt or innocence of one defendant is not dependent upon the guilt or innocence of a codefendant, the court held that even if error occurred, it did not rise to the level of plain error.

State v. Adams, 212 N.C. App. 413 (June 7, 2011). In a case in which two defendants were convicted of attempted murder and felonious assault, the trial judge committed plain error by giving jury instructions that impermissibly grouped the defendants together in presenting the charges and issues to the jury. In its instructions, the trial court repeatedly referred to the defendants collectively (e.g.,: "For you to find *the defendants guilty* of this offense . . . ."; the State must prove "that [when] each of the defendant had this intent[,] *they performed an act* that was calculated and designed to accomplish the crime").

Use of Word "Victim"

State v. Walston, ___ N.C. ___, 766 S.E.2d 312 (Dec. 19, 2014). Based on long-standing precedent, the trial court's use of the term "victim" in the jury instructions was not impermissible commentary on a disputed issue of fact and the trial court did not err by denying the defendant's request to use the words "alleged victim" instead of "victim" in the jury charge in this child sexual abuse case. The court continued:

> We stress, however, when the State offers no physical evidence of injury to the complaining witnesses and no corroborating eyewitness testimony, the best practice would be for the trial court to modify the pattern jury instructions at defendant's request to use the phrase "alleged victim" or "prosecuting witness" instead of "victim."

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). Citing *State v. Walston*, ___ N.C. ___, 766 S.E.2d 312 (Dec. 19, 2014), the court held in this child sexual assault case that the trial court did not commit reversible error by using the word "victim" in the jury instructions.

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In this child sexual abuse case, the trial court did not err by referring to the victim as the "alleged victim" in its opening remarks to the jury and referring to her as "the victim" in its final jury instructions. The court distinguished *State v. Walston*, ___ N.C. App. ___, ___, 747 S.E.2d 720, 728 (2013), *rev'd*, __ N.C. __, 766 S.E.2d 312 (Dec. 19, 2014), on grounds that in this case the defendant failed to object at trial and thus the plain error standard applied. Moreover, given the evidence, the court could not conclude that the trial court's word choice had a probable impact on the jury's finding of guilt.

State v. Walton, __ N.C. App. __, 765 S.E.2d 54 (Oct. 21, 2014). No plain error occurred in a sexual assault case where the trial court referred to "the victim" in its jury instructions.

State v. Jones, __ N.C. App. __, 752 S.E.2d 212 (Dec. 17, 2013). In this child sex case, the trial court did not commit plain error by using the word "victim" in the jury instructions. The court distinguished *State v. Walston*, __ N.C. App. __, 747 S.E.2d 720, 726, 728 (2013) (trial court's use of the term "victim" in jury instructions was prejudicial error), *rev'd*, __ N.C. __, 766 S.E.2d 312 (Dec. 19, 2014). First, in *Walston*, the trial court denied the defendant's request to modify the pattern jury instructions to use the term "alleged victim" in place of the term "victim," and objected repeatedly to the proposed instructions; here, no such request or objection was made. Second, in *Walston*, the evidence was conflicting as to whether the alleged sexual offenses occurred; here no such conflict existed. Finally, in *Walston* the trial court committed prejudicial error; here, the defendant did not assert that he suffered any prejudice because of the use of the term "victim."

State v. Phillips, __ N.C. App. __, 742 S.E.2d 338 (May 21, 2013). The court rejected the defendant's argument that by using the phrase "the victim" while instructing the jury the trial court expressed an opinion regarding a fact in violation of G.S. 15A-1232; the court found that the defendant failed to show prejudice.

State v. Boyett, __ N.C. App. __, 735 S.E.2d 371 (Dec. 4, 2012). In a sexual assault case, the trial court did not err by using the word "victim" in the jury instructions. Use of this word did not constitute an opinion by the trial court regarding guilt and caused no prejudice.

Specific Instructions

For instructions on defenses, such as Accident and Entrapment, see Defenses below.

404(b) Evidence

State v. Oliver, 210 N.C. App. 609 (Apr. 5, 2011). No plain error occurred when the trial court instructed the jury on the 404(b) evidence using N.C. Pattern Jury Instruction – Crim. 104.15 but

declined to instruct that the evidence could not be used to prove defendant's character or that he acted in conformity therewith.

Acting in Concert

State v. Calderon, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this case involving three accomplices and charges of armed robbery, common law robbery and attempted armed robbery, the court rejected the defendant's argument that he could not have been convicted of attempted armed robbery under the theory of acting in concert because the trial court did not specifically instruct the jury on that theory in its charge on that count. The trial court gave the acting in concert instruction with respect to the counts of armed and common law robbery; it did not however repeat the acting in concert instruction after instructing on attempted robbery with a firearm. Considering the jury instructions as a whole and the evidence, the court declined to hold that the trial court's failure to repeat the instruction was likely to have misled the jury.

Alibi

State v. Smith, 206 N.C. App. 404 (Aug. 17, 2010). In a murder case, the trial court did not err by denying the defendant's request for an alibi instruction. The alibi defense rested on the defendant's testimony that he did not injure the child victim and that he left the child unattended in a bathtub for an extended period of time while meeting with someone else. The court concluded that this testimony was merely incidental to the defendant's denial that he harmed the child and did not warrant an alibi instruction. The testimony did not show that the defendant was somewhere which would have made it impossible for him to have been the perpetrator, given that the precise timing of the incident was not determined and the defendant had exclusive custody of the child before his death.

Allen Charge

State v. Blackwell, __ N.C. App. __, 747 S.E.2d 137 (Aug. 6, 2013). (1) The trial court did not coerce a verdict by giving an *Allen* charge pursuant to G.S. 15A-1235. The jury sent the judge a note at 3:59 pm, after 70 minutes of deliberations, indicating that they were split 11-to-1 and that the one juror "will not change their mind." The court rejected the defendant's argument that a jury's indication that it may be deadlocked requires the trial court to immediately declare a mistrial, finding it inconsistent with the statute and NC case law. (2) The trial court did not coerce a verdict when it told the deliberating jury, in response to the same note about deadlock, that if they did not reach a verdict by 5 pm, he would bring them back the next day to continue deliberations. Although threatening to hold a jury until they reach a verdict can under some circumstances coerce a verdict, that did not happen here. After receiving the note at approximately 4:00 pm, the trial judge told the jurors that although they were divided, they had been deliberating for only approximately 75 minutes. The judge explained that he was going to have them continue to deliberate for the rest of the afternoon and that if they needed more time they could resume deliberations the next day. The trial judge further emphasized that the jurors should not rush in their deliberations and reminded them that it was "important that every view of the jury be considered, and that you deliberate in good faith among yourselves." The court found that these statements cannot be viewed as coercive.

State v. Summey, __ N.C. App. __, 746 S.E.2d 403 (Aug. 6, 2013). The trial court did not coerce a verdict by instructing the jurors to continue deliberating after they three times indicated a deadlock. Although the trial court did not give an *Allen* instruction every time, G.S. 15A-1235 does not require the trial court to do so every time the jury indicates that it is deadlocked.

State v. Gettys, 219 N.C. App. 93 (Feb. 21, 2012). (1) The trial court did not abuse its discretion by giving an *Allen* charge. During the jury's second day of deliberations in a murder case, it sent a note to the trial judge stating that the jurors could not agree on a verdict. The trial judge inquired as to the numerical division, instructing the foreperson not to tell him whether the division was in favor of guilty or not guilty. The foreperson informed the judge that the jury was divided eleven to one. The trial court then gave additional instructions based on G.S. 15A-1235(b) and the jury found the defendant guilty almost two hours later. (2) Although the trial court's *Allen* instruction (which was almost identical to N.C.P.I.—Crim. 101.40) varied slightly from the statutory language, no error occurred.

State v. Gillikin, 217 N.C. App. 256 (Dec. 6, 2011). The trial court's instructions to a deadlocked jury unconstitutionally coerced guilty verdicts. The jury began their initial deliberations and continued deliberating for about three hours. Following a lunch break, the jury resumed deliberations. After an hour the jury sent the following note to the court: "We cannot reach a unanimous decision on 4 of the 5 verdicts." Upon receiving the note, the trial judge brought the jury back into the courtroom and gave the following instruction:

> It's not unusual, quite frankly, in any case for jurors to have a hard time reaching a unanimous verdict on one charge, much less four or five or more.
>
> So what the Court is prepared to do is remind you – and if you look at the jury instructions – that it is your duty to find the truth in this case and reach a verdict.
>
> What I'm going to do is understand that you guys are having some difficulty back there but most respectfully, direct once again you go back into that jury room, deliberate until you reach a unanimous verdict on all charges. You've not been deliberating that long. I understand it's difficult and I understand sometimes it can be frustrating, but what I ask you to do is continue to be civil, professional, cordial with each other, exchange ideas, continue to deliberate and when you've reached a unanimous verdict, let us know.
>
> Thank you so much. Once again, I ask you [to] retire to your jury room to resume deliberations.

The jury then resumed deliberations, and after approximately 90 minutes, returned three guilty verdicts. Although the trial judge's instructions contained the substance of G.S. 15A-1235(a) and (c), they did not contain the substance of G.S. 15A-1235(b) and as a result were coercive. Nowhere in the instructions was there a suggestion to the jurors that no juror is expected to "surrender his honest conviction" or reach an agreement that may do "violence to individual judgment." The court went onto conclude that the error was not harmless and ordered a new trial.

State v. Price, 201 N.C. App. 153 (Nov. 17, 2009). The court upheld the language in N.C.

Criminal Pattern Jury Instruction 101.40, instructing the jury that "it is your duty to do whatever you can to reach a verdict."

State v. Walters, 209 N.C. App. 158 (Jan. 4, 2011). Upon being notified that the jury was deadlocked, the trial judge did not err by giving an *Allen* instruction pursuant to N.C. Crim. Pattern Jury Instruction 101.40 and not G.S. 15A-1235, as requested by the defendant. Because there was no discrepancy between the pattern instruction and G.S. 15A-1235, it was not an abuse of discretion for the trial court to use the pattern instruction.

State v. Ross, 207 N.C. App. 379 (Oct. 19, 2010). The trial court did not abuse its discretion by failing to give an *Allen* instruction after the jury reported for the third time that it was deadlocked when the trial judge had given such an instruction 45 minutes earlier.

State v. Lackey, 204 N.C. App. 153 (May 18, 2010). The trial judge did not abuse his discretion in giving an *Allen* instruction. After an hour of deliberation, the jury foreman sent a note stating that the jury was not able to render a verdict and were split 11-1. The trial court recalled the jury to the courtroom and, with the consent of the prosecutor and defendant, instructed the jury in accordance with N.C.P.I. Criminal Charge 101.40, failure of the jury to reach a verdict. The jury then returned to deliberate for 30 minutes before the trial judge recessed court for the evening. The next morning, before the jury retired to continue deliberations, the trial court again gave the *Allen* instruction.

Breath Tests as Evidence of Guilt

State v. Macon, __ N.C. App. __, 741 S.E.2d 688 (May 7, 2013). In a DWI case, an officer's testimony supported an instruction that the jury could consider the defendant's refusal to take a breath test as evidence of her guilt.

Credibility

State v. King, __ N.C. App. __, 742 S.E.2d 315 (May 21, 2013). The trial court did not err by denying the defendant's request for a special instruction concerning the effect of drug use on a witness's credibility where the trial court gave the general witness credibility instruction.

Defendant's Failure to Testify

White v. Woodall, 572 U.S. __, 134 S. Ct. 1697 (April 23, 2014). Nothing in U.S. Supreme Court precedent clearly establishes a rule that the Fifth Amendment requires a trial judge in a capital case to give the penalty phase jury an instruction that they should draw no adverse inferences from the defendant's failure to testify. The Kentucky Supreme Court's rejection of such a claim was not an objectively unreasonable application of law.

Eyewitness Identification

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 116 (July 1, 2014) (No. COA13-661). The trial court did not err by refusing to instruct the jury about the results of recent research into factors

bearing upon the accuracy of eyewitness identification evidence. The eyewitness identification instruction requested by the defendant was eight pages long and strongly resembled a New Jersey jury instruction. The trial court declined to give the defendant's proffered instruction and gave an alternate one, as well as an instruction relating to the manner in which the jury should evaluate the validity of photographic identification procedures as required by G.S. 15A-284.52(d)(3), with this instruction including a lengthy recitation of the criteria for a proper identification procedure set out in G.S. 15A-284.52(b). Citing prior NC cases, the court held that "existing pattern jury instructions governing the manner in which jurors should evaluate the weight and credibility of the evidence and the necessity for the jury to find that the defendant perpetrated the crime charged beyond a reasonable doubt sufficiently address the issues arising from the presentation of eyewitness identification testimony." The court went on to note the absence of any evidentiary support for the requested instruction.

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 392 (July 1, 2014) (No. COA13-925). For the reasons discussed in the case summarized immediately above, the court held that the trial court did not err by refusing to give a jury instruction requested by the defendant.

Flight

State v. Harvell, __ N.C. App. __, 762 S.E.2d 659 (Sept. 5, 2014). In this felony breaking and entering and larceny case where the victim discovered the defendant in his home, the trial court did not err by instructing the jury regarding flight where the victim testified that when he approached his front door and saw the defendant in his living room, the defendant looked at the victim and ran out the back door.

State v. Davis, __ N.C. App. __, 738 S.E.2d 417 (Mar. 19, 2013). In a homicide case, the trial court did not err by instructing on flight. The State's evidence showed that officers were unable to locate the defendant for several months following the shooting. The defendant resided at his aunt's house before the 2:30 am shooting and instead of returning there, he left the state and went to Florida. The court rejected the defendant's argument that his presence in Florida, his home state, was not indicative of whether he avoided apprehension.

State v. Golden, __ N.C. App. __, 735 S.E.2d 425 (Dec. 4, 2012). The trial court erred by instructing on flight. The defendant fled from an officer responding to a 911 call regarding violation of a domestic violence protective order. After being arrested the defendant's vehicle was searched and he was charged with perpetrating a hoax on law enforcement officers by use of a false bomb on the basis of a device found in his vehicle. The defendant's initial flight cannot be considered as evidence of his guilt of the hoax offense. However, the error did not prejudice the defendant.

State v. Lawrence, 210 N.C. App. 73 (Mar. 1, 2011), *rev'd on other grounds*, 365 N.C. 506 (Apr. 13, 2012). The evidence was sufficient to warrant an instruction on flight. During the first robbery attempt, the defendant and a co-conspirator fled from a deputy sheriff. During the second attempt, the defendant fled from an armed neighbor. After learning of the defendant's name and address, an officer canvassed the neighborhood, looking for the defendant. The defendant was later arrested in another state.

State v. Bonilla, 209 N.C. App. 576 (Feb. 15, 2011). In a kidnapping, sexual assault, and murder case, the trial court did not err by instructing the jury on flight. The defendant and an accomplice left the victims bound, placed a two-by-four across the inside of the apartment door, hindering access from the outside, and exited through a window. Despite the fact that the defendant lived at the apartment, there was no indication he ever returned. Although a warrant for the defendant's arrest was issued immediately, ten years passed before the defendant was extradited.

State v. Bettis, 206 N.C. App. 721 (Sept. 7, 2010). There was sufficient evidence to support an instruction on flight. A masked man robbed a store and left in a light-colored sedan. Shortly thereafter, an officer saw a vehicle matching this description and a high speed chase ensued. The vehicle was owned by the defendant. The driver abandoned the vehicle; a mask and a gun were found inside. Although the defendant initially reported that his car was stolen, he later admitted that his report was false. The court rejected the defendant's argument that the instruction was improper because there was only circumstantial evidence that defendant was the person who fled the scene.

State v. Rainey, 198 N.C. App. 427 (Aug. 4, 2009). The trial judge did not err by instructing on flight where the defendant failed to appear for a court date in the case.

Honesty & Trustworthiness

State v. Clapp, __ N.C. App. __, 761 S.E.2d 710 (Aug. 5, 2014). In a child sexual assault case, the trial court did not err by refusing the defendant's request to instruct the jury that it could consider evidence concerning his character for honesty and trustworthiness as substantive evidence of his guilt or innocence. At trial, five witnesses testified that the defendant was honest and trustworthy. The defendant requested an instruction in accordance with N.C.P.J.I. 105.60, informing the jury that a person having a particular character trait "may be less likely to commit the alleged crime(s) than one who lacks the character trait" and telling the jury that, if it "believe[d] from the evidence [that the defendant] possessed the character trait" in question, it "may consider this in [its] determination of [Defendant's] guilt or innocence[.]" The trial court would have been required to deliver the requested instruction if the jury could reasonably find that an honest and trustworthy person was less likely to commit the crimes at issue in this case than a person who lacked those character traits. Although "an individual's honesty and trustworthiness are certainly relevant to an individual's credibility, we are unable to say that a person exhibiting those character traits is less likely than others to commit a sexual offense [such as the ones charged in this case]."

Jurisdiction

State v. Lalinde, __ N.C. App. __, 750 S.E.2d 868 (Dec. 3, 2013), *review allowed*, 367 N.C. 503 (June 11, 2014). Where the evidence showed that part of a child abduction occurred in North Carolina jurisdiction was established and no jury instruction on jurisdiction was required. The defendant took the child from North Carolina to Florida. The court noted that jurisdiction over interstate criminal cases is governed by G.S. 15A-134 ("[i]f a charged offense occurred in part in North Carolina and in part outside North Carolina, a person charged with that offense may be

tried in this State"). It was undisputed that the defendant picked up the child in North Carolina. Therefore, the child abduction occurred, at least in part, in North Carolina.

Proximate Cause

State v. Fisher, __ N.C. App. __, 745 S.E.2d 894 (Aug. 6, 2013). In this involuntary manslaughter case, the trial court did not commit plain error by failing to instruct the jury that foreseeability was an essential element of proximate cause. The court noted that foreseeability is an essential element of proximate cause. It further noted that a trial court should, as a general proposition, incorporate a foreseeability instruction into its discussion of proximate cause when the record reflects the existence of a genuine issue as to whether the injury which resulted from a defendant's allegedly unlawful conduct was foreseeable. But on the facts of this case, the court found that no plain error occurred.

Reasonable Doubt

State v. Turner, __ N.C. App. __, 765 S.E.2d 77 (Nov. 18, 2014). No plain error occurred when the trial court in its preliminary instructions before jury selection referred to reasonable doubt as "fair doubt" but correctly defined that term in its final instructions to the jury.

State v. Foye, 220 N.C. App. 37 (Apr. 17, 2012). The trial court did not commit plain error in its jury instruction on reasonable doubt. When reinstructing on this issue, the trial court gave the pattern instruction and added: "[r]emember, nothing can be proved 100 percent basically, but beyond a reasonable doubt. So you have to decide for yourself what is reasonable, what makes sense." The court also held that this additional instruction did not violate the trial court's duty of impartiality or coerce a verdict.

Verdict

State v. Rollins, 220 N.C. App. 443 (May 15, 2012). The trial court's jury instruction regarding the duty to reach a verdict did not coerce a guilty verdict. The relevant pattern instruction (N.C.P.I.--Crim. 101.35), based on G.S. 15A-1235(a), reads: "All twelve of you must agree to your verdict. You cannot reach a verdict by majority vote. When you have agreed upon a unanimous verdict(s) (as to each charge) your foreperson should so indicate on the verdict form(s)." Here, the trial court instructed: "You must be unanimous in your decision. In other words, all twelve jurors must agree. When you have agreed upon a unanimous verdict, your foreperson may so indicate on the verdict form that will be provided to you." The defendant argued that telling the jurors that they had to agree, rather than that they had to agree to a verdict, caused the jurors to erroneously construe the charge to be a mandatory instruction that a verdict must be reached. Although it concluded that the "pattern instruction more carefully instructs the jury," the court found that the instruction in this case, when viewed in context, was not coercive of the jury's verdict.

Willfully

State v. Breathette, 202 N.C. App. 697 (Mar. 2, 2010). In an indecent liberties case where the defendant alleged that she did not know the victim's age, the trial court did not err by declining the defendant's proposed instruction on willfulness which would have instructed that willfully means something more than an intention to commit the offense and implies committing the offense purposefully and designed in violation of the law. Instead, the trial court instructed that willfully meant that the act was done purposefully and without justification or excuse. Although not given verbatim, the defendant's instruction was given in substance.

Involuntary Commitment Procedures

State v. Hartley, 212 N.C. App. 1 (May 17, 2011). In a triple murder case in which the defendant asserted an insanity defense, the trial court did not err by failing to give the defendant's requested jury instruction on the commitment process and instead instructing the jury on the issue pursuant to N.C.P.J.I—Crim. 304.10. The pattern instruction adequately charged the jury regarding procedures upon acquittal on the ground of insanity.

Homicide

Accessory Before the Fact to Murder

State v. Grainger, ___ N.C. ___, 766 S.E.2d 280 (Dec. 19, 2014). In this murder case, the trial court did not err by denying the defendant's request for a jury instruction on accessory before the fact. Because the defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule and the defendant's conviction for first-degree murder under the theory of felony murder is supported by the evidence (including the defendant's own statements to the police and thus not solely based on the uncorroborated testimony of the principal), the court of appeals erred by concluding that a new trial was required.

Premeditation & Deliberation

State v. Baldwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court did not err by instructing the jury that it could consider wounds inflicted after the victim was felled in determining whether the defendant acted with premeditation and deliberation. The trial court instructed the jury:

> Neither premeditation nor deliberation are usually susceptible of direct proof. They may be proved by circumstances by which they may be inferred such as lack of provocation by the victim; conduct of the defendant before, during, and after the attempted killing; threats and declarations of the defendant; use of grossly excessive force; or inflictions of wounds after the victim is fallen.

The defendant argued this instruction was improper because there was no evidence that he inflicted wounds on the victim after the victim was felled. Following *State v. Leach*, 340 N.C. 236, 242 (1995) (trial court did not err by giving the instruction, "even in the absence of evidence to support each of the circumstances listed" because the instruction "informs a jury that the circumstances given are only illustrative"), the court found no error.

Instruction on Second-Degree Murder

State v. Sterling, __ N.C. App. __, 758 S.E.2d 884 (May 6, 2014). In this felony-murder case the trial court did not err by denying the defendant's request to instruct on second-degree murder. The underlying felony was armed robbery and the defendant's own testimony established all the elements of that offense.

State v. Rogers, __ N.C. App. __, 742 S.E.2d 622 (June 4, 2013). Where no evidence negated the State's proof of first-degree murder, the trial court did not err by denying the defendant's request for an instruction on second-degree murder.

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). In a case in which the defendant was charged with first-degree murder, the trial court did not err by denying the defendant's request for a second-degree murder charge where there was no evidence to negate the State's proof of every element of first-degree murder; the defendant's defense was simply an assertion that he did not shoot the victim.

State v. Miles, 222 N.C. App. 593 (Aug. 21, 2012), *aff'd per curiam,* 366 N.C. 503 (Apr. 12, 2013). In a case in which the defendant was convicted of first-degree murder, the trial court did not err by failing to instruct the jury on second-degree murder. The court found that the record supported the inference that the defendant murdered the victim after premeditation and deliberation. The defendant harassed the victim over the telephone at least 94 times and visited the victim's home at least twice; the defendant threatened the victim's life by voicemail on the day of the murder; the defendant stated his intention to murder the victim to a confidant; the defendant and the victim had a heated relationship and argued over money; the defendant anticipated a confrontation whereby he would use deadly force; the defendant crafted a false alibi; the defendant fled the scene leaving the victim to die; and the defendant sold his wife's R.V., which the jury could infer was the vehicle the defendant drove on the night of the murder, less than two months after the crime. "Most notably," the victim died as a result of a gunshot wound to the center back of the head, discharged at close range, indicating that the defendant not only inflicted a brutal, fatal wound with a deadly weapon, but that even if the defendant and the victim were fighting at the time, the victim's back was to defendant and the victim was fleeing or turning away at the time of his death. The court rejected the defendant's argument that certain facts suggested that a fight precipitated the murder and thus warranted an instruction on the lesser offense. It noted that even evidence of an argument, "without more, is insufficient to show that defendant's anger was strong enough to disturb his ability to reason and hinder his ability to premeditate and deliberate the killing."

State v. Laurean, 220 N.C. App. 342 (May 1, 2012). In a case in which the defendant was convicted of first-degree murder, the trial court did not err by failing to instruct the jury on second-degree murder. The defendant conceded that the evidence warranted an instruction on first-degree murder. However, he argued that because the evidence failed to illustrate the circumstances immediately preceding the murder, the jury should have been allowed to consider that he formed the intent to kill absent premeditation and deliberation and, therefore, was entitled to an instruction on second-degree murder. The court concluded that in the absence of evidence suggesting that the victim was killed without premeditation and deliberation, an instruction on

second-degree murder would be improper.

State v. Wiggins, 210 N.C. App. 128 (Mar. 1, 2011). In a murder case, the trial court did not commit plain error by failing to instruct the jury on the lesser-included offense of second-degree murder. For reasons discussed in the opinion, the evidence showed that the defendant acted with premeditation and deliberation.

State v. Bedford, 208 N.C. App. 414 (Dec. 7, 2010). The trial court did not err by declining to instruct the jury on second-degree murder when no evidence negated the State's evidence of first-degree murder. The defendant argued that the evidence showed that he killed the victim in a "frenzied, crack-fueled explosion" of a long-simmering "rage of jealousy." However, the court noted, premeditation and deliberation do not imply a lack of passion, anger or emotion. Nor, the court noted, does the defendant's possible drug intoxication support an inference that he did not premeditate and deliberate. The State presented evidence of the defendant's conduct and statements before the killing, including threats towards the victim; ill-will and previous difficulties between the parties; lethal blows rendered after the victim had been felled and rendered helpless; the brutality of the killing; and the extreme nature and number of the victim's wounds.

Instruction on Involuntary Manslaughter

State v. Hinnant, ___ N.C. App. ___, 768 S.E.2d 317 (Dec. 31, 2014). In this assault and second-degree murder case, the trial court did not err by denying the defendant's request to instruct the jury on involuntary manslaughter. Involuntary manslaughter is a killing without malice. However, where death results from the intentional use of a firearm or other deadly weapon, malice is presumed. Here, the defendant intentionally fired the gun under circumstances naturally dangerous to human life and the trial court did not err by refusing to give an instruction on involuntary manslaughter.

State v. Gurkin, __ N.C. App. __, 758 S.E.2d 450 (June 3, 2014). In this murder case, the trial court did not commit plain error by failing to submit involuntary manslaughter to the jury. The trial court submitted first-degree murder, second-degree murder, voluntary manslaughter, and not guilty to the jury. The jury found the defendant guilty of second-degree murder. By finding the defendant guilty of this offense, the jury necessarily found, beyond a reasonable doubt, that the defendant acted with malice. Involuntary manslaughter is a homicide without malice, a fact rejected by the jury.

State v. Epps, __ N.C. App. __, 752 S.E.2d 733 (Jan. 7, 2014), *aff'd, State v. Epps*, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015) (per curiam). In a first-degree murder case, the court held, over a dissent, that the trial court did not err by declining to instruct the jury on involuntary manslaughter. The evidence showed that the defendant fought with the victim in the yard. Sometime later the defendant returned to the house and the victim followed him. As the victim approached the screen door, the defendant stabbed and killed the victim through the screen door. The knife had a 10-12 inch blade, the defendant's arm went through the screen door up to the elbow, and the stab wound pierced the victim's lung, nearly pierced his heart and was approximately 4 1/2 inches deep. The court rejected the defendant's argument that his case was

similar to those that required an involuntary manslaughter instruction where the "defendant instinctively or reflexively lashed out, involuntarily resulting in the victim's death." Here, the court held, the "defendant's conduct was entirely voluntary."

Instruction on Voluntary/Self-Defense

State v. Hinnant, ___ N.C. App. ___, 768 S.E.2d 317 (Dec. 31, 2014). In this assault and second-degree murder case, the trial court did not err by refusing to instruct the jury on self-defense and by omitting an instruction on voluntary manslaughter. The court noted that the defendant himself testified that when he fired the gun he did not intend to shoot anyone and that he was only firing warning shots. It noted: "our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter 'while still insisting . . . that he did not intend to shoot anyone[.]'"

State v. Gaston, __ N.C. App. __, 748 S.E.2d 21 (Sept. 3, 2013). In this murder case, the trial court did not err by denying the defendant's request for jury instructions on self-defense and voluntary manslaughter. The defendant's theory was that the gun went off accidentally. Additionally, there was no evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm.

Assaults & DVPO Offenses

State v. Edgerton, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). In a case where the defendant was found guilty of violation of a DVPO with a deadly weapon, the court per curiam reversed and remanded for the reasons stated in the dissenting opinion below. In the decision below, *State v. Edgerton*, ___ N.C. App. ___, 759 S.E.2d 669 (2014), the court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se. The dissenting judge did not agree with the majority that any error rose to the level of plain error.

State v. Clark, 201 N.C. App. 319 (Dec. 8, 2009). In a case in which the defendant was convicted, among other things, of assault with a deadly weapon on a governmental official, the trial court committed plain error by failing to instruct the jury on the lesser included offense of misdemeanor assault on a government official. Because the trial court did not conclude as matter of law that the weapon was a deadly one, but rather left the issue for the jury to decide, it should have instructed on the lesser included non-deadly weapon offense.

Sex Crimes

State v. Stepp, ___ N.C. ___, 767 S.E.2d 324 (Jan. 23, 2015) (per curiam). For reasons stated in the dissenting opinion below, the court reversed the court of appeals. In the decision below, *State v. Stepp*, __ N.C. App. __, 753 S.E.2d 485 (Jan. 21, 2014), the majority held that the trial court committed reversible error by failing to instruct the jury on an affirmative defense to a felony that was the basis of a felony-murder conviction. The jury convicted the defendant of first-degree felony-murder of a 10-month old child based on an underlying sexual offense felony. The jury's

verdict indicated that it found the defendant guilty of sexual offense based on penetration of the victim's genital opening with an object. At trial, the defendant admitted that he penetrated the victim's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by G.S. 14-27.1(4), that the penetration was for "accepted medical purposes," specifically, to clean feces and urine while changing her diapers. The trial court denied the request. The court of appeals found this to be error, noting that the defendant offered evidence supporting his defense. Specifically, the defendant testified at trial to the relevant facts and his medical expert stated that the victim's genital opening injuries were consistent with the defendant's stated purpose. The court of appeals reasoned:

> We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent – or another charged with the caretaking of an infant – from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

(Footnote omitted). The court of appeals added that in this case, expert testimony was not required to establish that the defendant's conduct constituted an "accepted medical purpose." The dissenting judge did not believe that there was sufficient evidence that the defendant's actions fell within the definition of accepted medical purpose and thus concluded that the defendant was not entitled to an instruction on the affirmative defense. The dissenting judge reasoned that for this defense to apply, there must be "some direct testimony that the considered conduct is for a medically accepted purpose" and no such evidence was offered here.

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge.

State v. Carter, 366 N.C. 496 (April 12, 2013). The court reversed the decision below in *State v. Carter*, 216 N.C. App. 453 (Nov. 1, 2011) (in a child sexual offense case, the trial court committed plain error by failing to instruct on attempted sexual offense where the evidence of penetration was conflicting), concluding that the defendant failed to show plain error. The court held that when applying the plain error standard

> [t]he necessary examination is whether there was a "probable impact" on the verdict, not a possible one. In other words, the inquiry is whether the defendant has shown that, "absent the error, the jury probably would have returned a different verdict." Thus, the Court of Appeals' consideration of what the jury "could rationally have found," was improper.

Slip Op at 7 (citations omitted). Turning to the case at hand, the court found even if the trial court had erred, the defendant failed to show a probable impact on the verdict.

State v. Stephens, __ N.C. App. __, 758 S.E.2d 695 (June 3, 2014). In a multi-count indecent liberties with a student case, the trial court did not err by failing to instruct the jury using the specific acts alleged in the amended bill of particulars. The trial court properly instructed the jury

that it could find the defendant guilty if it concluded that he willfully took "any immoral, improper, or indecent liberties" with the victim. The actual act by the defendant committed for the purpose of arousing himself or gratifying his sexual desire was immaterial. The victim's testimony included numerous acts, any one of which could have served as the basis for the offenses.

State v. Agustin, __ N.C. App. __, 747 S.E.2d 316 (Aug. 20, 2013). In a rape of a child by an adult case, the trial court did not commit plain error by failing to instruct the jury on the lesser offense of first-degree rape where there was no dispute that the defendant was at least 18 years of age.

State v. Treadway, 208 N.C. App. 286 (Dec. 7, 2010). In a child sexual offense case in which the indictment specified digital penetration and the evidence supported that allegation, the trial court was not required to instruct the jury that it only could find the defendant guilty if the State proved the specific sex act stated in the indictment.

Burglary

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). The trial court did not commit plain error by failing to define larceny in instructions it provided to the jury on burglary. Because evidence was presented permitting the inference that the defendants intended to steal property and there was no evidence suggesting that they intended to merely borrow it, the jury did not need a formal definition of the term "larceny" to understand its meaning and to apply that meaning to the evidence.

State v. Brown, 221 N.C. App. 383 (June 19, 2012). In a burglary case, the trial court did not err by failing to reiterate an instruction on the doctrine of recent possession when instructing the jury on the lesser-included offense of felonious breaking or entering. The trial court properly instructed the jury on felonious breaking and entering by describing how the elements of that offense differed from first-degree burglary, an offense for which they had already received instructions. By describing the differences in charges the trial court left the recent possession instruction intact and applicable to the lesser charge of felonious breaking and entering.

State v. Speight, 213 N.C. App. 38 (June 21, 2011). In a burglary case, instructions which allowed the jury to find the defendant guilty if they found that he intended to commit a felony larceny, armed robbery, *or* sexual offense did not impermissibly allow for a non-unanimous verdict.

Kidnapping

State v. Boyd, 366 N.C. 548 (June 13, 2013). For the reasons stated in the dissenting opinion below, the court reversed *State v. Boyd*, 222 N.C. App. 160 (Aug. 7, 2012), and held that no plain error occurred in a kidnapping case. In the decision below, the court of appeals held, over a dissent, that the trial court committed plain error by instructing the jury on a theory of second degree kidnapping (removal) that was not charged in the indictment or supported by evidence. The dissenting judge did not believe that the error constituted plain error.

Frauds

State v. Barker, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In an obtaining property by false pretenses case, the trial did not err by failing to specify in the jury instructions the misrepresentation made by defendant or the property the defendant received. Noting that the trial court used the standard pattern jury instruction, N.C.P.I--Crim. 219.10, the court found no error.

Impaired Driving

State v. Beck, __ N.C. App. __, 756 S.E.2d 80 (April 1, 2014). In this impaired driving case, the trial court did not err by denying the defendant's requested special jury instruction and instructing instead using Pattern Jury Instruction 270.20A. The special instruction would have informed the jury that the results of the chemical analysis did not create a presumption that the defendant was impaired or that the defendant had an alcohol concentration of .08 or greater; the jury was permitted to find that the defendant had an alcohol concentration of .08 or greater based on the results of the chemical analysis but was not required to do so; and the jury was allowed to consider the credibility and weight to be accorded to the results of the chemical analysis.

Miscellaneous Issues

State v. McGee, __ N.C. App. __, 758 S.E.2d 661 (June 3, 2014). (1) In an involuntary manslaughter case where a death occurred during a high speed chase by a bail bondsman in his efforts to arrest a principal, the trial court did not err by instructing the jury that bail bondsmen cannot violate motor vehicle laws in order to make an arrest. While the statute contains specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles, no provision exempts a bail bondsman from complying with speed limits when pursuing a principal. (2) The trial court did not err by failing to submit to the jury the question whether the defendant's means in apprehending his principal were reasonable. Under the law the defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. It concluded:

> Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

State v. Kelly, 221 N.C. App. 643 (July 17, 2012). The trial court did not err by refusing to instruct the jury on jury nullification.

State v. Surratt, 218 N.C. App. 308 (Jan. 17, 2012). No plain error occurred when the trial judge referred to the complainant as the victim several times in the jury instructions.

State v. Owens, 205 N.C. App. 260 (July 6, 2010). In a case involving a charge of possession of implements of housebreaking, the trial court erred by instructing the jury that bolt cutters, vice grips, channel lock pliers, flashlights, screwdrivers, a hacksaw, and a ratchet and socket are implements of housebreaking. The instruction was tantamount to a peremptory instruction that the tools at issue were implements of housebreaking. However, the error was not plain error.

Law of the Case

State v. Lewis, 365 N.C. 488 (Apr. 13, 2012). Affirming the court of appeals, the court held that on a retrial the trial court erred by applying the law of the case and denying the defendant's motion to suppress. At the defendant's first trial, he unsuccessfully moved to suppress the victim's identification as unduly suggestive. That issue was affirmed on appeal. At the retrial, the defense filed new motions to suppress on the same grounds. However, at the pretrial hearings on these motions, the defense introduced new evidence relevant to the reliability of the identification. The State successfully argued that the law of the case governed and that the defendant's motions must be denied. After the defendant was again convicted, he appealed and the court of appeals reversed on this issue. Affirming that ruling the court noted that "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." It then went on to affirm the court of appeals' holding that the retrial court erred in applying the doctrine of the law of the case to defendant's motion to suppress at the retrial.

Mistrial

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In this robbery case, the trial court did not err by denying the defendant's mistrial motion made after an officer testified that the defendant told him that he was turning himself in on a failure to appear charge issued in connection with unrelated drug charges. The defendant failed to timely object to the officer's testimony and any prejudice resulting from it was eliminated by the trial court's curative instruction and the defendant's own trial testimony.

State v. Newson, ___ N.C. App. ___, 767 S.E.2d 913 (Feb 3, 2015). The trial court did not err by denying the pro se defendant's motion for mistrial asserting that the jury was prejudiced against him. The record revealed that members of the jury did seem to be frustrated with the pro se defendant who was disruptive in court and asked rambling and irrelevant questions of witnesses. Their frustration was demonstrated through notes to the trial court and the fact that some members stood up several times in apparent exasperation during the proceedings. However, the court concluded that where a defendant was "prejudiced in the eyes of the jury by his own misconduct, he cannot be heard to complain." (quotation omitted).

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). The trial court did not err by denying the defendant's motion for a mistrial where the motion was based on the defendant's own misconduct in the courtroom.

State v. Smith, __ N.C. App. __, 736 S.E.2d 847 (Feb. 5, 2013). In a resist, delay and obstruct case arising out of an incident of indecent exposure, the trial court did not abuse its discretion by

denying the defendant's mistrial motion when an officer testifying for the State indicated that the defendant said he was a convicted sex offender. The trial court sustained the defendant's objection, granted the defendant's motion to strike, and gave the jury a curative instruction.

State v. Glenn, 221 N.C. App. 143 (June 5, 2012). The trial court did not abuse its discretion by denying the defendant's motion for a mistrial made after three law enforcement officers, who were witnesses for the State, walked through the jury assembly room on their way to court while two members of the jury were in the room. The trial court had found that the contact with jurors was inadvertent and that there was no conversation between the officers and the jurors.

State v. Sistler, 218 N.C. App. 60 (Jan. 17, 2012). The trial court did not abuse its discretion in this murder case by denying the defendant's motion for a mistrial made in response to a statement by the prosecutor during the State's direct examination of a witness that "[t]here was testimony in this case that a shot was fired from a shotgun in the hallway of the residence." The court agreed with the defendant that the statement was misleading given that no witness had testified that the shotgun was fired in the hallway. However, trial court took steps to mitigate the impact of the statement by sustaining the defendant's objection to it and instructing the jury to disregard the statement. The court also rejected the defendant's argument that his mistrial motion should have been granted because the prosecutor's statement violated an earlier suppression order. The suppression order prohibited the State from introducing testimony relating to SBI ballistics testing regarding the shotgun. The prosecutor's statement did not refer to the SBI testing and thus did not violate the prior order.

State v. Dye, 207 N.C. App. 473 (Oct. 19, 2010). The trial court did not abuse its discretion by denying the defendant's mistrial motion, made after the jury returned guilty verdicts. The motion was based on the fact that the child victim in this sexual assault case twice interrupted defense counsel's closing argument. After the initial interruption, the trial court, out of the jury's presence, instructed the victim to remain quiet. After her second outburst, the victim was removed from the courtroom. Additionally, the trial provided the defendant with an opportunity to request remedial measures, including mistrial, an invitation that was declined until after the verdict was returned.

State v. Sanders, 201 N.C. App. 631 (Jan. 5, 2010). The trial court did not abuse its discretion by denying the defendant's mistrial motion made after the State twice violated a court order forbidding any mention of polygraph examinations. The court disapproved of the State's action in submitting to the jury unredacted exhibits containing references to a polygraph examination but noted that the exhibits did not contain any evidence of the results of such examination.

Motions

Motion to Continue/Recess

State v. McClaude, __ N.C. App. __, 765 S.E.2d 104 (Nov. 18, 2014). In this drug and drug conspiracy case, the trial court did not abuse its discretion by denying the defendant's request for additional time to locate an alleged co-conspirator and his motion to reopen the evidence so that witness could testify when he was located after the jury reached a verdict. The trial court acted

within its authority given that the witness had not been subpoenaed (and thus was not required to be present) and his attorney indicated that he would not testify.

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case, the trial court did not err by denying the defendant's motion to continue, made on grounds that defense counsel learned of a potential defense witness on the eve of trial. Specifically, defense counsel learned that a psychologist prepared reports on the defendant and the victim in connection with a prior custody determination. However, the defendant knew about the psychologist's work given his participation in it and defense counsel had two months to confer with the defendant and prepare the case for trial.

State v. Gray, __ N.C. App. __, 758 S.E.2d 699 (June 3, 2014), *review allowed*, __ N.C. __, 766 S.E.2d 635 (Dec. 18, 2014). In an attempted armed robbery case where the defendant was alleged to have acted with others, the trial court did not abuse its discretion by denying the defendant's motion to continue, made shortly before trial and after a 24-hour continuance already had been granted to the defense. The defendant argued that the continuance was needed because of the late receipt of an accomplice's statement indicating that another accomplice had the gun during incident. The trial court denied the motion, reasoning that the statement was duplicative, did not introduce any new actors or witnesses, and did not significantly change the State's case against the defendant. The trial court explained that legally it did not matter who possessed the gun; if one of the perpetrators possessed a gun, all perpetrators were guilty to the same extent. Additionally, the trial court noted that it already had granted a defense motion to continue. The court of appeals agreed that the statement did not significantly change the case to the defendant's prejudice so as to require additional time to prepare for trial.

State v. Blackwell, __ N.C. App. __, 747 S.E.2d 137 (Aug. 6, 2013). In this drug case, the trial court did not violate the defendant's constitutional rights to due process and effective assistance of counsel by denying a motion to continue. The defendant argued that defense counsel had been appointed only 54 days before trial and had just become aware of material witnesses that might testify favorably for the defendant. Also, the defendant argued, on the Friday before trial week, the State turned over a confidential informant's statements. The court noted that the trial was a retrial and that the underlying facts–two hand-to-hand sales to an undercover officer--were straightforward. Furthermore, the defendant failed to explain how a period of two months was insufficient to prepare for trial. With respect to the additional witnesses, the defendant failed to explain why he was unable to find them in the more than three years since his indictment and why their testimony was material. Also, the defendant already had copies of the informant's statements.

State v. Gentry, __ N.C. App. __, 743 S.E.2d 235 (June 4, 2013). The trial court did not abuse its discretion by denying defense counsel's motion to withdraw or in the alternative for a continuance. In the four months prior to trial, the defendant failed to provide counsel with the names of potential defense witnesses. However, no justification was provided for the defendant's failure and counsel did not express any certainty that information about potential witnesses would be forthcoming. Nor did counsel's conclusory assertion that he could not prepare for trial because of communication problems with the defendant support the motion, particularly where the record indicated that the defendant was responsible for those difficulties.

State v. King, __ N.C. App. __, 742 S.E.2d 315 (May 21, 2013). In this murder case the trial court did not abuse its discretion by denying the defendant's motion to continue. The defendant sought the continuance so that he could procure an expert to evaluate and testify regarding the State's DNA evidence. The court rejected the defendant's argument that by denying his motion to continue, the trial court violated his right to the effective assistance of counsel. The State provided discovery, including all SBI-generated reports and data 9 June 2011. It produced one DNA analysis report in hard copy and included a second on a CD containing other material. Defense counsel did not examine the CD until around 5 March 2012, when he e-mailed the prosecutor and asked if he had missed anything. The prosecutor informed him that the CD contained a second DNA report. Trial was set for 9 April 2012. However, after conferring with a DNA expert, the defendant filed a motion to continue on 16 March 2012. At a hearing on the motion, defense counsel explained his oversight and an expert said that he needed approximately 3-4 months to review the material and prepare for trial. The trial court denied defendant's motion to continue. The court concluded:

> Although the trial court might have justifiably granted defendant's motion and could have avoided a potential question of ineffective assistance of counsel by doing so, we cannot say that where defendant had been provided the DNA report nearly a year before trial the trial court erred or violated defendant's constitutional rights in denying his motion to continue in order to secure an expert witness for trial.

The court went on to dismiss the defendant's claim of ineffective assistance without prejudice to him being able to raise it through a MAR.

State v. Burton, __ N.C. App. __, 735 S.E.2d 400 (Dec. 4, 2012). The trial court did not err by denying the defendant's motion to continue trial so that he could locate two alibi witnesses. Both alibi witnesses were served months prior and the trial had already been continued for this purpose.

State v. Banks, 210 N.C. App. 30 (Mar. 1, 2011). The trial court's denial of a motion to continue in a murder case did not violate the defendant's right to due process and effective assistance of counsel. The defendant asserted that he did not realize that certain items of physical evidence were shell casings found in defendant's room until the eve of trial and thus was unable to procure independent testing of the casings and the murder weapon. Even though the relevant forensic report was delivered to the defendant in 2008, the defendant did not file additional discovery requests until February 3, 2009, followed by *Brady* and *Kyles* motions on February 11, 2009. The trial court afforded the defendant an opportunity to have a forensic examination done during trial but the defendant declined to do so. The defendant was not entitled to a presumption of prejudice on grounds that denial of the motion created made it so that no lawyer could provide effective assistance. The defendant's argument that had he been given additional time, an independent examination *might* have shown that the casings were not fired by the murder weapon was insufficient to establish the requisite prejudice.

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). The trial court did not abuse its discretion by denying the defendant's motion to continue to test certain hair and fiber lifts from an item of clothing. The defendant had six months to prepare for trial and obtain independent testing, but

waited until the day of trial to file his motion, in violation G.S. 15A-952(c). This failure to file the motion to continue within the required time period constituted a waiver of the motion. Also, because the item had already been DNA tested by the State, the lifts were not the only physical evidence obtained.

State v. Flint, 199 N.C. App. 709 (Sept. 15, 2009). The trial court did not abuse its discretion in denying a motion to continue asserting that the State provided discovery at a late date. The defendant failed to show that additional time was necessary for the preparation of a defense.

State v. Wright, 200 N.C. App. 578 (Nov. 3, 2009). The trial court did not violate the defendant's due process rights by denying the defendant's motion to continue, which had asserted that pretrial publicity had the potential to prejudice the jury pool and deprive the defendant of a fair trial. No evidence regarding pretrial publicity was in the record and even if it had been, the record showed that publicity did not improperly influence the jury.

Motion to Dismiss

For cases dealing with motions to dismiss and the sufficiency of the evidence as to elements of the crime, see Criminal Offenses, below.

Corpus Delecti Rule

State v. Cox, 367 N.C. 147 (Nov. 8, 2013). The court reversed the decision below, *State v. Cox*, 222 N.C. App. 192 (2012), which had found insufficient evidence to support a conviction of felon in possession of a firearm under the corpus delicti rule. The defendant confessed to possession of a firearm recovered by officers ten to twelve feet from a car in which he was a passenger. The Supreme Court held that under the "*Parker* rule" the confession was supported by substantial independent evidence tending to establish its trustworthiness and that therefore the corpus delicti rule was satisfied. The court noted that after a Chevrolet Impala attempted to avoid a DWI checkpoint by pulling into a residential driveway, the driver fled on foot as a patrol car approached. The officer observed that the defendant was one of three remaining passengers in the car. Officers later found the firearm in question within ten to twelve feet of the driver's open door. Even though the night was cool and the grass was wet, the firearm was dry and warm, indicating that it came from inside the car. The court determined that these facts strongly corroborated essential facts and circumstances embraced in the defendant's confession and linked the defendant temporally and spatially to the firearm. The court went on to note that the defendant made no claim that his confession was obtained by deception or coercion, or was a result of physical or mental infirmity. It continued, concluding that the trustworthiness of the confession was "further bolstered by the evidence that defendant made a voluntary decision to confess."

State v. Sweat, 366 N.C. 79 (June 14, 2012). The court affirmed the holding of *State v. Sweat*, 216 N.C. App. 321 (Oct. 18, 2011), that there was sufficient evidence of fellatio under the corpus delicti rule to support sex offense charges. The court clarified that the rule imposes different burdens on the State:

> If there is independent proof of loss or injury, the State must show that the accused's confession is supported by substantial independent evidence tending to establish its trustworthiness, including facts that tend to show the defendant had the opportunity to commit the crime. However, if there is no independent proof of loss or injury, there must be strong corroboration of essential facts and circumstances embraced in the defendant's confession. Corroboration of insignificant facts or those unrelated to the commission of the crime will not suffice.

(quotations omitted). Here, because the substantive evidence of fellatio was defendant's confession to four such acts, the State was required to strongly corroborate essential facts and circumstances embraced in the confession. Under the totality of the circumstances, the State made the requisite showing based on: the defendant's opportunity to engage in the acts; the fact that the confession evidenced familiarity with corroborated details (such as the specific acts that occurred) likely to be known only by the perpetrator; the fact that the confession fit within the defendant's pattern of sexual misconduct; and the victim's extrajudicial statements to an investigator and a nurse. The court rejected the defendant's argument that the victim's extrajudicial statements introduced to corroborate her testimony could not be used to corroborate his confession.

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). Under the corpus delecti rule, there was insufficient evidence independent of the defendant's extrajudicial confession to sustain a conviction for first-degree sexual offense; however, there was sufficient evidence to support an indecent liberties conviction. Note: under the rule, the state may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence that supports the facts underlying the confession.

State v. Parks, __ N.C. App. __, 759 S.E.2d 355 (June 17, 2014). Where the State failed to produce substantial, independent corroborative evidence to support the facts underlying the defendant's extrajudicial statement in violation of the corpus delicti rule, the trial court erred by denying the defendant's motion to dismiss charges of participating in the prostitution of a minor.

In re A.N.C., __ N.C. App. __, 750 S.E.2d 835 (Feb. 5, 2013). The evidence was sufficient to sustain a juvenile's adjudication as delinquent for driving with no operator's license under the corpus delicti rule. The thirteen-year-old juvenile admitted that he drove the vehicle. Ample evidence, apart from this confession existed, including that the juvenile and his associates were the only people at the scene and that the vehicle was registered to the juvenile's mother.

State v. Foye, 220 N.C. App. 37 (Apr. 17, 2012). In an impaired driving and driving while license revoked case there was sufficient evidence other than the defendant's extrajudicial confession to establish that the defendant was driving the vehicle. Among other things, the vehicle was registered to the defendant and the defendant was found walking on a road near the scene, he had injuries suggesting that he was driving, and he admitting being impaired.

State v. Reeves, 218 N.C. App. 570 (Feb. 7, 2012). In an impaired driving case, there was sufficient evidence apart from the defendant's extrajudicial confession to establish that he was

driving the vehicle. When an officer arrived at the scene, the defendant was the only person in the vehicle and he was sitting in the driver's seat.

State v. Blue, 207 N.C. App. 267 (Oct. 5, 2010). Applying the corpus delicti rule (State may not rely solely on the extrajudicial confession of a defendant, but must produce substantial independent corroborative evidence) the court held that the State produced substantial independent corroborative evidence to show that a robbery and rape occurred. As to the robbery, aspects of the defendant's confession were corroborated with physical evidence found at the scene (weapons, etc.) and by the medical examiner's opinion testimony (regarding cause of death and strangulation). As to the rape, the victim's body was partially nude, an autopsy revealed injury to her vagina, rape kit samples showed spermatozoa, and a forensic analysis showed that defendant could not be excluded as a contributor of the weaker DNA profile.

Defendant as Perpetrator

State v. Carver, 366 N.C. 372 (Jan. 25, 2013). The court per curiam affirmed *State v. Carver,* 221 N.C. App. 120 (June 5, 2012), in which the court of appeals held, over a dissent, that there was sufficient evidence that the defendant perpetrated the murder. The State's case was entirely circumstantial. Evidence showed that at the time the victim's body was discovered, the defendant was fishing not far from the crime scene and had been there for several hours. Although the defendant repeatedly denied ever touching the victim's vehicle, DNA found on the victim's vehicle was, with an extremely high probability, matched to him. The court of appeals found *State v. Miller*, 289 N.C. 1 (1975), persuasive, which it described as holding "that the existence of physical evidence establishing a defendant's presence at the crime scene, combined with the defendant's statement that he was never present at the crime scene and the absence of any evidence that defendant was ever lawfully present at the crime scene, permits the inference that the defendant committed the crime and left the physical evidence during the crime's commission." The court of appeals rejected the defendant's argument that the evidence was insufficient given that lack of evidence regarding motive.

State v. Pastuer, 365 N.C. 287 (Oct. 7, 2011). An equally divided court left undisturbed the court of appeals' decision in *State v. Pastuer,* 205 N.C. App. 566 (July 20, 2010) (holding that the trial court erred by denying the defendant's motion to dismiss a charge alleging that he murdered his wife; the State's case was based entirely on circumstantial evidence; the court held that although the State may have introduced sufficient evidence of motive, evidence of the defendant's opportunity and ability to commit the crime was insufficient to show that he was the perpetrator; according to the court, no evidence put the defendant at the scene; although a trail of footprints bearing the victim's blood was found at her home and her blood was found on the bottom of one of the defendant's shoes, the court concluded that the State failed to present substantial evidence that the victim's DNA could only have gotten on the defendant's shoe at the time of the murder; evidence that the defendant was seen walking down a highway sometime around the victim's disappearance and that her body was later found in the vicinity did not supply substantial evidence that he was the perpetrator). The court noted that the effect of its decision is that the court of appeals' opinion stands without precedential value.

State v. Carpenter, __ N.C. App. __, 754 S.E.2d 478 (Mar. 4, 2014). Sufficient evidence supported the defendant's armed robbery conviction where two eyewitnesses identified the defendant and an accomplice. The court was unpersuaded by the defendant's citation of articles and cases from other states discussing the weaknesses of eyewitness identification, noting that such arguments have no bearing on the sufficiency of the evidence when considering a motion to dismiss. It continued: "If relevant at all, these arguments would go only to the credibility of an eyewitness identification."

State v. Kirkwood, __ N.C. App. __, 747 S.E.2d 730 (Sept. 17, 2013). There was sufficient evidence that the defendant perpetrated the crime of discharging a weapon into occupied property. Evidence tied a burgundy SUV to the shooting and suggested the defendant was the vehicle's driver, the defendant fled from police and made statements to them showing "inside" knowledge, and gunshot residue was found on the defendant shortly after the shooting.

State v. Powell, __ N.C. App. __, 732 S.E.2d 491 (Oct. 2, 2012). There was sufficient evidence that the defendant perpetrated the murder. The defendant's cell phone was found next to the victim, cell phone records showed that the phone was within one mile of the murder scene around the time of the murder, the defendant gave inconsistent statements about his whereabouts, and a witness testified that the defendant stated, "I must have dropped [my phone] after I killed him."

State v. Miles, 366 N.C. 503 (April 12, 2013). The court per curiam affirmed the decision below, *State v. Miles*, 222 N.C. App. 593 (Aug. 21, 2012), a murder case in which the court of appeals held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss. The court of appeals held that there was sufficient evidence that the defendant was the perpetrator of the offense and that the defendant possessed the motive, means, and opportunity to murder the victim. The victim owed the defendant approximately $40,000. The defendant persistently contacted the victim demanding his money; in the month immediately before the murder, he called the victim at least 94 times. A witness testified that the defendant, his business, and his family were experiencing financial troubles, thus creating a financial motive for the crime. On the morning of the murder the defendant left the victim an angry voicemail stating that he was going to retain a lawyer, but not to collect his money, and threatening that he would ultimately get "a hold of" the victim; a rational juror could reasonably infer from this that the defendant intentionally threatened the victim's life. Another witness testified that on the day of the murder, the defendant confided that if he did not get his money soon, he would kill the victim, and that he was going to the victim to either collect his money or kill the victim; this was evidence of the defendant's motive and intention to murder the victim. The victim's wife and neighbor saw the defendant at the victim's house on two separate occasions in the month prior to the crime. On the day of the murder, the victim's wife and daughter observed a vehicle similar one owned by the defendant's wife at their home. The defendant's phone records pinpointed his location in the vicinity of the crime scene at the relevant time. Finally, the defendant's false alibi was contradicted by evidence putting him at the crime scene.

State v. Barnhart, 220 N.C. App. 125 (Apr. 17, 2012). There was sufficient evidence that the defendant was the perpetrator of the charged offenses so that the trial court did not err by denying the defendant's motion to dismiss. The crimes occurred at approximately 1:00 am at the

victim's home. The intruder took a fifty-dollar bill, a change purse, a cell phone, and jewelry. The victim's description of the perpetrator was not inconsistent with the defendant's appearance. An eyewitness observed the defendant enter a laundromat near the victim's home at approximately 2:00 am the same morning. The stolen change purse, cell phone, and jewelry were found in the laundromat. No one other than the defendant entered the laundromat from midnight that evening until when the police arrived. The defendant admitted using used a fifty-dollar bill to purchase items that morning and gave conflicting stories about how he obtained the bill.

State v. Patel, 217 N.C. App. 50 (Nov. 15, 2011). In a first-degree murder case, the trial court did not err by denying the defendant's motion to dismiss on grounds of insufficiency of the evidence where the State produced evidence of motive, opportunity, and means as well as admissions by the defendant.

State v. Hayden, 212 N.C. App. 482 (June 7, 2011). In a case involving a 1972 homicide, the trial judge erred by denying the defendant's motion to dismiss due to insufficient evidence that he was the perpetrator. When the State presents only circumstantial evidence that the defendant is the perpetrator, courts look at motive, opportunity, capability and identity to determine whether a reasonable inference of the defendant's guilt may be inferred or whether there is merely a suspicion that the defendant is the perpetrator. Evidence of either motive or opportunity alone is insufficient to carry a case to the jury. Here, the evidence was sufficient to show motive; it showed hostility between the victim and the defendant that erupted at times in physical violence and threats. However, there was insufficient evidence of opportunity. The court noted that for there to be sufficient evidence of opportunity, the State must present evidence placing the defendant at the crime scene when the crime was committed. Here, the only evidence of opportunity was the defendant's statement, made 26 years after the murder, that he was briefly in a spot two miles away from the crime scene. Finally, the court agreed with the defendant's argument that State's evidence of his means to kill the victim was insufficient because it failed to connect the defendant to the murder weapon.

State v. Banks, 210 N.C. App. 30 (Mar. 1, 2011). The evidence was sufficient to establish that the defendant perpetrated the murder. The defendant was jealous of the victim and made numerous threats toward him; four spent casings found in his bedroom were fired from the murder weapon; on the day of the murder, the victim got into a vehicle that matched a description of the defendant's vehicle; and a fiber consistent with the victim's jacket was recovered from the defendant's vehicle.

State v. McNeil, 209 N.C. App. 654 (Mar. 1, 2011). The State presented sufficient evidence that the defendant perpetrated a breaking and entering. The resident saw the defendant break into her home, the getaway vehicle was registered to the defendant, the resident knew the defendant from prior interactions, a gun was taken from the home, and the defendant knew that the resident possessed the gun.

State v. Lowry, 198 N.C. App. 457 (Aug. 4, 2009). Where the State's evidence in this murder case showed both motive and opportunity, it was sufficient to survive a motion to dismiss on the issue of whether the defendant was the perpetrator.

State v. Boyd, 209 N.C. App. 418 (Feb. 1, 2011). In a robbery case, the trial court did not err by denying the defendant's motion to dismiss where there was substantial evidence that the defendant was the perpetrator. The victim, who knew the defendant well, identified the defendant's voice as that of his assailant; identified his assailant as a black man with a lazy eye, two characteristics consistent with the defendant's appearance; consistently identified the defendant as his assailant; and had a high level of certainty with regard to this identification.

State v. Hunter, 208 N.C. App. 506 (Dec. 21, 2010). There was sufficient evidence that the defendant perpetrated a murder when, among other things, cuts on the defendant's hands were visible more than 10 days after the murder; neither the defendant's nor the victim's DNA could be excluded from a DNA sample from the scene; DNA from blood stains on the defendant's jeans matched the victim's DNA; and 22 shoe prints found in blood in the victim's residence were consistent with the defendant's shoes.

State v. Szucs, 207 N.C. App. 694 (Nov. 2, 2010). In a case involving felonious breaking or entering, larceny, and possession of stolen goods, the State presented sufficient evidence identifying the defendant as the perpetrator. The evidence showed that although the defendant did not know the victim, she found his truck in her driveway with the engine running; the victim observed a man matching the defendant's description holding electronic equipment subsequently determined to have been stolen; the man dropped the electronic equipment and jumped over a fence; a police dog tracked the man's scent through muddy terrain and lost the trail near Thermal Road; a canine officer observed fresh slide marks in the mud; the defendant was found on Thermal Road with muddy pants and shoes and in possession of a Leatherman tool, which could have been used to open the door of the residence; the defendant had approximately $30.00 in loose change, which could have been taken from the residence; and when police apprehended an accomplice, the defendant's roommate and known associate, he had the victim's electronic device in his possession.

Irick Rule Regarding Fingerprint Evidence

State v. Hoff, __ N.C. App. __, 736 S.E.2d 204 (Dec. 4, 2012). Where a burglary victim identified the defendant as the perpetrator in court, the rule of *State v. Irick*, 291 N.C. 480 (1977) (fingerprint evidence can withstand a motion for nonsuit only if there is substantial evidence that the fingerprints were impressed at the time of the crime), did not require dismissal. Although the identification was not clear and unequivocal, it was not inherently incredible and supported the fingerprint evidence.

For Flagrant Constitutional Violations

State v. McCrary, __ N.C. App. __, 764 S.E.2d 477 (Oct. 21, 2014), *temporary stay allowed*, __ N.C. __, 764 S.E.2d 475 (Nov. 07, 2014). In this DWI case, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with a warrantless blood draw. Noting that the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court concluded that the only appropriate action by the

trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation.

State v. Allen, __ N.C. App. __, 731 S.E.2d 510 (Sept. 4, 2012). (1) The trial court erred by entering a pretrial order dismissing, under G.S. 15A-954(a)(4), murder, child abuse, and sexual assault charges against the defendant. The statute allows a trial court to dismiss charges if it finds that the defendant's constitutional rights have been flagrantly violated causing irreparable prejudice so that there is no remedy but to dismiss the prosecution. The court held that the trial court erred by finding that the State violated the defendant's *Brady* rights with respect to: a polygraph test of a woman connected to the incident; a SBI report regarding testing for the presence of blood on the victim's underwear and sleepwear; and information about crime lab practices and procedures. It reasoned, in part, that the State was not constitutionally required to disclose the evidence prior to the defendant's plea. Additionally, because the defendant's guilty plea was subsequently vacated and the defendant had the evidence by the time of the pretrial motion, he received it in time to make use of it at trial. The court also found that the trial court erred by concluding that the prosecutor intentionally presented false evidence at the plea hearing by stating that there was blood on the victim's underwear. The court determined that whether such blood existed was not material under the circumstances, which included, in part, substantial independent evidence that the victim was bleeding and the fact that no one else involved was so injured. Also, because the defendant's guilty plea was vacated, he already received any relief that would be ordered in the event of a violation. Next, the court held that the trial court erred by concluding that the State improperly used a threat of the death penalty to coerce a plea while withholding critical information to which the defendant was entitled and thus flagrantly violating the defendant's constitutional rights. The court reasoned that the State was entitled to pursue the case capitally and no *Brady* violation occurred. (2) The trial court erred by concluding that the State's case should be dismissed because of statutory discovery violations. With regard to the trial court's conclusion that the State's disclosure was deficient with respect to the SBI lab report, the court rejected the notion that the law requires either an affirmative explanation of the extent and import of each test and test result. It reasoned: this "would amount to requiring the creation of an otherwise nonexistent narrative explaining the nature, extent, and import of what the analyst did." Instead it concluded that the State need only provide information that the analyst generated during the course of his or her work, as was done in this case. With regard to polygraph evidence, the court concluded that it was not discoverable.

Procedure

State v. Kiselev, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The State had no right to appeal the trial court's order granting the defendant's motion to dismiss for insufficient evidence, made after the close of all evidence where the trial court erred by taking the defendant's motion under advisement and failing to rule until after the jury returned its verdict. Under G.S. 15A-1227(c), when a defendant moves to dismiss based on insufficient evidence, the trial court must rule on the motion "before the trial may proceed." Here, after the defendant moved to dismiss the trial court determined that it needed to review the transcript of an officer's trial testimony before ruling. While waiting for the court reporter to prepare the transcript, the trial court allowed the jury to begin deliberations. Shortly after the jury returned a guilty verdict, the court reporter completed the transcript and the trial court reviewed it. The trial court then granted the motion to

dismiss, explaining that the transcript showed the State had not met its burden of proof. The trial court added that it considered its ruling as one made "at the close of all the evidence." The State appealed. While double jeopardy prevents the State from appealing the grant of a motion to dismiss for insufficient evidence if it comes before the jury verdict, the State generally can appeal that ruling if it comes after the verdict (because, the court explained, if the State prevails, the trial court on remand can enter judgment consistent with the jury verdict without subjecting the defendant to a second trial). Here, the trial court's violation of the statute prejudiced the defendant; had the trial court ruled at the proper time, no appeal would have been allowed. The court determined that the proper remedy was to preclude the State's appeal.

Miscellaneous Issues

State v. Marley, __ N.C. App. __, 742 S.E.2d 634 (June 4, 2013). In an impaired driving case, evidence that the defendant's BAC was .09 was sufficient to survive a motion to dismiss, notwithstanding evidence that the machine may have had a margin of error of .02. The court concluded: "Defendant's argument goes to the credibility of the State's evidence, not its sufficiency to withstand defendant's motion to dismiss. Such an argument is more appropriately made to the jury at trial, and not to an appellate court."

State v. Steen, __ N.C. App. __, 739 S.E.2d 869 (April 16, 2013). The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss where the defendant's argument went to issues of credibility.

State v. Buddington, 210 N.C. App. 252 (Mar. 1, 2011). The trial court erred by granting the defendant's motion to dismiss a charge of felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence allowing the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

State v. Joe, 365 N.C. 538 (Apr. 13, 2012). Although a trial court may grant a defendant's motion to dismiss under G.S. 15A–954 or –1227 and the State may enter an oral dismissal in open court under G.S. 15A–931, the trial court has no authority to enter an order dismissing the case on its own motion.

Suppression Motions
Timeliness

State v. Reavis, 207 N.C. App. 218 (Sept. 21, 2010). The defendant's motion to suppress his statement made during a police interview was untimely. The motion was not made until trial and

there was no argument that the State failed to disclose evidence of the interview or statement in a timely manner.

State v. Paige, 202 N.C. App. 516 (Feb. 16, 2010). The defendant's motion to suppress was untimely where the defendant had approximately seven weeks of notice that the State intended to use the evidence, well more than the required 20 working days.

Findings of Fact & Conclusions of Law

State v. Ingram, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). On the State's appeal from a trial court order granting the defendant's motion to suppress, the court vacated and remanded for new findings of fact and if necessary, a new suppression hearing. After being shot by police, the defendant was taken to the hospital and given pain medication. He then waived his *Miranda* rights and made a statement to the police. He sought to suppress that statement, arguing that his *Miranda* waiver and statement were involuntarily. The court began by rejecting the State's claim that the trial court erred by considering hearsay evidence in connection with the suppression motion and by relying on such evidence in making its findings of fact. The court noted that the trial court had "great discretion" to consider any relevant evidence at the suppression hearing. However, the court agreed with the State's argument that the trial court erred by failing to resolve evidentiary issues before making its findings of fact. It explained:

> [T]he trial court suppressed Defendant's statements on the grounds Defendant was "in custody, in severe pain, and under the influence of a sufficiently large dosage of a strong narcotic medication[;]" however, the trial court failed to make any specific findings as to Defendant's mental condition, understanding, or coherence—relevant considerations in a voluntariness analysis—at the time his *Miranda* rights were waived and his statements were made. The trial court found only that Defendant was in severe pain and under the influence of several narcotic pain medications. These factors are not all the trial court should consider in determining whether his waiver of rights and statements were made voluntarily.

Furthermore, although the defendant moved to suppress on grounds that police officers allegedly coerced his *Miranda* waiver and statements by withholding pain medication, the trial court failed to resolve the material conflict in evidence regarding whether police coercion occurred.

State v. Wainwright, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). Because the trial court provided the rationale for its ruling on the defendant's motion to suppress from the bench and there were no material conflicts in the evidence, the trial court was not required to enter a written order.

State v. McFarland, __ N.C. App. __, 758 S.E.2d 457 (June 3, 2014). Although the trial court made findings of fact in its order denying the defendant's suppression motion, it erred by failing to make conclusions of law. The court remanded for appropriate conclusions of law.

State v. Bartlett, __ N.C. App. __, 752 S.E.2d 237 (Dec. 17, 2013), *review allowed*, __ N.C. __, 766 S.E.2d 632 (Dec. 18, 2014). A written order is not required on a motion to suppress when the trial court gives its rationale from the bench and there are no material conflicts in the evidence. Thus, the court determined it need not reach the issue of whether a judge who had not

heard the evidence at the suppression hearing had authority to sign a written order granting the suppression motion.

State v. Morgan, __ N.C. App. __, 741 S.E.2d 422 (Mar. 5, 2013). The trial court erred by failing to issue a written order denying the defendant's motion to suppress. A written order is necessary unless the court announces its rationale from the bench and there are no material conflicts in the evidence. Here, although the trial court announced its ruling from the bench, there was a material conflict in the evidence. The court remanded for entry of the required written order.

State v. Wilson, __ N.C. App. __, 737 S.E.2d 186 (Feb. 5, 2013). A trial court's order denying a motion to suppress is not invalid merely because the trial court did not make its findings immediately after the suppression hearing where the trial court later made the required findings.

State v. O'Connor, 222 N.C. App. 235 (Aug. 7, 2012). In granting the defendant's motion to suppress, the trial judge erred by failing to make findings of fact resolving material conflicts in the evidence. The court rejected the defendant's argument that the trial court "indirectly provided a rationale from the bench" by stating that the motion was granted for the reasons in the defendant's memorandum.

State v. Braswell, 222 N.C. App. 176 (Aug. 7, 2012). The trial court was not required to make written finding of fact supporting its denial of a suppression motion where the trial court provided its rationale from the bench and there were not material conflicts in the evidence.

In re N.J., 221 N.C. App. 427 (June 19, 2012). The district court erred by failing to make findings of fact or conclusions of law in connection with its ruling on the juvenile's motion to suppress in violation of G.S. 15A-977, where the trial court failed to provide its rationale for denying the motion.

State v. Salinas, 366 N.C. 119 (June 14, 2012). Modifying and affirming *State v. Salinas*, 214 N.C. App.408 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard to a vehicle stop), the court held that the trial court may not rely on allegations contained in a defendant's G.S. 15A-977(a) affidavit when making findings of fact in connection with a motion to suppress.

State v. Phillips, 365 N.C. 103 (June 16, 2011) . The court rejected the capital defendant's argument that the trial court's findings of fact as to whether he had consumed impairing substances before making an incriminating statement to the police were insufficient. The court reviewed the trial court's detailed findings and found them sufficient.

State v. Williams, 215 N.C. App. 412 (Sept. 6, 2011). Although there was no material conflict in the evidence as to whether the defendant was impaired when he made a statement, the court held, over a dissent, that there was a material conflict as to whether he was in custody and that the trial court erred by failing to make the necessary findings of fact on that issue. Because the defendant's testimony did not meet the standard for rendering his statement involuntary, any conflict in the evidence on this issue was not material. As to custody, the officer's testimony

suggested the defendant was not in custody. However the defendant's testimony if believed would support a contrary conclusion; therefore there was a material conflict on this issue.

State v. Neal, 210 N.C. App. 645 (Apr. 5, 2011). By orally denying the defendant's motion to suppress, the trial court failed to comply with G.S. 15A-977(f)'s requirement that it enter a written order with findings of fact resolving material conflicts in the evidence. The statute mandates a written order unless the trial court provides its rationale from the bench and there are no material conflicts in the evidence. Although the trial court provided its rationale from the bench, there were material conflicts in the evidence as to whether the defendant's consent to search was voluntary. The court remanded for the trial court to make the necessary findings of fact and for reconsideration of its conclusions of law in light of those findings.

State v. Baker, 208 N.C. App. 376 (Dec. 7, 2010). The trial court erred by failing to make findings of fact and conclusions of law in connection with its denial of the defendant's motion to suppress. When a trial court's failure to make findings of fact and conclusions of law is assigned as error, the trial court's ruling on a motion to suppress is fully reviewable for a determination as to whether (1) the trial court provided the rationale for its ruling from the bench; and (2) there was a material conflict in the evidence presented at the suppression hearing. If a reviewing court concludes that both criteria are met, then the findings of fact are implied by the trial court's denial of the motion to suppress and will be binding on appeal, if supported by competent evidence. If a reviewing court concludes that either of the criteria is not met, then a trial court's failure to make findings of fact and conclusions of law is reversible error. A material conflict in the evidence exists when evidence presented by one party controverts evidence presented by an opposing party such that the outcome of the matter is likely to be affected. Turning to the case at hand, the court held that the defendant had presented evidence that controverts the State's evidence as to whether a seizure occurred. Because there was a material conflict in the evidence, the trial court's failure to make findings of fact and conclusions of law is fatal to the validity of its ruling. The court reversed and remanded for findings of fact and conclusions of law. The court noted that even when there is no material conflict in the evidence, the better practice is for the trial court to make findings of fact.

State v. Rollins, 200 N.C. App. 105 (Sept. 15, 2009). Remanding for a new suppression hearing where the trial court failed to provide any basis or rationale for its denial of the defendant's suppression motion. The court "again urge[d] the trial courts . . . to remember 'it is always the better practice to find all facts upon which the admissibility of the evidence depends.'"

Supporting Affidavit

State v. O'Connor, 222 N.C. App. 235 (Aug. 7, 2012). (1) Although a trial court may summarily deny or dismiss a suppression motion for failure to attach a supporting affidavit, it has the discretion to refrain from doing so. (2) In granting the defendant's motion to suppress, the trial judge erred by failing to make findings of fact resolving material conflicts in the evidence. The court rejected the defendant's argument that the trial court "indirectly provided a rationale from the bench" by stating that the motion was granted for the reasons in the defendant's memorandum.

G.S. 15A-980 Motions

State v. Blocker, 219 N.C. App. 395 (Mar. 6, 2012). The trial court abused its discretion by summarily denying the defendant's motion under G.S. 15A-980 for suppression, in connection with sentencing, of a prior conviction which the defendant alleged was obtained in violation of her right to counsel. The trial court dismissed the motion as an impermissible collateral attack on a prior conviction that only could be raised by motion for appropriate relief. Relying on a prior unpublished opinion, the court held that although the defendant "could not seek to overturn her prior conviction" on this basis, G.S. 15A-980 gave her "the right to move to suppress that conviction's use in this case."

Law of the Case

State v. Lewis, 365 N.C. 488 (Apr. 13, 2012). Affirming the court of appeals, the court held that on a retrial the trial court erred by applying the law of the case and denying the defendant's motion to suppress. At the defendant's first trial, he unsuccessfully moved to suppress the victim's identification as unduly suggestive. That issue was affirmed on appeal. At the retrial, the defense filed new motions to suppress on the same grounds. However, at the pretrial hearings on these motions, the defense introduced new evidence relevant to the reliability of the identification. The State successfully argued that the law of the case governed and that the defendant's motions must be denied. After the defendant was again convicted, he appealed and the court of appeals reversed on this issue. Affirming that ruling the court noted that "the law of the case doctrine does not apply when the evidence presented at a subsequent proceeding is different from that presented on a former appeal." It then went on to affirm the court of appeals' holding that the retrial court erred in applying the doctrine of the law of the case to defendant's motion to suppress at the retrial.

Reconsideration

State v. Wade, 198 N.C. App. 257 (July 21, 2009). The trial court did not abuse its discretion by denying the defendant's motion to renew his suppression motion in light of an officer's trial testimony. There was no additional relevant information discovered during trial that required reconsideration of the motion to suppress.

Appeal/Preservation for Appellate Review

State v. Oates, 366 N.C. 264 (Oct. 5, 2012). The court reversed *State v. Oates*, 215 N.C. App. 491 (Sept. 6, 2011), and held that the State's notice of appeal of a trial court ruling on a suppression motion was timely. The State's notice of appeal was filed seven days after the trial judge in open court orally granted the defendant's pretrial motion to suppress but three months before the trial judge issued his corresponding written order of suppression. The court held that the window for filing a written notice of appeal in a criminal case opens on the date of rendition of the judgment or order and closes fourteen days after entry of the judgment or order. The court clarified that rendering a judgment or an order means to pronounce, state, declare, or announce the judgment or order and is "the judicial act of the court in pronouncing the sentence of the law

upon the facts in controversy." Entering a judgment or an order is "a ministerial act which consists in spreading it upon the record." It continued:

> For the purposes of entering notice of appeal in a criminal case . . . a judgment or an order is rendered when the judge decides the issue before him or her and advises the necessary individuals of the decision; a judgment or an order is entered under that Rule when the clerk of court records or files the judge's decision regarding the judgment or order.

State v. Hargett, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The denial of a motion to suppress does not preserve the issue for appellate review in the absence of a timely objection made when the evidence is introduced at trial.

State v. Brown, 217 N.C. App. 566 (Dec. 20, 2011). The defendant gave sufficient notice of his intent to appeal the denial of his motion to suppress so as to preserve his right to appeal. The State had argued that defense counsel's language was not specific enough to put the trial court and prosecution on notice of his intention to appeal the adverse ruling. Immediately following an attempt to make a renewed motion to suppress at the end of the State's evidence, defense counsel stated "that [the defendant] would like to preserve any appellate issues that may stem from the motions in this trial." The court noted that the defendant had only made five motions during trial, two of which were motions to suppress, and that following defense counsel's request, the trial court reentered substantially similar facts as he did when initially denying the pretrial motion to suppress. Clearly, the court concluded, the trial court understood which motion the defendant intended to appeal and decided to make its findings of fact as clear as possible for the record.

Burden of Proof

State v. Williams, __ N.C. App. __, 738 S.E.2d 211 (Feb. 19, 2013). The trial court did not impermissibly place the burden of proof on the defendant at a suppression hearing. Initially the burden is on the defendant to show that the motion is timely and in proper form. The burden then is on the State to demonstrate the admissibility of the challenged evidence. The party who bears the burden of proof typically presents evidence first. Here, the fact that the defendant presented evidence first at the suppression hearing does not by itself establish that the burden of proof was shifted to the defendant.

For Substantial Violation of 15A

State v. Caudill, __ N.C. App. __, 742 S.E.2d 268 (May 7, 2013). (1) The trial court did not err by denying the defendant's motion to suppress statements to officers on grounds that they were obtained in violation of G.S. 15A-501(2) (arrested person must be taken before a judicial official without unnecessary delay). After a consensual search of his residence produced controlled substances, the defendant and three colleagues were arrested for drug possession. The defendant, who previously had waived his *Miranda* rights, was checked into the County jail at 11:12 am. After again being informed of his rights, the defendant was interviewed from 1:59 pm to 2:53 pm and made incriminating statements about a murder. After the interview the defendant was taken before a magistrate and charged with drug offenses and murder. The defendant argued that the delay between his arrival at the jail and his initial appearance required suppression of his

statements regarding the murder. The court noted that under G.S. 15A-974(2), evidence obtained as a result of a substantial violation of Chapter 15A must be suppressed upon timely motion; the statutory term "result" indicates that a causal relationship between a violation of the statute and the acquisition of the evidence to be suppressed must exist. The court concluded that the delay in this case was not unnecessary and there was no causal relationship between the delay and defendant's incriminating statements made during his interview. The court rejected the defendant's constitutional arguments asserted on similar grounds.

Miscellaneous Issues

State v. Hernandez, 208 N.C. App. 591 (Dec. 21, 2010). Any alleged violation of the New Jersey constitution in connection with a stop in that state leading to charges in North Carolina, provided no basis for the suppression of evidence in a North Carolina court.

Pleas

Appeal After Plea

State v. Santos, 210 N.C. App. 448 (Mar. 15, 2011). Although the court treated the defendant's brief challenging his guilty plea as a writ of certiorari and addressed his contentions, it reviewed the law on the right to appeal after a plea, stating: A defendant who has entered a guilty plea is not entitled to appellate review as a matter of right, unless the defendant is appealing sentencing issues or the denial of a motion to suppress, or the defendant has made an unsuccessful motion to withdraw the guilty plea. Thus, the court concluded, a defendant does not have an appeal as a matter of right to challenge the trial court's acceptance of his guilty plea as knowing and voluntary absent a denial of a motion to withdraw that plea.

Claims Waived by Plea

State v. Harwood, __ N.C. App. __, 746 S.E.2d 445 (Aug. 6, 2013). By pleading guilty to multiple counts of felon in possession, the defendant waived the right to challenge his convictions on double jeopardy grounds.

Factual Basis

State v. Myers, ___ N.C. App. ___, 766 S.E.2d 690 (Dec. 16, 2014). Because there was an insufficient factual basis to support an *Alford* plea that included an admission to aggravating factors, the court vacated the plea and remanded for proceedings on the original charge. The defendant was charged with the first-degree murder of his wife. He entered an *Alford* plea to second-degree murder, pursuant to a plea agreement that required him to concede the existence of two aggravating factors. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced the defendant for second-degree murder in the aggravated range. The court found that there was not a sufficient factual basis to support the aggravating factor that the offense was especially heinous, cruel, and atrocious. The record did not show excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects. The court rejected the State's argument that the aggravating factor was supported by the fact that the victim was killed within the "sanctuary" of her home. On this issue, the court distinguished

prior case law on grounds that in those cases the defendant was not lawfully in the victim's home; here the crime occurred in a home that the defendant lawfully shared with the victim. The court also rejected the State's argument that the mere fact that the victim did not die instantaneously supported the aggravating factor. The court also found an insufficient factual basis to support the aggravating factor that the defendant took advantage of a position of trust or confidence, reasoning that "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where [t]here was no evidence showing that defendant exploited his wife's trust in order to kill her." (quotation omitted). Here, there was no evidence that the defendant so exploited his wife's trust.

State v. Rouson, __ N.C. App. __, 741 S.E.2d 470 (April 16, 2013). There was a sufficient factual basis for the defendant's pleas to possession of a stolen firearm and possession with intent to sell or deliver a controlled substance. There was evidence that the gun was stolen and that the defendant knew or had reasonable grounds to know that. There was also evidence that the defendant possessed cocaine with the intent to sell and deliver it. Additionally, the fact that the defendant purchased the firearm in exchange for cocaine constituted other incriminating evidence of knowledge and intent.

State v. Crawford, __ N.C. App. __, 737 S.E.2d 768 (Feb. 5, 2013). There was a sufficient factual basis for the defendant's plea to felony breaking or entering where the State's summary of the evidence was sufficient under G.S. 15A-1022(c). The State indicated that BB&T owned a residence located at 128 Lake Drive in Candler as a result of a foreclosure and that the defendant broke into the house and was preparing to move in when she was discovered on the property.

State v. Collins, 221 N.C. App. 604 (July 17, 2012). The prosecutor's summary of facts and the defendant's stipulations were sufficient to establish a factual basis for the plea.

State v. Flint, 199 N.C. App. 709 (Sept. 15, 2009). Holding, over a dissent, that there was an inadequate factual basis for some of the pleaded-to felonies. While the transcript of plea addressed 68 felony charges plus a habitual felon indictment, the trial court relied solely on the State's factual basis document, which addressed only 47 charges. The transcript of plea form could not provide the factual basis for the plea. Nor could the indictments serve this purpose where they did not appear to have been before the trial judge at the time of the plea.

State v. Salvetti, 202 N.C. App. 18 (Jan. 19, 2010). There was an adequate factual basis for the defendant's *Alford* plea in a child abuse case based on starvation where the trial court heard evidence from a DSS attorney, the victim, and the defendant's expert witness.

Withdraw a Plea

State v. Shropshire, 210 N.C. App. 478 (Mar. 15, 2011). The trial court did not err by denying the defendant's motion to withdraw his guilty plea. When a defendant seeks to withdraw a guilty plea after being sentenced consistent with a plea agreement, the defendant is entitled to withdraw his plea only upon a showing of manifest injustice. Factors relevant to the analysis include whether the defendant was represented by competent counsel and is asserting innocence, and whether the plea was made knowingly and voluntarily or was the result of misunderstanding,

haste, coercion, or confusion. None of these factors were present here. The defendant was represented by competent counsel, admitted his guilt, averred that he made the plea knowingly and voluntarily, and admitted that he fully understood the plea agreement and that he accepted the arrangement.

State v. Chery, 203 N.C. App. 310 (Apr. 6, 2010). The trial court did not err by denying the defendant's motion to withdraw his plea, made before sentencing. The fact that the plea was a no contest or *Alford* plea did not establish an assertion of legal innocence for purposes of the *State v. Handy* analysis that applies to pre-sentencing plea withdrawal requests. Although the defendant testified at a co-defendant's trial that he did not agree to take part in the crime, that testimony was negated by his stipulation to the factual basis for his plea and argument for a mitigated sentence based on acceptance of responsibility. The court also concluded that the State's uncontested proffer of the factual basis at the defendant's plea hearing was strong and that the fact that the co-defendant was acquitted at trial was irrelevant to the analysis. The court held that based on the full colloquy accompanying the plea, it was voluntarily entered. It also rejected the defendant's argument that an alleged misrepresentation by his original retained counsel caused him to enter the plea when such counsel later was discharged and the defendant was represented by new counsel at the time of the plea. Although the defendant sought to withdraw his plea only nine days after its entry, this factor did not weigh in favor of withdrawal where the defendant executed the plea transcript approximately 3½ months before the plea was entered and never waivered in this decision.

State v. Watkins, 195 N.C. App. 215 (Feb. 3, 2009). The trial court did not err in denying the defendant's motion to withdraw his plea before sentencing; no fair and just reason supported the motion.

State v. Salvetti, 202 N.C. App. 18 (Jan. 19, 2010). The trial court did not err in denying the defendant's motion to withdraw a plea, made after sentencing. Such pleas should be granted only to avoid manifest injustice, which was not shown on the facts presented.

Plea Agreements
Improper Terms

State v. Tinney, __ N.C. App. __, 748 S.E.2d 730 (Sept. 17, 2013). The defendant's plea was valid even though the plea agreement contained an unenforceable provision preserving his right to appeal the transfer of his juvenile case to superior court. Distinguishing cases holding that the inclusion of an invalid provision reserving the right to obtain appellate review of a particular issue rendered a plea agreement unenforceable, the court noted that in this case the defendant had ample notice that the provision was, in all probability, unenforceable and he elected to proceed with his guilty plea in spite of this. Specifically, he was so informed by the trial court.

State v. Demaio, 216 N.C. App. 558 (Nov. 1, 2011). The defendant's plea agreement impermissibly sought to preserve the right to appeal adverse rulings on his motions to dismiss and in limine when no right to appeal those rulings in fact existed. The court remanded, instructing that the defendant may withdraw his guilty plea and proceed to trial or attempt to negotiate another plea agreement that does not violate the law.

State v. White, 213 N.C. App. 181 (July 5, 2011). The trial court erred by accepting a plea agreement that attempted to preserve the defendant's right to appeal the trial court's adverse ruling on his motion to dismiss a felon in possession of a firearm charge on grounds that the statute was unconstitutional as applied. Because a defendant has no right to appeal such a ruling, the court vacated the plea and remanded. A dissenting judge would have dismissed the appeal entirely because of the defendant's failure to include a copy of his written motion to dismiss and suppress in the record.

State v. Smith, 193 N.C. App. 739 (Nov. 18, 2008). The defendant's plea had to be vacated where the plea agreement included a term that the defendant had a right to appeal an adverse ruling on a pretrial motion but the pretrial motion was not subject to appellate review.

Breach of Plea Agreement

State v. King, 218 N.C. App. 384 (Feb. 7, 2012). The trial court erred by setting aside the plea agreement in response to the defendant's motion seeking return of seized property. The defendant pleaded guilty pursuant to a plea agreement that called for, in part, the return of over $6,000 in seized funds. The defendant complied with her obligations under the agreement, but the State did not return the funds, on grounds that they had been forfeited to federal and State authorities. When the defendant filed a motion for return of the property, the trial court found that the State had breached the agreement but that specific performance was impossible; instead, the trial judge struck the plea. The court began by agreeing that the State breached the plea agreement. It went on to conclude that because the State was in a better position to know whether the money had been forfeited, it bore the risk as to the mistake of fact. It explained:

> [When] the district attorney entered into the plea agreement, he was capable of confirming the status of the funds prior to agreeing to return them to defendant. The money was seized from defendant and sent to the DEA the same month. The parties did not enter into the plea agreement until approximately nine months after the forfeiture . . . . The State could have easily confirmed the availability of the funds prior to the execution of the agreement but failed to do so. Therefore, the State must bear the risk of that mistake and the Court erred by rescinding the plea agreement based on a mistake of fact.

In this case, it concluded, rescission could not repair the harm to the defendant because the defendant had already completed approximately nine months of probation and had complied with all the terms of the plea agreement, including payment of fines and costs. The court reasoned that while the particular funds seized were no longer available, "money is fungible" and "there is no requirement that *the exact funds seized* must be returned to defendant and the State cannot avoid its obligation on this basis." The court reversed the trial court's order, reinstated the plea, and ordered the State to return the funds

Mutual Mistake in a Plea Agreement

State v. Rico, 366 N.C. 327 (Dec. 14, 2012). For the reasons stated in the dissenting opinion below, the court reversed *State v. Rico*, 218 N.C. App. 109 (Jan. 17, 2012) (holding, over a dissent, that where there was a mistake in the plea agreement and where the defendant fully

complied with the agreement, and the risk of any mistake in a plea agreement must be borne by the State; according to the court, both parties mistakenly believed that the aggravating factor of use of a firearm could enhance a sentence for voluntary manslaughter by use of that same firearm; the court determined that the State remains bound by the plea agreement and that the defendant must be resentenced on his guilty plea to voluntary manslaughter; the dissenting judge argued that the proper remedy was to set aside the plea arrangement and remand for disposition of the original charge (murder)).

Terms of the Agreement

State v. Khan, 366 N.C. 448 (Mar. 8, 2013). (1) There was no ambiguity in a plea agreement with regard to whether the defendant understood that he was stipulating to an aggravating factor that could apply to both indictments. Although the Transcript of Plea Form listed only a file number for the first indictment, the document as a whole clearly referenced all of the charges and the in-court proceedings confirmed that the stipulation applied to both indictments.

When Sentence Not in Accord With Plea Agreement

State v. Blount, 209 N.C. App. 340 (Jan. 18, 2011). The trial court did not violate G.S. 15A-1024 (withdrawal of guilty plea when sentence not in accord with plea arrangement) by sentencing the defendant in the presumptive range. Under G.S. 15A-1024, if the trial court decides to impose a sentence other than that provided in a plea agreement, the court must inform the defendant of its decision and that he or she may withdraw the plea; if the defendant chooses to withdraw, the court must grant a continuance until the next court session. Although the defendant characterized the agreement as requiring sentencing in the mitigated range, the court found that his interpretation was not supported by the plain language of the plea arrangement, which stated only that the State "shall not object to punishment in the mitigated range."

Boykin Claims & Plea Colloquy Issues

State v. Khan, 366 N.C. 448 (Mar. 8, 2013). The trial court properly followed the procedure in G.S. 15A-1022.1 for accepting an admission of an aggravating factor.

State v. Collins, 221 N.C. App. 604 (July 17, 2012). Based on the trial court's colloquy with the defendant, the court rejected the defendant's challenge to the knowing and voluntary nature of his plea. The defendant had argued that the trial court did not adequately explain that judgment may be entered on his plea to assault on a handicapped person if he did not successfully complete probation on other charges.

State v. Reynolds, 218 N.C. App. 433 (Feb. 7, 2012). The defendant's plea was not constitutionally valid where the trial judge misinformed the defendant of the maximum sentence he would receive. The trial court told the defendant that the maximum possible sentence would be 168 months' imprisonment when the maximum sentence (and the maximum ultimately imposed) was 171 months. The court rejected the State's argument that the defendant was not prejudiced by this error.

State v. Santos, 210 N.C. App. 448 (Mar. 15, 2011). The court rejected the defendant's argument that his guilty plea was not knowing and voluntary because it was the result of unreasonable and excessive pressure by the State and the trial court. The defendant asserted that the trial court pressured him to accept the plea during a 15 minute recess, denying him the time he needed to reflect on the decision. However, the plea offer was made some days earlier and the trial judge engaged in an extensive colloquy with the defendant, beyond statutory mandates, to ensure that the plea was knowing and voluntary.

State v. Szucs, 207 N.C. App. 694 (Nov. 2, 2010). The defendant's plea to habitual felon was valid based on the totality of the circumstances. Although the trial court informed the defendant that the plea would elevate punishment for the underlying offenses from Class H to Class C, it did not inform the defendant of the minimum and maximum sentences associated with habitual felon status.

State v. Mohamed, 205 N.C. App. 470 (July 20, 2010). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error that did not invalidate a plea to obtaining property by false pretenses where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number. The incorrect file number related to an armed robbery charge against the defendant.

State v. Salvetti, 202 N.C. App. 18 (Jan. 19, 2010). The defendant, who had entered an *Alford* plea, was not prejudiced by the trial judge's failure to inform him of his right to remain silent, the maximum possible sentence, and that if he pleaded guilty he would be treated as guilty even if he did not admit guilt. (In addition to the trial court's failure to verbally inform the defendant of the maximum sentence, a worksheet attached to the signed Transcript of Plea form incorrectly stated the maximum sentence as 89 months; the correct maximum was 98 months). The court further held that based on the questions that were posed, the trial judge properly determined that the plea was a product of the defendant's informed choice.

State v. Bare, 197 N.C. App. 461 (June 16, 2009). When taking a plea, a judge is not required to inform a defendant of possible imposition of sex offender satellite-based monitoring (SBM). Such a statement is not required by G.S. 15A-1022. Nor is SBM a direct consequence of a plea.

State v. Anderson, 198 N.C. App. 201 (July 7, 2009). Following *Bare* (discussed above).

Improper Pressure

State v. Salvetti, 202 N.C. App. 18 (Jan. 19, 2010). The prosecutor's offer of a package deal in which the defendant's wife would get a plea deal if the defendant pleaded guilty did not constitute improper pressure within the meaning of G.S. 15A-1021(b). Although special care may be required to determine the voluntariness of package deal pleas, the court's inquiry into voluntariness was sufficient in this case.

Satellite-Based Monitoring (SBM) & Pleas

State v. Bare, 197 N.C. App. 461 (June 16, 2009). When taking a plea, a judge is not required to

inform a defendant of possible imposition of sex offender SBM. Such a statement is not required by G.S. 15A-1022. Nor is SBM a direct consequence of a plea.

State v. Wagoner, 199 N.C. App. 321 (Sept. 1, 2009), *aff'd*, 364 N.C. 422 (Oct. 8, 2010). In a case in which there was a dissenting opinion, the court rejected the defendant's argument that the trial court erred in imposing SBM when SBM was not addressed in the defendant's plea agreement with the State.

Miscellaneous Issues

State v. Ruffin, __ N.C. App. __, 754 S.E.2d 685 (Mar. 4, 2014). In a rape case, any error made by the trial court regarding the maximum possible sentence did not entitle the defendant to relief. The trial court's statement was made in connection with noting for the record—on defense counsel's request—that the defendant had rejected a plea offer by the State. The court rejected the defendant's argument that the provisions of G.S. 15A-1022 should apply, noting that statute only is applicable when the defendant actually pleads guilty; a trial court is not required to make an inquiry into a defendant's decision not to plead guilty.

Preservation of Evidence

State v. Lewis, 365 N.C. 488 (Apr. 13, 2012). Reversing the court of appeals, the court held that the trial court did not violate the defendant's due process rights by allowing the State to present evidence of a knife allegedly used during the crime at the defendant's retrial. The knife had been seized from the defendant's residence and was admitted into evidence during the defendant's first trial. However, the knife was not available at the retrial because it had been destroyed after the defendant's first conviction was affirmed. Before the retrial the defense unsuccessfully moved to limit evidence regarding the knife. The court noted that under *California v. Trombetta*, 467 U.S. 479 (1984), "[t]he duty imposed by the Constitution on the State to preserve evidence is limited to evidence that might be expected to play a significant role in the suspect's defense." It continued: "[t]o meet this standard of constitutional materiality, evidence must both possess an exculpatory value that was apparent before the evidence was destroyed, and be of such a nature that the defendant would be unable to obtain comparable evidence by other reasonably available means." (quotation omitted). Applying this test, the court concluded that the evidence did not meet the constitutional materiality threshold required by *Trombetta.* According to the defendant, the knife was the only physical evidence linking him to the crime and if it had been available at the retrial, he would have been able to compare the recovered knife with the victim's description to show that the victim's identification of the knife as the one used by the attacker was not credible. The court concluded however that although the knife was unavailable, defense counsel was able to challenge the victim's identification of the knife by using cross-examination to point out that its handle had been inside the assailant's hand. While cross-examining the lead detective defense counsel also established that the victim's nightgown had been left bloody by the assault but that the recovered knife was tested for blood and DNA and found to be "clean." Thus, the court concluded, despite the knife's unavailability, defense counsel was able to elicit impeaching testimony from the State's witnesses concerning the knife. It held: "In the absence of an allegation that the evidence was destroyed in bad faith, we conclude that the State's failure to preserve the knife for defendant's retrial did not violate defendant's right to due process."

Pretrial Release

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). Even if the magistrate erred by ordering an "option bond" that gave the defendant a choice between paying a $1,000 secured bond or a $1,000 "unsecured bond and being released to a sober, responsible adult" without making written findings of fact to support the secured bond, the defendant failed to show how he was prejudiced where he was released on an unsecured bond to his wife.

State v. Harrison, 217 N.C. App. 363 (Dec. 6, 2011). A district court judge did not err by failing to follow an administrative order issued by the senior resident superior court judge when that order was not issued in conformity with G.S. 15A-535(a) (issuance of policies on pretrial release). The administrative order provided, in part, that "the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and a Defendant into a formal Deferred Prosecution Agreement." The district court judge was not required to follow the administrative order because the superior court judge issued it without consulting with the chief district court judge or other district court judges within the district.

Probable Cause Hearings

State v. Brunson, 221 N.C. App. 614 (July 17, 2012). The court rejected the defendant's argument that denying him a probable cause hearing violated his constitutional rights by depriving him of discovery and impeachment evidence. Relying on *State v. Hudson,* 295 N.C. 427 (1978) (the defendant failed to show that he was prejudiced by a lack of a hearing), the court noted that in this case, probable cause was twice established: when the warrant was issued and when the grand jury returned the indictments. The defendant's speculations about discovery and impeachment evidence failed to establish a reasonable possibility that a different result would have been reached at trial had he been given a preliminary hearing.

Trial in the Defendant's Absence; Right to Be Present

State v. Mackey, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). The trial court violated the defendant's constitutional right to presence at every stage of the trial by failing to disclose a note from the jury to the defendant. However, the error was harmless beyond a reasonable doubt.

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014). Where the defendant voluntarily ingested a large quantity of sedative, hypnotic or anxiolytic medications and alcohol during the jury deliberation stage of his non-capital trial, he voluntarily waived his constitutional right to be present.

State v. Anderson, 222 N.C. App. 138 (Aug. 7, 2012). The trial court did not err by denying a motion to dismiss asserting that the defendant was deprived of his constitutional rights due to his involuntary absence at trial. The defendant was missing from the courtroom on the second day of trial and reappeared on the third day. To explain his absence he offered two items. First, the fact that his friend Stacie Wilson called defense counsel to say that the defendant was in the hospital

suffering from stomach pains. Defense counsel did not know who Stacie Wilson was, what hospital the defendant was in, or any other information. Second, the defendant offered a note from a hospital indicating that he had been treated there at some point. The note did not contain a date or time of treatment. The defendant failed to sufficiently explain his absence and his right to be present was waived.

State v. Shaw, 218 N.C. App. 607 (Feb. 7, 2012). The court rejected the defendant's argument that he had an absolute right to waive the right to be present at trial. The court noted that no such right exists.

State v. McNeil, 209 N.C. App. 654 (Mar. 1, 2011). The trial court did not err when, after the defendant failed to appear during trial, he explained to the jury that the trial would proceed in the defendant's absence. The trial judge instructed the jury that the defendant's absence was of no concern with regard to its job of hearing the evidence and rendering a fair and impartial verdict.

State v. Whitted, 209 N.C. App. 522 (Feb. 15, 2011). (1) The trial court did not err by failing to instruct the jury about the defendant's absence from the habitual felon phase of the trial. Because the trial court did not order the defendant removed from the courtroom, G.S. 15A-1032 did not apply. Rather, the defendant asked to be removed. (2) The trial court did not err by accepting the defendant's oral waiver of her right to be present during portions of her trial.

Selective Prosecution

State v. Pope, 213 N.C. App. 413 (July 19, 2011). The trial court erred by dismissing charges on grounds of selective prosecution. The defendant, a public works director, was charged with larceny by employee in connection with selling "white goods" and retaining the proceeds. To demonstrate selective prosecution, the defendant must: (1) make a prima facie showing that he or she has been singled out for prosecution while others similarly situated and committing the same acts have not; and (2) demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. The trial court erroneously concluded that other similarly situated employees were not charged. The defendant was the public works director while the others were his subordinates; none were in a position to oversee wholesale theft from the town; and the defendant alone received the money from the sales, divided up the money, failed to remit it to the town, and kept a portion for himself while distributing the remainder to other employees. The court also rejected the defendant's assertion that his prosecution resulted from support of certain town political candidates, concluding that he failed to demonstrate that the prosecution, as opposed to the initial investigation, was politically motivated. While the initial investigation may or may not have been politically motivated, local officials subsequently brought in the SBI to investigate and it was the SBI's investigation which resulted in defendant being charged and prosecuted by the district attorney, who is not an agent of local government.

Sentencing

Active Sentence

State v. Miller, 205 N.C. App. 291 (July 6, 2010). Under the Structured Sentencing Act a trial judge does not have authority to allow a defendant to serve an active sentence on nonconsecutive days, such as on weekends only.

Aggravating Factors/Sentence

State v. Facyson, 367 N.C. 454 (June 12 2014). Reversing the court of appeals, the court held the evidence necessary to prove a defendant guilty under the theory of acting in concert is not the same as that necessary to establish the aggravating factor that the defendant joined with more than one other person in committing the offense and was not charged with committing a conspiracy. Because the aggravating factor requires additional evidence beyond that necessary to prove acting in concert, the trial court properly submitted the aggravating factor to the jury. Specifically, the aggravating factor requires evidence that the defendant joined with at least two other individuals to commit the offense while acting in concert only requires proof that the defendant joined with at least one other person. Additionally, the aggravating factor requires proof that the defendant was not charged with committing a conspiracy, which need not be proved for acting in concert.

State v. Khan, 366 N.C. 448 (Mar. 8, 2013). The evidence was sufficient to establish the aggravating factor that the defendant took advantage of a position of trust or confidence to place the victim in a vulnerable position. The defendant referred to the victim as his "twin," was brought into the murder conspiracy as a friend of the victim, participated in hatching the details of the plan to kill the victim, and agreed to incapacitate the victim so others could kill him.

State v. Edgerton, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). In this violation of a domestic violence protective order (DVPO) case, the trial court did not err by sentencing the defendant within the aggravated range based in part on the G.S. 15A-1340.16(d)(15) statutory aggravating factor (the "defendant took advantage of a position of trust or confidence, including a domestic relationship, to commit the offense"). The defendant argued that because a personal relationship between the parties is a prerequisite to obtaining a DVPO, the abuse of a position of trust or confidence aggravating factor cannot be used aggravate a sentence imposed for a DVPO violation offense. The court concluded that imposing an aggravated sentence did not violate the rule that evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation.

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) No violation of due process occurred when the defendant was sentenced in the aggravated range where proper notice was given and the jury found an aggravated factor (that the defendant committed the offense while on pretrial release on another charge). (2) Because G.S. 15A-1340.16 (aggravated and mitigated sentences) applies to all defendants, imposition of an aggravated sentence did not violate equal protection.

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). In this felony child abuse case the trial court erred by failing to provide an adequate instruction on the especially heinous, atrocious, or cruel (EHAC) aggravating factor. Rather than adapting the EHAC pattern instruction used in capital cases or providing any "narrowing definitions" that are required for

this aggravating factor, the trial court simply instructed the jury: "If you find from the evidence beyond a reasonable doubt that . . . the offense was especially heinous, atrocious, or cruel . . . then you will write yes in the space after the aggravating factor[] on the verdict sheet." The court concluded: "The trial court failed to deliver the substance of the pattern jury instruction on EHAC approved by our Supreme Court, and in doing so, instructed the jury in a way that the United States Supreme Court has previously found to be unconstitutionally vague." Having found that the trial court erred, the court went on to conclude that the error did not rise to the level of plain error.

State v. Saunders, ___ N.C. App. ___, 768 S.E.2d 340 (Feb. 17, 2015). In this rape case involving an 82-year-old victim, the court rejected defendant's argument that the trial court erred by failing to instruct the jury that it could not use the same evidence to find both the element of mental injury for first-degree rape and the aggravating factor that the victim was very old. The defendant argued that the jury may have relied on evidence about ongoing emotional suffering and behavioral changes experienced by the victim after the rape to find both an element of the offense and the aggravating factor. Rejecting this argument the court noted that evidence established that after the rape the victim suffered mental and emotional consequences that extended for a time well beyond the attack itself. The court further explained, in part: "These after-effects of the crime were the evidence that the jury considered in finding that the victim suffered a serious personal injury, an element of first-degree rape. None of the evidence regarding the lingering negative impact of the rape on the victim's emotional well-being was specifically related to her age." (citation omitted).

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). In this sexual assault case, the State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in the indictment the existence of the non-statutory aggravating factor that the defendant committed the sexual assault knowing that he was HIV positive. The court disagreed with the State's argument that alleging the non-statutory aggravating factor would have violated G.S. 130A-143. It explained:

> This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records and as such, may generally be made available upon request by a citizen. However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State could have sought to seal the indictment. (citations omitted)

State v. Myers, ___ N.C. App. ___, 766 S.E.2d 690 (Dec. 16, 2014). Because there was an insufficient factual basis to support an *Alford* plea that included an admission to aggravating factors, the court vacated the plea and remanded for proceedings on the original charge. The defendant was charged with the first-degree murder of his wife. He entered an *Alford* plea to second-degree murder, pursuant to a plea agreement that required him to concede the existence of two aggravating factors. The trial court accepted the plea agreement, found the existence of those aggravating factors, and sentenced the

defendant for second-degree murder in the aggravated range. The court found that there was not a sufficient factual basis to support the aggravating factor that the offense was especially heinous, cruel, and atrocious. The record did not show excessive brutality, or physical pain, psychological suffering, or dehumanizing aspects. The court rejected the State's argument that the aggravating factor was supported by the fact that the victim was killed within the "sanctuary" of her home. On this issue, the court distinguished prior case law on grounds that in those cases the defendant was not lawfully in the victim's home; here the crime occurred in a home that the defendant lawfully shared with the victim. The court also rejected the State's argument that the mere fact that the victim did not die instantaneously supported the aggravating factor. The court also found an insufficient factual basis to support the aggravating factor that the defendant took advantage of a position of trust or confidence, reasoning that "[t]he relationship of husband and wife does not *per se* support a finding of trust or confidence where [t]here was no evidence showing that defendant exploited his wife's trust in order to kill her." (quotation omitted). Here, there was no evidence that the defendant so exploited his wife's trust.

State v. Hurt, __ N.C. App. __, 760 S.E.2d 341 (July 15, 2014). In this murder case, the trial court did not err by denying the defendant's motion to dismiss for insufficient evidence as to the aggravating factor that the offense was especially heinous, atrocious, or cruel. Relying on prior N.C. Supreme Court case law, the court rejected the defendant's argument that the State's failure to submit any evidence showing that he played an active role in the murder precludes a finding by the jury beyond a reasonable doubt that the murder was especially heinous, atrocious, or cruel as to him. The court continued, finding that in this case, a reasonable inference can be drawn that the defendant did in fact actively participate in the murder.

State v. Bacon, __ N.C. App. __, 745 S.E.2d 905 (Aug. 6, 2013). Trial court erred by finding a statutory aggravating factor where the evidence used to support the G.S. 15A-1340.16(d)(8) aggravating factor (knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person) was the same evidence used to support an element of the involuntary manslaughter charge. That charge stemmed from a vehicle accident. The court reasoned: "[D]efendant was not impaired when the accident occurred, and defendant's speed is the only evidence that would support the aggravating factor that he used a device in a manner normally hazardous to the lives of more than one person. Because the evidence of defendant's speed was required to prove the charge of involuntary manslaughter and the finding of the aggravating factor, the trial court erred in sentencing defendant in the aggravated range[.]"

State v. Wilkes, __ N.C. App. __, 736 S.E.2d 582 (Jan. 15, 2013), *aff'd per curiam*, 367 N.C. 116 (Oct. 4, 2013). The trial court erred by sentencing the defendant in the aggravated range without considering uncontradicted evidence of a mitigating factor. One judge declined to reach this issue.

State v. Morston, 221 N.C. App. 464 (July 3, 2012). The trial court did not abuse its discretion by finding that one aggravating factor outweighed six mitigating factors.

State v. Rico, 218 N.C. App. 109 (Jan. 17, 2012), *reversed on other grounds*, State v. Rico, 366 N.C. 327 (Dec. 14, 2012). (1) Even though the defendant pleaded guilty to a crime and admitted an aggravating factor pursuant to a plea agreement, the trial judge still was required to find that an aggravating factor existed and that an aggravated sentence was appropriate. Failure to do so rendered the sentence invalid. (2) Where, as a here, the use of a deadly weapon was necessary to prove the unlawful killing element of the pleaded-to offense of voluntary manslaughter, use of a deadly weapon could not also be used as an aggravating factor.

State v. Barrow, 216 N.C. App. 436 (Nov. 1, 2011), *aff'd in part, review dismissed in part*, 366 N.C. 141 (2012). In a case in which the defendant was charged with killing his infant son, the trial court erred by failing to instruct the jury, as provided in G.S. 15A-1340.16(d), that evidence necessary to prove an element of the offense may not be used to prove a factor in aggravation. After the jury found the defendant guilty of second-degree murder, the trial court submitted two aggravating factors to the jury: that the victim was young and physically infirm and that the defendant took advantage of a position of trust. The jury found both factors and the defendant was sentenced in the aggravated range. With respect to the first factor, the court noted that the State's theory relied almost exclusively on the fact that because of the vulnerability of the young victim, shaking him was a reckless act indicating a total disregard of human life (the showing necessary for malice). Because this theory of malice is virtually identical to the rationale underlying submission of the aggravating factor, there is a reasonable possibility that the jury relied on the victim's age in finding both malice and the aggravating factor. The court came to a different conclusion as to the other aggravating factor. One judge dissented on a different issue.

State v. Ross, 216 N.C. App. 337 (Oct. 18, 2011). The trial court erred by submitting to the jury three aggravating factors that had not been alleged in the indictment as required by G.S. 15A-1340.16(a4). The three aggravating factors were that the defendant used a firearm equipped with an unregistered silencing device; the defendant's conduct included involvement in the illegal sale and purchase of narcotics; and the defendant's conduct was part of a course of conduct which included the commission of other crimes of violence against another person or persons.

State v. Carter, 212 N.C. App. 516 (June 21, 2011). There was sufficient evidence supporting the trial judge's submission of the G.S. 15A-1340.16(d)(6) aggravating factor (offense against a law enforcement officer, etc. while engaged in the performance of or because of the exercise of official duties.) to the jury. Subsection (d)(6)'s "engaged in" prong does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class engaged in the exercise of his or her official duties; rather, submission simply requires evidence sufficient to establish the "objective fact" that the victim was a member of the protected class — here, a law enforcement officer — engaged in the performance of his or her official duties. On the facts presented, the evidence was sufficient.

State v. Gillespie, 209 N.C. App. 746 (Mar. 1, 2011). Where the trial court determined that one aggravating factor (heinous, atrocious or cruel) outweighed multiple mitigating factors, it acted within its discretion in sentencing the defendant in the aggravated range.

State v. Mackey, 209 N.C. App. 116 (Jan. 4, 2011). The defendant was improperly sentenced in the aggravated range when the State did not provide proper notice of its intent to present evidence of aggravating factors as required by G.S. 15A-1340.16(a6). The court rejected the State's argument that a letter regarding plea negotiations sent by the State to the defendant provided timely and sufficient notice of its intent to prove aggravating factors.

State v. Anderson, 200 N.C. App. 216 (Oct. 6, 2009). Rejecting the defendant's argument that the trial court erred by not holding a separate sentencing proceeding for aggravating factors.

State v. Davis, 208 N.C. App. 26 (Nov. 16, 2010). The trial court did not violate G.S. 15A-1340.16(d) (evidence necessary to prove an element of the offense may not be used to prove any factor in aggravation) by submitting, in connection with assault with a deadly weapon charges, the aggravating factor that the defendant "knowingly created a great risk of death to more than one person by means of a weapon or device which would normally be hazardous to the lives of more than one person." The court reasoned that for the assault charges the State was not required to prove that the defendant used a weapon or device which would normally be hazardous to the lives of more than one person.

State v. Sellars, 363 N.C. 112 (Mar. 20, 2009). The court affirmed a ruling of the North Carolina Court of Appeals finding no error in the defendant's trial and sentence. However, it rejected the implication in the court of appeals' opinion that a jury's determination that a defendant is not insane resolves the presence or absence of the statutory aggravating factor, G.S. 15A-1340.16(d)(8) (knowingly creating great risk of death to more than one person by weapon normally hazardous to lives of more than one person). Nor does a jury's finding that a defendant is not insane automatically render any *Blakely* error concerning this aggravating factor harmless beyond a reasonable doubt. However, the court examined the evidence and determined that the trial judge's finding of the aggravating factor was harmless beyond a reasonable doubt.

State v. Hunter, 208 N.C. App. 506 (Dec. 21, 2010). The evidence was sufficient to support the aggravating factor that the offense committed was especially heinous, atrocious, or cruel. The defendant assaulted his 72-year-old grandmother, stabbing her, striking her in the head, strangling her, and impaling her with a golf club shaft eight inches into her back and chest.

State v. Blakeman, 202 N.C. App. 259 (Feb. 2, 2010). In a sexual assault case involving a 13-year-old victim, the evidence was insufficient to establish aggravating factor G.S. 15A-1340.16(d)(15) (took advantage of a position of trust or confidence, including a domestic relationship). The defendant was the stepfather of the victim's friend. The victim required parental permission to spend the night with her friend, and had done so not more than ten times. There was no evidence that the victim's mother had arranged for the defendant to care for the victim on a regular basis, or that the defendant had any role in the victim's life other than being her friend's stepfather. There was no evidence suggesting that the victim, who lived nearby, would have relied on the defendant for help in an emergency, rather than going home. There was no evidence of a familial relationship between the victim and the defendant, that they had a close personal relationship, or that the victim relied on the defendant for any physical or emotional care. The evidence showed only that the victim "trusted" the defendant in the same way she might "trust" any adult parent of a friend.

State v. Rivens, 198 N.C. App. 130 (July 7, 2009). There was sufficient evidence to establish the aggravating factor that the defendant had previously been adjudicated delinquent for an offense that would be a B2 felony if it had been committed by an adult. The evidence of that prior adjudication was a Transcript of Admission from the juvenile proceeding, not the Juvenile Adjudication Order or Disposition/Commitment Order. Under G.S. 15A-1131(b), a person has been convicted when he or she has been adjudged guilty or has entered a guilty plea. An admission by a juvenile, like that recorded in a Transcript of Admission is equivalent to a guilty plea.

Applicable Law

State v. Whitehead, 365 N.C. 444 (Mar. 9, 2012). The superior court judge erred by "retroactively" applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case. The defendant was sentenced under the FSA. After SSL came into effect, he filed a motion for appropriate relief asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL. The superior court judge granted relief. The supreme court, exercising rarely used general supervisory authority to promote the expeditious administration of justice, allowed the State's petition for writ of certiorari and held that the superior court judge erred by modifying the sentence. The court relied on the effective date of the SSL, as set out by the General Assembly when enacting that law. Finding no other ground for relief, the court remanded for reinstatement of the original FSA sentence.

State v. Lee, __ N.C. App. __, 745 S.E.2d 73 (July 16, 2013). The trial court erred by granting the defendant's MAR and retroactively applying 2009 amendments to the Structured Sentencing Act (SSA) to the defendant's 2005 offenses. The court reasoned that the Session Law amending the SSA stated that "[t]his act becomes effective December 1, 2009, and applies to offenses committed on or after that date." Thus, it concluded, it is clear that the legislature did not intend for the 2009 grid to apply retroactively to offenses committed prior to December 1, 2009.

Mitigating Factors/Sentence

State v. Dahlquist, __ N.C. App. __, 753 S.E.2d 355 (Jan. 7, 2014). The trial court did not abuse its discretion by failing to find two statutory mitigating factors with respect to a 17-year-old defendant: G.S. 15A-1340.16(e)(4) (defendant's "age, or immaturity, at the time of the commission of the offense significantly reduced defendant's culpability for the offense") and G.S. 15A-1340.16(e)(18) ("defendant has a support system in the community").

State v. Bacon, __ N.C. App. __, 745 S.E.2d 905 (Aug. 6, 2013). Trial court did not err by declining to find two statutory mitigating factors: G.S. 15A-1340.16(e)(12) (good character/reputation in the community) and 15A-1340.16(e)(19) (positive employment history). The court rejected the defendant's argument that the evidence supporting each factor was uncontradicted and manifestly credible.

State v. Johnson, 217 N.C. App. 605 (Dec. 20, 2011). In a drug trafficking case, the trial court did not err by failing to intervene ex mero motu during the prosecutor's closing argument. The

prosecutor asserted: "Think about the type of people who are in that world and who would be able to testify and witness these type of events. I submit to you that when you try the devil, you have to go to hell to get your witness. When you try a drug case, you have to get people who are involved in that world. Clearly the evidence shows that [the defendant] was in that world. He's an admitted drug dealer and admitted drug user." Citing *State v. Willis*, 332 N.C. 151, 171 (1992), the court concluded that the prosecutor was not characterizing the defendant as the devil but rather was using this phrase to illustrate the type of witnesses which were available in this type of case.

State v. Garnett, 209 N.C. App. 537 (Feb. 15, 2011). The trial court did not abuse its discretion by refusing the defendant's request for a mitigated sentence despite uncontroverted evidence of mitigating circumstances. The defendant offered uncontroverted evidence of mitigating factors and the trial court considered this evidence during the sentencing hearing. That the trial court did not, however, find any mitigating factors and chose to sentence the defendant in the presumptive range was within its discretion.

State v. Simonovich, 202 N.C. App. 49 (Jan. 19, 2010). The trial court did not err by failing to find the G.S. 15A-1340.16(e)(8) mitigating factor that the defendant acted under strong provocation or that the relationship between the defendant and the victim was otherwise extenuating. As to an extenuating relationship, the evidence showed only that the victim (who was the defendant's wife) repeatedly had extra-marital sexual relationships and that the couple fought about that behavior. As to provocation, there was no evidence that the victim physically threatened or challenged the defendant in any way; the only threat she made was to commit further adultery and to report the defendant as an abuser.

State v. Davis, 206 N.C. App. 545 (Aug. 17, 2010). The trial court did not abuse its discretion by failing to find mitigating factors. As to acceptance of responsibility, the court found that although the defendant apologized for her actions, her statement did not lead to the "sole inference that [s]he accepted [and that] [s]he was answerable for the result of [her] criminal conduct." Although defense counsel argued other mitigating factors, no supporting evidence was presented to establish them. Finally, although the defendant alleged that a drug addiction compelled her to commit the offenses, the court noted that drug addiction is not *per se* a statutorily enumerated mitigating factor and in any event, the defendant did not present any evidence on this issue at sentencing.

Extraordinary Mitigation

State v. Williams, __ N.C. App. __, 741 S.E.2d 486 (May 7, 2013). (1) The trial court did not put the burden on the State to disprove extraordinary mitigating factors. After the defendant presented evidence of mitigating factors, the trial court asked the State to respond to the defendant's evidence by explaining why it believed these factors were not sufficient reasons for finding extraordinary mitigation. The trial court did not presume extraordinary mitigating factors and then ask the State to present evidence to explain why they did not exist. (2) The trial court erred by finding extraordinary mitigation. The trial court found ten statutory mitigating factors and four extraordinary factors. Two extraordinary factors were the same as corresponding normal statutory mitigating factors and thus were insufficient to support a finding of

extraordinary mitigation. The third factor was not a proper factor in support of mitigation; the fourth was not supported by the evidence.

State v. Riley, 202 N.C. App. 299 (Feb. 2, 2010). The trial court abused its discretion by determining that two normal mitigating factors, without additional facts being present, constituted extraordinary mitigation.

Bible References

State v. Earls, __ N.C. App. __, 758 S.E.2d 654 (June 3, 2014). Although the trial court erred by referencing the Bible or divine judgment in sentencing, given the sentence imposed, the defendant failed to show prejudice or that his sentence was based on the trial court's religious invocation. Before pronouncing its sentence on the defendant, who was found guilty of sexually abusing his children, the trial court addressed the defendant as follows:

> Well, let me say this: I think children are a gift of God and I think God expects when he gives us these gifts that we will treat them as more precious than gold, that we will keep them safe from harm the best as we're able and nurture them and the child holds a special place in this world. In the 19th chapter of Matthew Jesus tells his disciples, suffer the little children, to come unto me, forbid them not: for such is the kingdom of heaven. And the law in North Carolina, and as it is in most states, treats sexual abuse of children as one of the most serious crimes a person can commit, and rightfully so, because the damage that's inflicted in these cases is incalculable. It's murder of the human spirit in a lot of ways. I'm going to enter a judgment in just a moment. But some day you're going to stand before another judge far greater than me and you're going to have to answer to him why you violated his law and I hope you're ready when that day comes.

Although finding no basis for a new sentencing hearing, the court "remind[ed] trial courts that judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not." Slip Op. at 18 (quotation omitted).

Blakely Issues

Alleyne v. United States, 570 U.S. __, 133 S.Ct. 2151 (June 17, 2013). The Court overruled *Harris v. United States*, 536 U.S. 545 (2002), and held that any fact that increases a mandatory minimum sentence must be submitted to the jury. The defendant was charged with several federal offenses, including using or carrying a firearm in relation to a crime of violence under § 924(c)(1)(A). The statute provided in part that anyone who "uses or carries a firearm" in relation to a "crime of violence" shall be sentenced to a term of imprisonment of not less than 5 years and that if the firearm is "brandished," the term of imprisonment is not less than 7 years. The jury convicted the defendant of the offense and indicated on the verdict form that he had "[u]sed or carried a firearm during and in relation to a crime of violence"; it did not indicate a finding that the firearm was brandished. The trial court applied the "brandishing" mandatory minimum and sentenced the defendant to seven years' imprisonment. The Court of Appeals affirmed, noting that the defendant's objection to the sentenced was foreclosed by *Harris*, which had held that

judicial fact-finding that increases the mandatory minimum sentence for a crime is permissible under the Sixth Amendment. The Court reversed.

Southern Union Co. v. United States, 567 U.S. __, 132 S. Ct. 2344 (June 21, 2012). The Court held that the *Apprendi* rule applies to fines. Thus, any fact that increases a defendant's statutory maximum fine must be found by a jury beyond a reasonable doubt

Oregon v. Ice, 555 U.S. 160 (Jan. 14, 2009). *Apprendi*, and later rulings do not provide a Sixth Amendment right to jury trial under an Oregon law that requires findings of fact to support a judge's decision to impose consecutive sentences. The Court made clear that states such as North Carolina, which do not require a judge to make findings of fact to impose consecutive sentences, are not required to provide a defendant with a jury trial on the consecutive sentences issue.

State v. Edmonds, __ N.C. App. __, 763 S.E.2d 552 (Oct. 7, 2014). Although the trial court erred in accepting the defendant's admission to an aggravating factor without complying with G.S. 15A-1022, as required by G.S. 15A-1022.1, the error was harmless beyond a reasonable doubt based on the uncontroverted and overwhelming evidence of the relevant factor.

State v. Miles, 221 N.C. App. 211 (June 5, 2012). Where the defendant admitted that he was serving a prison sentence when the crime was committed, no *Blakely* violation occurred when the trial judge assigned a prior record level point on this basis without submitting the issue to the jury.

State v. Jacobs, 202 N.C. App. 71 (Jan. 19, 2010). Trial judge's *Blakely* error with respect to aggravating factors was not harmless and required a new sentencing hearing.

State v. Shaw, 207 N.C. App. 369 (Oct. 5, 2010). The court rejected the defendant's argument that the trial court took into account a non-statutory aggravating factor neither stipulated to nor found by the jury beyond a reasonable doubt. The defendant's argument was based on the trial court's comments that (1) the defendant could have been tried for premeditated first degree murder and (2) "the State . . . made a significant concession . . . allowing [him] to plead second-degree murder." When taken in context, these comments were merely responses to those made by defense counsel.

Charge Conference at Sentencing Hearing

State v. Hill, __ N.C. App. __, 760 S.E.2d 85 (July 15, 2014). Remanding for a new sentencing hearing, the court held that the trial court erred when it failed to hold a charge conference before instructing the jury during the sentencing phase of the trial, as required by G.S. 15A-1231(b). The court concluded that holding a charge conference is mandatory, and a trial court's failure to do so is reviewable on appeal even in the absence of an objection at trial. The court rejected the State's argument that the statute should not apply to sentencing proceedings in non-capital cases. It concluded:

> If, as occurred in this case, the trial court decides to hold a separate sentencing proceeding on aggravating factors as permitted by [G.S.] 15A-1340.16(a1), and

> the parties did not address aggravating factors at the charge conference for the guilt-innocence phase of the trial, [G.S.] 15A-1231 requires that the trial court hold a separate charge conference before instructing the jury as to the aggravating factor issues.

Although G.S. 15A-1231(b) provides that "[t]he failure of the judge to comply fully with the provisions of this subsection does not constitute grounds for appeal unless his failure, not corrected prior to the end of the trial, materially prejudiced the case of the defendant," in this case, the court noted, the trial court did not comply with the statute at all.

Consolidated or Consecutive Offenses

State v. Herrin, 213 N.C. App. 68 (June 21, 2011). The trial court exceeded its statutory authority by mandating that any later sentence imposed on the defendant must run consecutive to the sentence imposed in the case at hand. The court, however, declined to vacate the relevant portion of the judgment, concluding that because the defendant had not yet been ordered to serve a consecutive sentence, such an opinion would be advisory.

State v. Jacobs, 202 N.C. App. 71 (Jan. 19, 2010). G.S. 15A-1340.15(b) requires that when offenses are consolidated for judgment, the trial judge must enter a sentence for the most serious offense.

Costs

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014). The trial court erred by ordering costs for fingerprint examination as lab fees. G.S. 7A-304(a)(8) does not allow recovery of lab costs for fingerprint analysis.

State v. Phillips, __ N.C. App. __, 742 S.E.2d 338 (May 21, 2013). The defendant had adequate notice and opportunity to be heard before the trial court imposed court costs.

State v. Patterson, __ N.C. App. __, 735 S.E.2d 602 (Oct. 16, 2012). (1) The trial court erred by failing to exercise discretion when ordering the defendant to pay court costs. Ordering payment of costs, the court stated: "I have no discretion but to charge court costs and I'll impose that as a civil judgment." Amended G.S. 7A-304(a) does not mandate imposition of court costs; rather, it includes a limited exception under which the trial court may waive court costs upon a finding of just cause. The trial court's statement suggests that it was unaware of the possibility of a just cause waiver. (2) Court costs must be limited to the amounts authorized by G.S. 7A-304.

Credit

State v. Lewis, __ N.C. App. __, 752 S.E.2d 216 (Dec. 17, 2013). The trial court did not err by failing to grant the defendant credit for 18 months spent in federal custody prior to trial. After the defendant was charged in state court, the State dismissed the charges to allow for a federal prosecution based on the same conduct. After the defendant's federal conviction was vacated, the State reinstated the state charges. The defendant was not entitled to credit for time served in

federal custody under G.S. 15-196.1 because his confinement was in a federal institution and was a result of the federal charge.

State v. Corkum, __ N.C. App. __, 735 S.E.2d 420 (Dec. 4, 2012). The trial court erred by denying credit for the time the defendant was incarcerated pending a revocation hearing on his first violation of post-release supervision. Under G.S. 15-196.1, the trial court was required to credit the defendant with eight days he spent in custody awaiting a revocation hearing for his first violation of post-release supervision when the defendant's sentence later was activated upon the revocation of his post-release supervision following his second violation.

State v. Stephenson, 213 N.C. App. 621 (July 19, 2011). The defendant was not entitled to credit under G.S. 15-196.1 for time spent in a drug treatment program as a condition of probation because the program was not an institution operated by a State or local government.

DVPO Enhancements

State v. Jacobs, ___ N.C. App. ___, 768 S.E.2d 883 (Feb. 17, 2015). The trial court erred by enhancing under G.S. 50B-4.1(d) defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and attempted second-degree kidnapping. G.S. 50B-4.1(d) provides that a person who commits another felony knowing that the behavior is also in violation of a domestic violence protective order (DVPO) shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement "shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section." Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon. Here, defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced under G.S. 50B-4.1(d); AWDWIKISI, enhanced; and violation of a DVPO with the use of a deadly weapon. He was found guilty of three crimes: attempted second-degree kidnapping, enhanced; AWDWIKISI, enhanced; and violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g). The court held:

> We believe the limiting language in G.S. 50B-4.1(d) - that the subsection "shall not apply to a person charged with or convicted of" certain felonies - is unambiguous and means that the subsection is not to be applied to "the person," as advocated by Defendant, rather than to certain felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant's convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B- 4.1(d) since he was "a person charged" under subsection (g) of that statute.

DWI Sentencing

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014), *temporary stay allowed*, __ N.C.__, 767 S.E.2d 53 (Dec. 2, 2014). (1) In this DWI case, the court rejected the defendant's invitation to decide whether G.S. 20-179(d)(1) (aggravating factor to be considered in sentencing of gross impairment or alcohol concentration of 0.15 or more) creates an unconstitutional

mandatory presumption. Defendant challenged that portion of the statute that provides: "For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court." In this case, instead of instructing the jury in accordance with the challenged language, the trial court refrained from incorporating any reference to the allegedly impermissible mandatory presumption and instructed the prosecutor to refrain from making any reference to the challenged language in the presence of the jury. Because the jury's decision to find the G.S. 20-179(d)(1) aggravating factor was not affected by the challenged statutory provision, the defendant lacked standing to challenge the constitutionality of the statutory provision. (2) The court rejected the defendant's argument that a double jeopardy violation occurred when the State used a breath test result to establish the factual basis for the defendant's plea and to support the aggravating factor used to enhance punishment. The court reasoned that the defendant was not subjected to multiple punishments for the same offense, stating: "instead of being punished twice, he has been subjected to a more severe punishment for an underlying substantive offense based upon the fact that his blood alcohol level was higher than that needed to support his conviction for that offense."

State v. Geisslercrain, __ N.C. App. __, 756 S.E.2d 92 (April 1, 2014). (1) In this DWI case the trial court committed a *Blakely* error by finding an aggravating factor. The trial court found the aggravating factor, determined that it was counterbalanced by a mitigating factor and sentenced the defendant at Level Four. If the aggravating factor had not been considered the trial court would have been required to sentence the defendant to a Level Five punishment. Thus, the aggravating factor, which was improperly found by the judge, increased the penalty for the crime beyond the prescribed maximum. (2) The State failed to provide notice that it intended to seek aggravating factors as required by G.S. 20-179(a1)(1).

State v. Reeves, 218 N.C. App. 570 (Feb. 7, 2012). The court vacated the defendant's sentence on an impaired driving conviction and remanded for a new sentencing hearing where the State failed to provide the defendant with notice of its intent to use an aggravating factor under G.S. 20-179(d).

State v. Green, 209 N.C. App. 669 (Mar. 1, 2011). No *Blakely* error occurred in the defendant's sentence for impaired driving. The trial court found two aggravating factors, two factors in mitigation, and imposed a level four punishment. The level four punishment was tantamount to a sentence within the presumptive range, so that the trial court did not enhance defendant's sentence even after finding aggravating factors. Therefore, *Blakely* is not implicated.

State v. Dalton, 197 N.C. App. 392 (June 2, 2009). G.S. 20-179(a1)(1) (requiring the state, in an appeal to superior court, to give notice of grossly aggravating factors) only applies to offenses committed on or after the effective date of the enacting legislation, December 1, 2006.

Eighth Amendment Issues

Miller v. Alabama, 567 U.S. __, 132 S. Ct. 2455 (June 25, 2012). The Court held that the 8th Amendment prohibits a sentencing scheme that requires life in prison without the possibility of

parole for juvenile homicide offenders.

Graham v. Florida, 560 U.S. 48 (May 17, 2010). The Eighth Amendment's Cruel and Unusual Punishments Clause does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime. For a more detailed discussion of this case, click here.

State v. Thomsen, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). The trial court erred by concluding that the defendant's 300-month minimum, 420-month maximum sentence for statutory rape and statutory sex offense violated the Eighth Amendment. The court concluded: "A 300-month sentence is not grossly disproportionate to the two crimes to which Defendant pled guilty. Furthermore, Defendant's 300-month sentence … is less than or equal to the sentences of many other offenders of the same crime in this jurisdiction."

State v. Lovette, __ N.C. App. __, 758 S.E.2d 399 (May 6, 2014). In this case, arising from the defendant's conviction for first-degree murder of UNC student Eve Carson, the court upheld the constitutionality of the State's "*Miller* fix" statute and determined that the trial court's findings supported a sentence to life in prison without the possibility of parole. The defendant—who was 17 years old at the time of the murder—was originally sentenced to life in prison without parole. In his first appeal the court vacated the sentence and remanded for resentencing under G.S. 15A-1340.19A et. seq., the new sentencing statute enacted by the N.C. General Assembly in response to the U.S. Supreme Court's ruling in *Miller v. Alaba*ma, 567 U.S. ___, ___, 183 L.Ed. 2d 407, 421-24 (2012). On remand, the trial court held a new sentencing hearing and resentenced the defendant under the new sentencing statute to life imprisonment without parole after making extensive findings of fact as to any potential mitigating factors revealed by the evidence. Among other things, the court rejected the defendant's argument that the *Miller* fix statute was constitutionally infirm because it "vests the sentencing judge with unbridled discretion providing no standards." It also rejected the defendant's arguments that the evidence was insufficient to support the trial court's findings of fact in connection with the resentencing and that without findings of irretrievable corruption and no possibility of rehabilitation the trial court should not have imposed a sentence of life imprisonment without parole. It concluded:

> As noted by *Miller*, the "harshest penalty will be uncommon[,]" but this case is uncommon. *Miller*, 567 U.S. at ___, 183 L.E. 2d at 424. The trial court's findings support its conclusion. The trial court considered the circumstances of the crime and defendant's active planning and participation in a particularly senseless murder. Despite having a stable, middleclass home, defendant chose to take the life of another for a small amount of money. Defendant was 17 years old, of a typical maturity level for his age, and had no psychiatric disorders or intellectual disabilities that would prevent him from understanding risks and consequences as others his age would. Despite these advantages, defendant also had an extensive juvenile record, and thus had already had the advantage of any rehabilitative programs offered by the juvenile court, to no avail, as his criminal activity had continued to escalate. Defendant was neither abused nor neglected, but rather the evidence indicates for most of his life he had two parents who cared deeply for his well-being in all regards.

State v. Sterling, __ N.C. App. __, 758 S.E.2d 884 (May 6, 2014). The court declined to extend *Miller* to this felony-murder case, where the defendant turned 18 one month before the crime in question.

State v. Wilkerson, __ N.C. App. __, 753 S.E.2d 829 (Feb. 18, 2014). The trial court erred by concluding that a 50-year sentence with the possibility of parole on a defendant who was a juvenile at the time the crimes were committed subjected him to cruel and unusual punishment in violation of the Eighth Amendment. The defendant was convicted of second degree burglary (1 count), felonious breaking or entering (3 counts), felonious larceny (four counts), and possession of stolen property (2 counts). Assessing the number of felony convictions, the fact that one was particularly serious, and the fact that the defendant's conduct involved great financial harm and led to criminal activity on the part of a younger individual, the court concluded that the sentence was not "grossly disproportionate."

State v. Stubbs, __ N.C. App. __, 754 S.E.2d 174 (Feb. 4, 2014), *aff'd on other grounds*, *State v. Stubbs*, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). The court held that the trial court erred by concluding that the defendant's sentence of life in prison with the possibility of parole violated of the Eighth Amendment. In 1973, the 17-year-old defendant was charged with first-degree burglary and other offenses. After he turned 18, he defendant pleaded guilty to second-degree burglary and another charge. On the second-degree burglary conviction, he was sentenced to an active term for "his natural life." In 2011 the defendant filed a MAR challenging his life sentence, asserting, among other things, a violation of the Eighth Amendment. The trial court granted relief and the State appealed. The court began by noting that the defendant had properly asserted a claim in his MAR under G.S. 15A-1415(b)(8) (sentence invalid as a matter of law) and (b)(4) (unconstitutional sentence). On the substance of the Eighth Amendment claim, the court noted that under the statutes in effect at that time, prisoners with life sentences were eligible to have their cases considered for parole after serving 10 years. Although the record was not clear how often the defendant was considered for parole, it was clear that in 2008, after serving over 35 years, he was paroled. After he was convicted in 2010 of driving while impaired, his parole was revoked and his life sentence reinstated. Against this background, the court concluded that the "defendant's outstanding sentence of life in prison with possibility of parole for second-degree burglary, though severe, is not cruel or unusual in the constitutional sense." The dissenting judge believed that the court lacked jurisdiction to consider the State's appeal.

State v. Perry, __ N.C. App. __, 750 S.E.2d 521 (Aug. 20, 2013). The court rejected the defendant's argument that a sentence of life in prison without the possibility of parole for first-degree felony-murder (child abuse as the underlying felony) violated the 8th Amendment.

State v. Pemberton, __ N.C. App. __, 743 S.E.2d 719 (July 2, 2013). Under *Miller v. Alabama*, 132 S. Ct. 2455 (2012), the trial court violated the defendant's constitutional right to be free from cruel and unusual punishment by imposing a mandatory sentence of life imprisonment without the possibility of parole upon him despite the fact that he was under 18 years old at the time of the murder. Because the defendant was convicted of first-degree murder solely on the basis of the felony-murder rule, he must be resentenced to life imprisonment with parole in accordance with G.S. 15A-1340.19B(a).

State v. Lovette, __ N.C. App. __, 737 S.E.2d 432 (Feb. 5, 2013). In an appeal from a conviction obtained in the Eve Carson murder case, the court held that the defendant was entitled to a new sentencing hearing in accordance with G.S. 15A-1476 (recodified as G.S. 15A-1340.19A), the statute enacted by the North Carolina General Assembly to bring the State's sentencing law into compliance with *Miller v. Alabama*, __ U.S. __, 132 S.Ct. 2455 (2012) (Eighth Amendment prohibits a sentencing scheme that requires life in prison without the possibility of parole for juvenile homicide offenders). The State conceded that the statute applied to the defendant, who was seventeen years old at the time of the murder and whose case was pending on direct appeal when the Act became law.

State v. Lowery, 219 N.C. App. 151 (Feb. 21, 2012). No violation of the Eighth Amendment's prohibition against cruel and unusual punishment occurred when the defendant, who was 16 years old at the time of his arrest, was convicted of first degree murder and sentenced to life in prison without the possibility of parole . The court rejected the defendant's argument that *Graham v. Florida*, 130 S. Ct. 2011 (2010) (the Eighth Amendment does not permit a juvenile offender to be sentenced to life in prison without the possibility of parole for a non-homicide crime), warranted a different result; the court distinguished *Graham* on grounds that the case at hand involved a murder conviction.

State v. Pettigrew, 204 N.C. App. 248 (June 1, 2010). The defendant, who was sixteen years old when he committed the sexual offenses at issue, was sentenced to 32 to 40 years imprisonment. The court held that the sentence did not violate the constitutional prohibitions against cruel and unusual punishment.

Evidence at Sentencing Hearing

State v. Hurt, __ N.C. App. __, 760 S.E.2d 341 (July 15, 2014). (The trial court did not err by refusing to admit during the sentencing hearing the defendant's evidence consisting of a notebook prepared in connection with earlier sentencing proceedings and containing recitations of an accomplice's confessions, a forensic blood spatter expert report, and medical reports. The trial court declined to admit the notebook and instead asked that the defendant call live witnesses from his witness list, expressing concern about the "unsupported" and "unauthenticated" nature of the writings.

Ex Post Facto

See also discussions under specific subsections below, such as prior record level and SBM

Peugh v. United States, 569 U.S. __, 133 S.Ct. 2072 (June 10, 2013). The Court held that retroactive application of amended Federal Sentencing Guidelines to the defendant's convictions violated the Ex Post Facto Clause. The defendant was convicted for conduct occurring in 1999 and 2000. At sentencing he argued that the Ex Post Facto Clause required that he be sentenced under the 1998 version of the Guidelines in effect when he committed the offenses, not under the 2009 version, which was in effect at the time of sentencing. Under the 1998 version, his

sentencing range was 30-37 months; under the 2009 version it was 70-87 months. The lower courts rejected the defendant's argument and the Supreme Court reversed.

Expunction

State v. Frazier, 206 N.C. App. 306 (Aug. 3, 2010). The trial court erred by applying G.S. 14-50.30 and expunging the defendant's conviction for an offense occurring on February 6, 1995. At the time, the statute only applied to offenses occurring on or after December 1, 2008.

Fees

State v. Fennell, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The trial court erred in calculating the amount of jail fees due where it used the daily rate provided in the wrong version of G.S. 7A-313. The court rejected the State's argument that because the defendant failed to object to the fees on this basis at sentencing, the issue was not properly before the court or, alternatively was bared by res judicata because of the defendant's prior appeals.

State v. Rowe, __ N.C. App. __, 752 S.E.2d 223 (Dec. 17, 2013). The trial court erred by imposing jail fees of $2,370 pursuant to G.S. 7A-313. The trial court orally imposed an active sentence of 60 days, with credit for 1 day spent in pre-judgment custody. The written judgment included a $2,370.00 jail fee. Although the trial court had authority under G.S. 7A-313 to order the defendant to pay $10 in jail fees the statute did not authorize an additional $2,360 in fees where the defendant received an active sentence, not a probationary one.

Fines

Southern Union Co. v. United States, 567 U.S. __, 132 S. Ct. 2344 (June 21, 2012). The Court held that the *Apprendi* rule applies to fines. Thus, any fact that increases a defendant's statutory maximum fine must be found by a jury beyond a reasonable doubt

Fair Sentencing

State v. Whitehead, 365 N.C. 444 (Mar. 9, 2012). The superior court judge erred by "retroactively" applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case. The defendant was sentenced under the FSA. After SSL came into effect, he filed a motion for appropriate relief asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL. The superior court judge granted relief. The supreme court, exercising rarely used general supervisory authority to promote the expeditious administration of justice, allowed the State's petition for writ of certiorari and held that the superior court judge erred by modifying the sentence. The court relied on the effective date of the SSL, as set out by the General Assembly when enacting that law. Finding no other ground for relief, the court remanded for reinstatement of the original FSA sentence.

State v. Pace, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). Finding that the trial court erred by sentencing the defendant in the aggravated range in this Fair Sentencing Act (FSA)

child sexual assault case, the court remanded for a new sentencing hearing in compliance with *Blakely* and in accordance with the court's opinion regarding how *Blakely* applies to FSA cases.

Gang Offenses

State v. Dubose, 208 N.C. App. 406 (Dec. 7, 2010). The trial court erred by making a determination under G.S. 14-50.25 that the offenses involved criminal street gang activity outside of defendant's presence and without giving him an opportunity to be heard; vacating and remanding for a new sentencing hearing. A finding of criminal street gang activity was a "substantive change" in the judgments that must be made in defendant's presence and with an opportunity to be heard.

Impermissibly Based on Exercise of Rights/Poverty

State v. Pinkerton, 365 N.C. 6 (Feb. 4, 2011). In a per curiam opinion, the court reversed, for the reasons stated in the dissenting opinion below, the decision of the court of appeals in *State v. Pinkerton*, 205 N.C. App. 490 (July 20, 2010). The court of appeals had held, over a dissent, that when sentencing the defendant in a child sexual assault case, the trial court impermissibly considered the defendant's exercise of his right to trial by jury. After the jury returned a guilty verdict and the defendant was afforded the right to allocution, the trial court stated that "if you truly cared–if you had one ounce of care in your heart about that child–you wouldn't have put that child through this." Instead, according to the trial court, defendant "would have pled guilty, and you didn't." The trial court stated: "I'm not punishing you for not pleading guilty . . . I would have rewarded you for pleading guilty." The dissenting judge found no indication of improper motivation by the trial court judge in imposing the defendant's sentence.

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). Although the trial court erred when it based its imposition of sentence on the defendant's exercise of his right to appeal, the issue was moot because the defendant had served his sentence and could not be resentenced. Although the 120-day sentence was within the statutorily permissible range, the trial court changed its judgment from a split sentence of 30 days followed by probation to an active term in response to the defendant's decision to appeal.

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). The trial court did not improperly base its sentencing decision on the defendant's decision to reject an offered plea agreement and go to trial. However, the court repeated its admonition that "judges must take care to avoid using language that could give rise to an appearance that improper factors have played a role in the judge's decision-making process even when they have not."

State v. Massenburg, __ N.C. App. __, 759 S.E.2d. 703 (July 1, 2014). Where the defendant's sentence was within the presumptive range, the trial court did not abuse its discretion by imposing an intermediate sanction of a term of special probation of 135 days in the Division of Adult Correction. The court rejected the defendant's argument that the sentence was a discriminatory sentence predicated on poverty, namely that the trial court chose a sentence with active time as opposed to regular probation because the defendant would never make enough money at his current job to pay monies as required.

State v. Jones, 216 N.C. App. 519 (Nov. 1, 2011). The defendant's sentence was impermissibly based on his exercise of his constitutional rights. At the sentencing hearing, the trial court noted more than once that the defendant "was given an opportunity to plead guilty[,]" and that his failure to plead was one of the "factors that the Court considers when the Court fashions judgment." The trial court also admonished the defendant and defense counsel for "unnecessarily" protracting the trial for 6 days when it should have only taken 2 days.

State v. Haymond, 203 N.C. App. 151 (Apr. 6, 2010). Ordering a new sentencing hearing where there was a reasonable inference that the trial judge ran the defendant's ten felony sentences consecutively in part because of the defendant's rejection of a plea offer and insistence on going to trial. Even though the sentences were elevated to Class C felonies because of habitual felon status, the trial judge could have consolidated them into a single judgment. At a pretrial hearing and in response to an offer by the prosecutor to recommend a ten-year sentence, the defendant asked the trial court to consider a sentence of five years in prison and five years of probation. The trial court responded saying, "So I'm just telling you up front that the offer the State made is probably the best thing." The defendant declined the state's offer, went to trial, and was convicted. At sentencing, the trial judge stated: "[w]ay back when we dealt with that plea different times and, you know, you told me . . . what you wanted to do, and I told you that the best offer you're gonna get was that ten-year thing, you know." This statement created an inference arises that the trial court based its sentence at least in part on defendant's failure to accept the State's plea offer.

State v. Anderson, 194 N.C. App. 292 (Dec. 16, 2008). Rejecting the defendant's argument that the trial court imposed a greater sentence because the defendant chose to proceed to trial rather than plead guilty. At a conference between the judge, prosecutor, and defense counsel, the judge commented that if the parties were engaged in plea discussions, he would be amenable to a probationary sentence. Defense counsel objected to the judge's comments, stating that it could be inferred that the judge would be less likely to give the defendant probation if he did not plead guilty. The judge stated that he had not meant to make any such implication, but rather to encourage the parties to enter plea negotiations. The defendant failed to show that it can be reasonably inferred that the defendant's sentence was improperly based, even in part, on his insistence on a jury trial.

Life Without Possibility of Parole

State v. Antone, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Where the defendant was convicted of first-degree murder on the theories of felony murder and premeditation and deliberation, the trial court violated G.S. 15A-1340.19C(a) by imposing a sentence of life imprisonment without the possibility of parole without assessing mitigating factors, requiring a remand for a new sentencing hearing. The trial court's findings of fact and order failed to comply with the statutory mandate requiring it to "include findings on the absence or presence of any mitigating factors[.]" The trial court's order made "cursory, but adequate findings as to some mitigating circumstances but failed to address other factors at all. The court added:

> We also note that portions of the findings of fact are more recitations of testimony, rather than evidentiary or ultimate findings of fact. The better practice

> is for the trial court to make evidentiary findings of fact that resolve any conflicts in the evidence, and then to make ultimate findings of fact that apply the evidentiary findings to the relevant mitigating factors . . . . If there is no evidence presented as to a particular mitigating factor, then the order should so state, and note that as a result, that factor was not considered. (citations omitted).

Meaning of "Month"

McDonald v. N.C. Department of Correction, 219 N.C. App. 536 (Mar. 20, 2012). G.S. 12-3(12) (defining "imprisonment for one month" as imprisonment for 30 days) is inapplicable to sentences imposed under structured sentencing. For purposes of structured sentencing, the term "month" is defined by G.S. 12-3(3) to mean a calendar month.

Merger Rule

State v. Blymyer, 205 N.C. App. 240 (July 6, 2010). The trial court erred by consolidating for judgment convictions for first-degree murder and robbery with a dangerous weapon where the jury did not specify whether it had found the defendant guilty of first-degree murder based on premeditation and deliberation or on felony-murder. In this situation, the robbery merged with the murder.

Misdemeanors

Limit on Consecutive Sentences

State v. Remley, 201 N.C. App. 146 (Nov. 17, 2009). The trial court violated G.S. 15A-1340.22(a) when it imposed a consecutive sentence on multiple misdemeanor convictions that was more than twice that allowed for the most serious misdemeanor, a Class 1 misdemeanor. The statute provides, in part, that if the trial court imposes consecutive sentences for two or more misdemeanors and the most serious offense is a Class A1, Class 1, or Class 2 misdemeanor, the total length of the sentences may not exceed twice the maximum sentence authorized for the most serious offense.

Prejudice Enhancement

State v. Brown, 202 N.C. App. 499 (Feb. 16, 2010). Prejudice enhancement in G.S. 14-3(c) was properly applied where the defendant, a white male, assaulted another white male because of the victim's interracial relationship with a black female.

Post-Release Supervision

State v. Harris, 198 N.C. App. 371 (July 21, 2009). The trial court did not err in ordering that an indigent defendant reimburse the State for the costs of providing a transcript of the defendant's prior trial as a condition of post-release supervision.

Prayer for Judgment Continued

Walters v. Cooper, 367 N.C. 117 (Oct. 4, 2013). The court per curiam affirmed the decision below, *Walters v. Cooper*, __ N.C. App. __, 739 S.E.2d 185 (Mar. 19, 2013), in which the court of appeals had held, over a dissent, that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

State Watkins, __ N.C. App. __, 747 S.E.2d 907 (Sept. 17, 2013). The court remanded for a determination of whether the trial court had jurisdiction to sentence the defendant more than a year after the date set for the PJC.

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). When the trial court enters a PJC, there is no final judgment from which to appeal.

State v. Craven, 205 N.C. App. 393 (July 20, 2010), *reversed on other grounds*, 367 N.C. 51 (June 27, 2013). The court had jurisdiction to enter judgment on a PJC. The defendant was indicted on August 7, 2006, and entered a guilty plea on January 22, 2007, when a PJC was entered, from term to term. Judgment was entered on March 13, 2009. Because the defendant never requested sentencing, he consented to continuation of sentencing and the two-year delay was not unreasonable.

State v. Popp, 197 N.C. App. 226 (May 19, 2009). The following conditions went beyond requirements to obey the law and transformed a PJC into a final judgment: abide by a curfew, complete high school, enroll in an institution of higher learning or join the armed forces, cooperate with random drug testing, complete 100 hours of community service, remain employed, and write a letter of apology.

Presumptive Range Sentencing

State v. James, __ N.C. App. __, 738 S.E.2d 420 (Mar. 19, 2013). Because the defendant was sentenced in the presumptive range, the trial court did not err in failing to make findings regarding a mitigating factor.

State v. Oakes, 219 N.C. App. 490 (Mar. 20, 2012). The trial court did not err by considering the seriousness of the offense when exercising its discretion to choose a minimum term within the presumptive range.

State v. Twitty, 212 N.C. App. 100 (May 17, 2011). The court rejected the defendant's argument that because his sentence at the top of the presumptive range overlapped with the low end of the aggravated range, it was improper without findings of an aggravating factor. No such findings are required to support the defendant's presumptive range sentence.

State v. Whitted, 209 N.C. App. 522 (Feb. 15, 2011). The trial judge's comments about the judgment and conviction form did not suggest that it incorrectly thought that it could not impose a sentence in the presumptive range when aggravating and mitigating factors were in equipoise.

Prior Record Level

Ability to Appeal

State v. Gardner, __ N.C. App. __, 736 S.E.2d 826 (Jan. 15, 2013). Distinguishing *State v. Hamby*, 129 N.C. App. 366, (1998), the court held that the defendant could appeal the trial court's calculation of her prior record level even though she had stipulated to her prior convictions on the sentencing worksheet.

Constitutional Issues

State v. Threadgill, __ N.C. App. __, 741 S.E.2d 677 (May 7, 2013). The court rejected the defendant's argument that the trial court violated his rights under the ex post facto clause when it assigned points to his prior record level based upon a conviction that was entered after the date of the offenses for which he was sentenced in the present case. The court noted that the conviction for the prior was entered more than a year before entry of judgment in the present case and G.S. 15A-1340.11(7) (defining prior conviction) was enacted prior to the date of the present offense.

Double Counting Issues

State v. Best, 214 N.C. App. 39 (Aug. 2, 2011). Distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), the court held that the trial court did not err by using a felonious breaking or entering conviction for the purpose of both supporting a possession of a firearm by a felon charge and calculating the defendant's prior record level.

Defendant as Offender for Priors

State v. Sturdivant, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court correctly determined the defendant's prior record level (PRL) points. At sentencing, the State submitted a print-out of the defendant's Administrative Office of the Courts (AOC) record. The defendant offered no evidence. On appeal, the defendant argued that the State failed to meet its burden of proving that one of the convictions was the defendant's, arguing that the birthdate in the report was incorrect and that he did not live at the listed address at the time of sentencing. The court held that the fact that the defendant was living at a different address at the time of sentencing was of no consequence, in part because people move residences. As to the birthdate, under G.S. 15A-1340.14(f), a copy of a AOC record "bearing the same name as that by which the offender is charged, is prima facie evidence that the offender named is the same person as the offender before the court."

Elements of Current Offense Included in Prior Conviction

State v. Gardner, __ N.C. App. __, 736 S.E.2d 826 (Jan. 15, 2013). The trial court erred by assigning a PRL point under G.S. 15A-1340.14(b)(6) (one point if all the elements of the present offense are included in any prior offense). The trial court assigned the point because the defendant was convicted of felony speeding to elude (Class H felony) and had a prior conviction for that offense. However, the new felony speeding to elude conviction was consolidated with a

conviction for assault with a deadly weapon on a governmental officer (AWDWOGO), a more serious offense (Class F felony). When offenses are consolidated, the most serious offense controls, here AWDWOGO. Analyzed in this fashion, all of the elements of AWDWOGO are not included in the prior felony speeding to elude conviction. The court rejected the State's argument that because both felonies were elevated to Class C felonies under the habitual felon law, assignment of the prior record level was proper.

State v. Ford, 195 N.C. App. 321 (Feb. 3, 2009). The defendant was convicted of attempted felony larceny and then pled guilty to being a habitual felon. The defendant previously had been convicted of felony larceny. That the judge properly found one point under G.S. 15A-1340.14(b)(6) (all elements of current offense are included in offense for which defendant was previously convicted) in calculating prior record level. Attempted felony larceny is a lesser-included offense of felony larceny regardless of the theory of felony larceny. It was irrelevant that the defendant's prior felony larceny convictions did not include the element that the defendant took property valued over $1,000.

State v. Williams, 200 N.C. App. 767 (Nov. 3, 2009). Following *Ford*, discussed above, and holding that the trial court properly assigned a prior record level point based on the fact that all elements of the offense at issue−delivery of a controlled substance, cocaine−were included in a prior conviction for delivery of a controlled substance, marijuana.

Ex Post Facto Issues

State v. Watkins, 195 N.C. App. 215 (Feb 3, 2009). There was no ex post facto violation in determining the defendant's prior record level when prior record level points were calculated using the classification of the prior offense at the time of sentencing (Class G felony) rather than the lower classification in place when the defendant was convicted of the prior (Class H felony).

Habitual Felon

State v. Flint, 199 N.C. App. 709 (Sept. 15, 2009). When calculating prior record level points for a new felony, points may be assigned based on a prior substantive felony supporting a prior habitual felon conviction, but not based on the prior habitual felon conviction itself.

Harmless Error

State v. Blount, 209 N.C. App. 340 (Jan. 18, 2011). Although the trial court incorrectly determined that the defendant had a total of 8 prior record level points rather than six, the error was harmless. The defendant was assigned to prior record level III, which requires 5-8 points. A correct calculation of defendant's points would have placed him in the same level.

Multiple Offenses in One Court Week & Related Issues

State v. Watlington, __ N.C. App. __, 759 S.E.2d. 392 (July 1, 2014) (No. COA13-925). Citing, *State v. West*, 180 N.C. App. 664 (2006) (the same case cited in *Perkins* above), the court held that the trial court erred by increasing the defendant's sentence based on convictions for charges

that originally had been joined for trial with the charges currently before the court. The charges were joined for trial and at the first trial, the defendant was found guilty of some charges, not guilty of others and there was a jury deadlock as to several others. The defendant was retried on charges that resulted in a deadlock and convicted. The trial court used the convictions from the first trial when calculating the defendant's PRL. [Author's note: This case was decided by a different panel than the one that decided *Perkins,* above.]

State v. Martin, __ N.C. App. __, 749 S.E.2d 922 (Nov. 19, 2013). Although the trial court erred by assigning the defendant one point for a misdemeanor breaking and entering conviction when it also assigned two points for a felony possession of a stolen vehicle conviction that occurred on the same date, the error did not increase the defendant's PRL and thus was harmless.

State v. Fair, 205 N.C. App. 315 (July 6, 2010). On appeal, a defendant is bound by his or her stipulation to the existence of a prior conviction. However, even if a defendant has stipulated to his or her prior record level, the defendant still may appeal the propriety of counting a stipulated-to conviction for purposes of calculating prior record level points. In this case, the trial court erred by counting, for prior record level purposes, two convictions in a single week of court in violation of G.S. 15A-1340.14(d).

Notice

State v. Snelling, __ N.C. App. __, 752 S.E.2d 739 (Jan. 7, 2014). The trial court erred by sentencing the defendant as a PRL III offender when State failed to provide the notice required by G.S. 15A-1340.16(a6) and the defendant did not waive the required notice.

Proof, Stipulations & Admissions

State v. Edgar, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). The trial court correctly calculated the defendant's PRL. The defendant argued that the trial court erred by basing its PRL calculation on an ineffective stipulation. The defendant's only prior conviction was one in Michigan for carrying a concealed weapon, which he contended is substantially similar to the NC Class 2 misdemeanor offense of carrying a concealed weapon. The court concluded that the defendant did not make any stipulation as to the similarity of the Michigan offense to NC offense. Instead, the prior conviction was classified as a Class I felony, the default classification for an out-of-state felony. Thus, defendant's stipulations in the PRL worksheet that he had been convicted of carrying a concealed weapon in Michigan and that the offense was classified as a felony in Michigan, were sufficient to support the default classification of the offense as a Class I felony.

State v. Snelling, __ N.C. App. __, 752 S.E.2d 739 (Jan. 7, 2014). The court rejected the defendant's argument that the trial court erred by sentencing the defendant as a PRL III offender without complying with G.S. 15A-1022.1 (procedure for admissions in connection with sentencing). At issue was a point assigned under G.S. 15A-1340.14 (b)(7) (offense committed while on probation). As a general rule, this point must be determined by a jury unless admitted to by the defendant pursuant to G.S. 15A-1022.1. However, the court noted, "these procedural requirements are not mandatory when the context clearly indicates that they are inappropriate"

(quotation omitted). Relying on *State v. Marlow*, ___ N.C. App. ___, 747 S.E.2d 741, 748 (2013), the court noted that the defendant stipulated to being on probation when he committed the crimes, defense counsel signed the PRL worksheet agreeing to the PRL, and at sentencing, the defendant stipulated that he was a PRL III..

State v. Marlow, __ N.C. App. __, 747 S.E.2d 741 (Sept. 17, 2013). The trial court did not err by accepting a stipulation to a PRL point under G.S. 15A-1340.14(b)(7) without engaging in the mandated colloquy where the context clearly indicated that it was not required.

State v. Claxton, __ N.C. App. __, 736 S.E.2d 603 (Jan. 15, 2013). The evidence supported the trial court's determination that the defendant was in PRL V. The trial court based its determination on NC and NY DCI records. The defendant argued that the NY DCI record was not sufficient because it was inconsistent with the NC DCI record. The court found any inconsistencies to be minor clerical errors.

State v. Powell, __ N.C. App. __, 732 S.E.2d 491 (Oct. 2, 2012). Sufficient evidence supported the trial court's determination of the defendant's prior record level. Counsel's oral stipulation and the prior record level worksheet established the existence of an out-of-state felony conviction, even though neither the defendant nor defense counsel signed the worksheet.

State v. Wingate, 213 N.C. App. 419 (July 19, 2011). Where the defendant stipulated that he was previously convicted of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine and that these convictions were Class G felonies, there was sufficient proof to establish his prior conviction level. The class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court.

State v. Bethea, 204 N.C. App. 587 (June 15, 2010). The defendant was properly assigned two prior record level points for a federal felony. The State presented a prior record level worksheet, signed by defense counsel, indicating that the defendant had two points for the federal conviction. During a hearing, the prosecutor asked defense counsel if the defendant stipulated to having two points and defense counsel responded: "Judge, I saw one conviction on the worksheet. [The defendant] has agreed that's him. Two points." Defense counsel made no objection to the worksheet. When the defendant was asked by counsel if he wanted to say anything, the defendant responded, "No, sir." The worksheet, defense counsel's remark, and defendant's failure to dispute the existence of his out-of-state conviction are sufficient to prove that the prior conviction exists, that the defendant is the person named in the prior conviction, and that the prior offense carried two points.

State v. Lee, 193 N.C. App. 748 (Nov. 18, 2008). The defendant's stipulation that a New Jersey conviction was substantially similar to a North Carolina offense for prior record level points was ineffective. The "substantially similar" issue is a question of law that must be determined by a judge.

State v. Bohler, 198 N.C. App. 631 (Aug. 4, 2009). The defendant's stipulation that certain out-of-state convictions were substantially similar to specified North Carolina offenses was

ineffective. However, the defendant could stipulate that the out-of-state convictions occurred and that they were either felonies or misdemeanors under the other state's law, for purposes of assigning prior record level points. Based on the stipulation in this case, the defendant's out-of-state convictions could be counted for prior record level purposes using the "default" classifications in G.S. 15A-1340.14(e).

State v. Henderson, 201 N.C. App. 381 (Dec. 8, 2009). A defendant's stipulation to the existence of out-of-state convictions and their classification as felonies or misdemeanors can support a "default" classification for prior record level purposes. However, a stipulation to substantial similarity is ineffective, as that issue is a matter of law that must be determined by the judge.

State v. Hussey, 194 N.C. App. 516 (Dec. 16, 2008). A stipulation signed by the prosecutor and defense counsel in Section III of AOC-CR-600 (prior record level worksheet) supported the judge's finding regarding prior record level. The court distinguished a prior case on grounds that the current version of the form includes a stipulation to prior record level.

State v. Boyd, 207 N.C. App.632 (Nov. 2, 2010). The State's evidence regarding the defendant's prior record level was insufficient. The State offered only an in-court statement by the prosecutor and the prior record level worksheet. The court rejected the State's argument that the prior record level was agreed to by stipulation, noting that defense counsel objected to the worksheet and to two listed convictions.

State v. Jacobs, 202 N.C. App. 350 (Feb. 2, 2010). The trial court erred by sentencing the defendant at prior record level VI. Although the prosecutor submitted a Felony Sentencing Worksheet (AOC-CR-600), there was no stipulation, either in writing on the worksheet or orally by the defendant. The court noted that the relevant form now includes signature lines for the prosecutor and either the defendant or defense counsel to acknowledge their stipulation to prior conviction level but that this revision seems to have gone unnoticed.

State v. Fortney, 201 N.C. App. 662 (Jan. 5, 2010). A printout from the FBI's National Crime Information Center (NCIC) contained sufficient identifying information to prove, by a preponderance of the evidence, that the defendant was the subject of the report and the perpetrator of the offenses specified in it. The printout listed the defendant's prior convictions as well as his name, date of birth, sex, race, and height. Because the printout included the defendant's weight, eye and hair color, scars, and tattoos, the trial court could compare those characteristics to those of the defendant. Additionally, the State tendered an official document from another state detailing one of the convictions listed in the NCIC printout. Although missing the defendant's year of birth and social security number, that document was consistent in other respects with the NCIC printout.

State v. Best, 202 N.C. App. 753 (Mar. 2, 2010). A printed copy of a screen-shot from the N.C. Administrative Office of the Courts (AOC) computerized criminal record system showing the defendant's prior conviction is sufficient to prove the defendant's prior conviction under G.S. 15A-1340.14(f)(3). Additionally, the information in the printout provides sufficient identifying information with respect to the defendant to give it the indicia of reliability to prove the prior conviction under subsection (f)(4).

Substantially Similar Offense

State v. Sanders, ___ N.C. ___, 766 S.E.2d 331 (Dec. 19, 2014). (1) The trial court erred by determining that a Tennessee offense of "domestic assault" was substantially similar to the North Carolina offense of assault on a female without reviewing all relevant sections of the Tennessee code. Section 39-13-111 of the Tennessee Code provides that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Section 39-13-101 defines when someone commits an "assault." Here the State provided the trial court with a photocopy section 39-13-111 but did not give the trial court a photocopy of section 39-13-101. The court held: "We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." (2) Comparing the elements of the offenses, the court held that they are not substantially similar under G.S. 15A-1340.14(e). The North Carolina offenses does not require any type of relationship between the perpetrator and the victim but the Tennessee statutes does. The court noted: "Indeed, a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee."

State v. Edgar, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). The trial court correctly calculated the defendant's PRL. The defendant argued that the trial court erred by basing its PRL calculation on an ineffective stipulation. The defendant's only prior conviction was one in Michigan for carrying a concealed weapon, which he contended is substantially similar to the NC Class 2 misdemeanor offense of carrying a concealed weapon. The court concluded that the defendant did not make any stipulation as to the similarity of the Michigan offense to NC offense. Instead, the prior conviction was classified as a Class I felony, the default classification for an out-of-state felony. Thus, defendant's stipulations in the PRL worksheet that he had been convicted of carrying a concealed weapon in Michigan and that the offense was classified as a felony in Michigan, were sufficient to support the default classification of the offense as a Class I felony.

State v. Hogan, __ N.C. App. __, 758 S.E.2d 465 (June 3, 2014). The trial court did not err in calculating the defendant's prior record level when it counted a New Jersey third-degree theft conviction as a Class I felony. The court rejected the defendant's argument that because New Jersey does not use the term "felony" to classify its offenses, the trial court could not determine that third-degree theft is a felony for sentencing purposes, noting that the State presented a certification that third-degree theft is considered a felony in New Jersey. The court also rejected the defendant's argument that the offense was substantially similar to misdemeanor larceny.

State v. Northington, __ N.C. App. __, 749 S.E.2d 925 (Nov. 19, 2013). Although the trial court erred by accepting the defendant's stipulation that a Tennessee conviction for "theft over $1,000"

was substantially similar to a NC Class H felony, the error did not affect the computation of the defendant's PRL and thus was not prejudicial.

State v. Phillips, __ N.C. App. __, 742 S.E.2d 338 (May 21, 2013). Based on the elements of the two offenses, the trial court erred by concluding that a prior Ohio conviction was substantially similar to the North Carolina crime of assault with a deadly weapon with intent to kill.

State v. Threadgill, __ N.C. App. __, 741 S.E.2d 677 (May 7, 2013). Where the defendant stipulated to the worksheet's classification of a South Carolina conviction as a Class I felony, the trial court correctly assigned two points for that conviction. The court reasoned that the defendant knew of the worksheet's contents and had ample opportunity to object to them. It thus concluded that the defendant's silence regarding the worksheet's classification of the conviction as a Class I felony constituted a stipulation. Moreover, it reasoned, because Class I is the default classification for an out-of-state felony the State met its burden and was required to prove nothing further in support of that classification.

State v. Davis, __ N.C. App. __, 738 S.E.2d 417 (Mar. 19, 2013). When determining prior record level, the trial court erroneously concluded that a Georgia conviction for theft was substantially similar to misdemeanor larceny without hearing any argument from the State. Additionally, the Georgia offense is not substantially similar to misdemeanor larceny; the Georgia offense covers both temporary and permanent takings but misdemeanor larceny covers only permanent takings.

State v. Crawford, __ N.C. App. __, 737 S.E.2d 768 (Feb. 5, 2013). The trial court did not err in calculating the defendant's prior record level. The trial court considered the defendant's two federal felony convictions as Class I felonies for purposes of calculating prior record level. Because the defendant made no showing that either conviction was substantially similar to a North Carolina misdemeanor, the trial court did not err by using the default Class I categorization.

State v. Sanders, __ N.C. App. __, 736 S.E.2d 238 (Jan. 15, 2013). In determining whether out-of-state convictions were substantially similar to NC offenses, the trial court erred by failing to compare the elements of the offenses and instead comparing their punishment levels.

State v. Claxton, __ N.C. App. __, 736 S.E.2d 603 (Jan. 15, 2013). The trial court did not err by finding that a NY drug conviction for third-degree drug sale was substantially similar to a NC Class G felony under G.S. 90-95. Comparing the two states' statutes, the offenses were substantially similar, notwithstanding the fact that the states' drug schedules are not identical. The court noted: the requirement in G.S. 15A-1340.14(e) "is not that the statutory wording precisely match, but rather that the offense be 'substantially similar.'"

State v. Rollins, 221 N.C. App. 572 (July 17, 2012). The trial court erred by determining that the defendant was a prior record level VI when the defendant's Florida conviction for burglary was not sufficiently similar to the corresponding N.C. burglary offense. The Florida statute is broader than the N.C. statute in that it encompasses more than a dwelling house or sleeping apartment. Significantly, the Florida statute does not require that the offense occur in the nighttime or that there be a breaking as well as an entry. Based on these differences, the Florida burglary statute is

not sufficiently similar to N.C.'s burglary statute. The court went on to find the Florida crime sufficiently similar to G.S. 14-54, felonious breaking or entering.

State v. Watlington, 216 N.C. App. 388 (Oct. 18, 2011). The trial court erred in calculating the defendant's prior record level with respect to whether a federal conviction was substantially similar to a N.C. felony. The determination of substantial similarity is a question of law which cannot be determined by stipulation to the worksheet.

State v. Burgess, 216 N.C. App. 54 (Sept. 20, 2011). The trial court erred by sentencing the defendant as a level IV offender when the State failed to present sufficient evidence establishing that out-of-state offenses were substantially similar to North Carolina offenses. The State presented printed copies of out-of-state statutes purportedly serving as the basis for the out-of-state convictions. However, the State's worksheet did not identify the out-of-state crimes by statute number and instead used brief and non-specific descriptions that could arguably describe more than one crime, making it unclear whether the statutes presented were the basis for the defendant's convictions. Also, the State presented 2008 versions of statutes when the defendant's convictions were from 1993 and 1994, and there was no evidence that the statutes were unchanged. Finally, the trial erred by accepting the classification of the defendant's out-of-state offenses without comparing the elements of those offenses to the elements of the North Carolina offenses the State contended were substantially similar.

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). Since the State failed to demonstrate the substantial similarity of out-of-state New York and Connecticut convictions to North Carolina crimes and the trial court failed to determine whether the out-of-state convictions were substantially similar to North Carolina offenses, a resentencing was required. The State neither provided copies of the applicable Connecticut and New York statutes, nor provided a comparison of their provisions to the criminal laws of North Carolina. Also, the trial court did not analyze or determine whether the out-of-state convictions were substantially similar to North Carolina offenses.

State v. Armstrong, 203 N.C. App. 399 (Apr. 20, 2010). For purposes of assigning one prior record level point for out-of-state misdemeanors that are substantially similar to a North Carolina A1 or 1 misdemeanor, North Carolina impaired driving is a Class 1 misdemeanor. Thus, the trial court did not err by assigning one prior record level point to each out-of-state impaired driving conviction. The state presented sufficient evidence that the out-of-state convictions were misdemeanors in the other state.

Probation

Appeal Issues

Appeal From Revocation

State v. Pennell, 367 N.C. 466 (June 12 2014). Reversing the court of appeals, the court held that on direct appeal from the activation of a suspended sentence, a defendant may not challenge the jurisdictional validity of the indictment underlying his original conviction. The court reasoned that a challenge to the validity of the original judgment constitutes an impermissible collateral attack. It explained:

> [D]efendant failed to appeal from his original judgment. He may not now appeal the matter collaterally via a proceeding contesting the activation of the sentence imposed in the original judgment. As such, defendant's present challenge to the validity of his original conviction is improper. Because a jurisdictional challenge may only be raised when an appeal is otherwise proper, we hold that a defendant may not challenge the jurisdiction over the original conviction in an appeal from the order revoking his probation and activating his sentence. The proper procedure through which defendant may challenge the facial validity of the original indictment is by filing a motion for appropriate relief under [G.S.] 15A-1415(b) or petitioning for a writ of habeas corpus. Our holding here does not prejudice defendant from pursuing these avenues.

Slip Op. at 9-10 (footnote and citation omitted).

State v. Williams, __ N.C. App. __, 754 S.E.2d 826 (Nov. 19, 2013). The court declined to consider the defendant's argument that the trial court had no jurisdiction to revoke his probation because the sentencing court failed to make findings supporting a probation term of more than 30 months. It reasoned that a defendant cannot re-litigate the legality of a condition of probation unless he or she raises the issue no later than the hearing at which his probation is revoked.

State v. Hunnicutt, __ N.C. App. __, 740 S.E.2d 906 (April 2, 2013). A defendant may not challenge the validity of an indictment in an appeal challenging revocation of probation. In such circumstances, challenging the validity of the original judgment is an impermissible collateral attack.

State v. Long, 220 N.C. App. 139 (Apr. 17, 2012). On appeal from judgment revoking probation, the defendant could not challenge the trial court's jurisdiction to enter the original judgment as this constituted an impermissible collateral attack on the original judgment.

Appeal from Modification & CRV

State v. Romero, __ N.C. App. __, 745 S.E.2d 364 (July 16, 2013). Defendant had no right to appeal from the trial court's orders modifying the terms of his probation and imposing Confinement in Response to Violation. For a discussion of this case, see my colleague's blog post here.

Miscellaneous Appeal Issues

State v. Sale, __ N.C. App. __, 754 S.E.2d 474 (Mar. 4, 2014). The court held that it had no authority to consider the defendant's challenge to the trial court's imposition of a special condition of probation.

Violations & Revocation
Evidence Issues

State v. Murchison, 367 N.C. 461 (June 12, 2014). Reversing an unpublished decision of the court of appeals, the court held that the trial court did not abuse its discretion by basing its

decision to revoke the defendant's probation on hearsay evidence presented by the State. The court noted that under Rule 1101, the formal rules of evidence do not apply in probation revocation hearings.

Jurisdiction Issues

State v. Hoskins, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) In this case, which came to the court on a certiorari petition to review the trial court's 2013 probation revocation, the court concluded that it had jurisdiction to consider the defendant's claim that the trial court lacked jurisdiction to extend her probation in 2009. (2) The trial court lacked jurisdiction to extend the defendant's probation in 2009. The defendant's original period of probation expired on 27 June 2010. On 18 February 2009, 16 months before the date probation was set to end, the trial court extended the defendant's probation. Under G.S. 15A-1343.2(d), the trial court lacked statutory authority to order a three-year extension more than six months before the expiration of the original period of probation. Also, the trial court lacked statutory authority under G.S. 15A-1344(d) because the defendant's extended period of probation exceeded five years. Because the trial court lacked jurisdiction to extend probation in 2009, the trial court lacked jurisdiction to revoke the defendant's probation in 2013.

State v. Moore (No. 14-665), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant's probation when it did so after his probationary period had expired and he was not subject to a tolling period.

State v. Sanders, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant's probation when it did so after his probationary period had expired and he was not subject to a tolling period.

State v. Knox, ___ N.C. App. ___, 768 S.E.2d 381 (Feb. 17, 2015). Because the trial court revoked defendant's probation before the period of probation expired, the court rejected defendant's argument that under G.S. 15A-1344(f) the trial court lacked jurisdiction to revoke.

State v. Sitosky, ___ N.C. App. ___, 767 S.E.2d 623 (Dec. 31, 2014). (1) The trial court lacked jurisdiction to revoke the defendant's probation and activate her suspended sentences where the defendant committed her offenses prior to 1 December 2009 but had her revocation hearing after 1 December 2009 and thus was not covered by either statutory provision—G.S. 15A-1344(d) or 15A-1344(g)—authorizing the tolling of probation periods for pending criminal charges. (2) The trial court erred by revoking her probation in other cases where it based the revocation, in part, on probation violations that were neither admitted by the defendant nor proven by the State at the probation hearing.

State v. Lee, __ N.C. App. __, 753 S.E.2d 721 (Feb. 4, 2014). A Sampson County superior court judge had jurisdiction to revoke the defendant's probation where the evidence showed that the defendant resided in that county.

State v. Williams, __ N.C. App. __, 754 S.E.2d 826 (Nov. 19, 2013). (1) The trial court erred by revoking the defendant's probation where the State failed to present evidence that the violation

report was filed before the termination of the defendant's probation. As a result, the trial court lacked jurisdiction to revoke. (2) The court declined to consider the defendant's argument that the trial court had no jurisdiction to revoke his probation in another case because the sentencing court failed to make findings supporting a probation term of more than 30 months. It reasoned that a defendant cannot re-litigate the legality of a condition of probation unless he or she raises the issue no later than the hearing at which his probation is revoked.

State v. High, __ N.C. App. __, 750 S.E.2d 9 (Nov. 5, 2013). The trial court lacked jurisdiction to extend the defendant's probation after his original probation period expired. Although the probation officer prepared violation reports before the period ended, they were not filed with the clerk before the probation period ended as required by G.S. 15A-1344(f). The court rejected the State's argument that a file stamp is not required and that other evidence established that the reports were timely filed.

State v. Kornegay, __ N.C. App. __, 745 S.E.2d 880 (July 16, 2013). The trial court lacked jurisdiction to revoke the defendant's probation and activate his sentence. Although the trial court revoked on grounds that the defendant had committed a subsequent criminal offense, such a violation was not alleged in the violation report. Thus, the defendant did not receive proper notice of the violation. Because the defendant did not waive notice, the trial court lacked jurisdiction to revoke.

State v. Tindall, __ N.C. App. __, 742 S.E.2d 272 (May 7, 2013). The trial court lacked jurisdiction to revoke the defendant's probation on the basis of a violation that was not alleged in the violation report and of which she was not given notice. The violation reports alleged that the defendant violated two conditions of her probation: to "[n]ot use, possess or control any illegal drug" and to "participate in further evaluation, counseling, treatment or education programs recommended . . . and comply with all further therapeutic requirements." The specific facts upon which the State relied were that "defendant admitted to using 10 lines of cocaine" and that the defendant failed to comply with treatment as ordered. However, the trial court found that the defendant's probation was revoked for "violation of the condition(s) that he/she not commit any criminal offense . . . or abscond from supervision."

State v. Black, 197 N.C. App. 373 (June 2, 2009). Holding, in a case decided under the old version of G.S. 15A-1344(f), that the trial court lacked jurisdiction to hold a probation revocation hearing where the state failed to make reasonable efforts to notify the defendant and to hold the hearing before the period of probation expired.

State v. Yonce, 207 N.C. App. 658 (Nov. 2, 2010). The court lacked jurisdiction to consider an appeal when the defendant failed to timely challenge an order revoking his probation. If a trial judge determines that a defendant has willfully violated probation, activates the defendant's suspended sentence, and then stays execution of his or her order, a final judgment has been entered, triggering the defendant's right to seek appellate review of the trial court's decision. In this case, the defendant appealed well after expiration of the fourteen-day appeal period prescribed in the appellate rules.

State v. Mauck, 204 N.C. App. 583 (June 15, 2010). The trial court had jurisdiction to revoke the defendant's probation. In 2003, the defendant was convicted in Haywood County and placed on probation. In 2007, the defendant's probation was modified in Buncombe County. In 2009, it was revoked in Buncombe County. Appealing the revocation, the defendant argued that under G.S. 15A-1344(a), Buncombe County was not a proper place to hold the probation violation hearing. The court held that the 2007 Buncombe County modification made that county a place "where the sentence of probation was imposed," and thus a proper place to hold a violation hearing.

Notice Issues

State v. Knox, ___ N.C. App. ___, 768 S.E.2d 381 (Feb. 17, 2015). Where counsel stated at the revocation hearing that defendant acknowledged that he had received a probation violation report and admitted the allegations in the report and defendant appeared and participated in the hearing voluntarily, the defendant waived the notice requirement of G.S. 15A-1345(e).

State v. Lee, __ N.C. App. __, 753 S.E.2d 721 (Feb. 4, 2014). A probation violation report provided the defendant with adequate notice that the State intended to revoke his probation on the basis of a new criminal offense. The report alleged that the defendant violated the condition that he commit no criminal offense in that he had several new pending charges which were specifically identified. The report further stated that "If the defendant is convicted of any of the charges it will be a violation of his current probation."

State v. Hubbard, 198 N.C. App. 154 (July 7, 2009). Although the probation report might have been ambiguous regarding the condition allegedly violated, because the report set forth the specific facts at issue (later established at the revocation hearing), the report gave the defendant sufficient notice of the alleged violation, as required by G.S. 15A-1345(e). The State presented sufficient evidence that the defendant violated a special condition of probation requiring compliance with the rules of intensive probation. The State's evidence included testimony by probation officers that they informed the defendant of his curfew and their need to communicate with him during curfew checks, and that compliance with curfew meant that the defendant could not be intoxicated in his home. During a curfew check, the defendant was so drunk that he could not walk; later that evening the defendant was drunk and disruptive, to the extent that his girlfriend was afraid to enter the residence.

Counsel Issues

State v. Jacobs, __ N.C. App. __, 757 S.E.2d 366 (May 6, 2014). The trial court erred by allowing the defendant to proceed pro se at a probation revocation hearing without taking a waiver of counsel as required by G.S. 15A-1242. The defendant's appointed counsel withdrew at the beginning of the revocation hearing due to a conflict of interest and the trial judge allowed the defendant to proceed pro se. However, the trial court failed to inquire as to whether the defendant understood the range of permissible punishments. The court rejected the State's argument that the defendant understood the range of punishments because "the probation officer told the court that the State was seeking probation revocation." The court noted that as to the underlying sentence, the defendant was told only that, "[t]here's four, boxcar(ed), eight to ten."

The court found this insufficient, noting that it could not assume that the defendant understood this legal jargon as it related to his sentence. Finally, the court held that although the defendant signed the written waiver form, "the trial court was not abrogated of its responsibility to ensure the requirements of [G.S.] 15A-1242 were fulfilled."

Grounds for Revocation & Related Issues

State v. Nolen, __ N.C. App. __, 743 S.E.2d 729 (July 2, 2013). Applying the Justice Reinvestment Act (JRA), the court held that the trial court improperly revoked the defendant's probation. The defendant violated the condition of probation under G.S. 15A-1343(b)(2) that she not leave the jurisdiction without permission and monetary conditions under G.S. 15A-1343(b). She did not commit a new crime, was not subject to the new absconding condition codified by the JRA in G.S. 15A-1343(b)(3a), and had served no prior CRVs under G.S. 15A 1344(d2). Thus, under the JRA, her probation could not be revoked.

State v. Hunnicutt, __ N.C. App. __, 740 S.E.2d 906 (April 2, 2013). (1) The trial court did not err by activating the defendant's sentence on the basis that the defendant absconded by willfully avoiding supervision. The defendant's probation required that he remain in the jurisdiction and report as directed to the probation officer. The violation report alleged violations of both of these conditions. Despite the trial court's use of the term "abscond," it was clear that the trial court revoked the defendant's probation because he violated the two listed conditions. (2) The trial court did not abuse its discretion in finding a violation and revoking his probation where the evidence supported its determination.

State v. Boone, __ N.C. App. __, 741 S.E.2d 371 (Feb. 5, 2013). The trial court erred by revoking the defendant's probation. The defendant pleaded guilty and was sentenced to 120 days confinement suspended for one year of supervised probation. The trial court ordered the defendant to perform 48 hours of community service, although no date for completion of the community service was noted on the judgment, and to pay $1,385 in costs, fines, and fees, as well as the probation supervision fee. The schedule required for the defendant's payments and community service was to be established by the probation officer. The probation officer filed a violation report alleging that the defendant had willfully violated his probation by failing to complete any of his community service, being $700 in arrears of his original balance, and being in arrears of his supervision fee. The defendant was found to have willfully violated and was revoked. The court concluded that absent any evidence of a required payment schedule or schedule for community service, the evidence was insufficient to support a finding of willful violation.

State v. Jones, __ N.C. App. __, 736 S.E.2d 634 (Jan. 15, 2013). The trial court did not abuse its discretion by revoking the defendant's probation under the Justice Reinvestment Act when the defendant was convicted of another criminal offense while on probation.

State v. Brown, __ N.C. App. __, 731 S.E.2d 530 (Sept. 4, 2012). (1) The trial court did not abuse its discretion by revoking the defendant's probation. The defendant asserted that the revocation was improper because he never received a written statement containing the conditions of his probation, as required by G.S. 15A-1343(c). The court noted that the statute requires

written notice. However, citing an unpublished opinion, it noted that a different approach applies when the violation is a failure to initially report for processing, as happened here. In this case the defendant walked away from the probation office before he could be given the written notice. The court concluded that because the trial judge informed the defendant of his obligation to report and the defendant failed to do so, written confirmation was not necessary. (2) The court also rejected the defendant's argument that he could not have violated probation because he was not assigned a probation officer, reasoning that the defendant was not so assigned because he left in the middle of intake procedure.

State v. Askew, 221 N.C. App. 659 (July 17, 2012). The trial court erred by finding that the defendant willfully violated probation by failing to have an approved residence plan. The defendant was placed on supervised probation to begin when he was released from incarceration on separate charges. On the day that the defendant was scheduled to be released, a probation officer filed a violation report. The defendant demonstrated that he was unable to obtain suitable housing before his release from incarceration because of circumstances beyond his control; the trial court abused its discretion by finding otherwise.

State v. Talbert, 221 N.C. App. 650 (July 17, 2012). The trial court erred by revoking the defendant's probation on grounds that he willfully violated the condition that he reside at a residence approved by the supervising officer. The defendant was violated on the day he was released from prison, before he even "touched outside." Prior to his release the defendant, who was a registered sex offender and indigent, had tried unsuccessfully to work with his case worker to secure a residence. At the revocation hearing, the trial judge rejected defense counsel's plea for a period of 1-2 days for the defendant to secure a residence. The court concluded that the defendant's violation was not willful and that probation was "revoked because of circumstances beyond his control."

State v. Floyd, 213 N.C. App. 611 (July 19, 2011). The trial court erred by failing to make findings of fact that clearly show it considered and evaluated the defendant's evidence before concluding that the defendant violated his probation by failing to pay the cost of his sexual abuse treatment program. The defendant presented ample evidence of an inability to pay after efforts to secure employment; the probation officer corroborated this evidence and testified that he believed that the defendant would complete the treatment program if he could pay for it.

State v. Crowder, 208 N.C. App. 723 (Dec. 21, 2010). (1) The trial court abused its discretion by revoking the defendant's probation when the State failed to present evidence that he violated the condition of probation that he "not reside in a household with a minor child." Although the trial court interpreted the term "reside" to mean that the defendant could not have children anywhere around him, *State v. Strickland*, 169 N.C. App. 193 (2005), construed that term much more narrowly, establishing that the condition is not violated simply when a defendant sees or visits with a child. Because the evidence showed only that the defendant was visiting with his fiancée's child, it was insufficient to establish a violation. (2) The trial court improperly revoked the defendant's probation for violating conditions that he not (a) socialize or communicate with minors unless accompanied by an approved adult; or (b) be alone with a minor without approval. The conditions were not included in the written judgments and there was no evidence that the

defendant ever was provided written notice of them. As such, they were not valid conditions of probation.

State v. Stephenson, 213 N.C. App. 621 (July 19, 2011). The defendant's explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug treatment program.

Miscellaneous Issues

State v. Webb, __ N.C. App. __, 742 S.E.2d 284 (May 7, 2013). The court rejected the defendant's argument that his revocation was improper because the attorney who represented him at the revocation hearing was not his appointed attorney and trial court made no findings about a substitute attorney. Any error that occurred was not prejudicial.

State v. Cleary, 213 N.C. App. 198 (July 5, 2011). G.S. 15A-1023(b), which grants a defendant the right to a continuance when a trial court refuses to accept a plea, does not apply when the trial court refuses to accept a plea in the context of a probation revocation proceeding.

State v. Kerrin, 209 N.C. App. 72 (Jan. 4, 2011). (1) The trial court improperly ordered a forfeiture of the defendant's licensing privileges without making a finding of fact required by G.S. 15A-1331A that the defendant failed to make reasonable efforts to comply with the conditions of her probation. The court noted that form AOC-CR-317 does not contain a section specifically designated for the required finding and encouraged revision of the form to add this required finding. (2) The term of the forfeiture exceeded statutory limits. A trial court revoking probation may order a license forfeiture under G.S. 15A-1331A(b)(2) at any time during the probation term, but the term of forfeiture cannot exceed the original probation term set by the sentencing court at the time of conviction. The defendant was placed on 24 months probation by the sentencing court, to end on December 15, 2009. His probation was revoked on Apr. 1, 2009, eight months before his probation was set to expire, and the trial court ordered the forfeiture for 24 months from the date of revocation. Because the forfeiture term extended beyond the defendant's original probation, it was invalid. The court encouraged further revision of AOC-CR-317 (specifically the following note: "*The 'Beginning Date' is the date of the entry of this judgment, and the 'Ending Date' is the date of the end of the full probationary term imposed at the time of conviction.*") "to clarify this issue and perhaps avoid future errors based upon misinterpretation of the form."

State v. Yonce, 207 N.C. App. 658 (Nov. 2, 2010). The trial court did not abuse its discretion by declining to further stay another judge's order finding a probation violation for failure to pay restitution and activating the sentence but staying execution of the order when the defendant presented no evidence of an inability to pay.

Modification

State v. Willis, 199 N.C. App. 309 (Aug. 18, 2009). Although a trial court has authority under G.S. 15A-1344(d) to modify conditions of probation, modifications only may be made after notice and a hearing, and if good cause is shown. Although one modification made in this case

was permissible as a clerical change, a second modification was substantive and was invalid as it was made without notice and a hearing.

Period of Probation

State v. Sale, __ N.C. App. __, 754 S.E.2d 474 (Mar. 4, 2014). The trial court erred by entering a period of probation longer than 18 months without making the findings that the extension was necessary.

State v. Wilkerson, __ N.C. App. __, 733 S.E.2d 181 (Oct. 16, 2012). The trial court made sufficient findings to support its decision to place the defendant on probation for sixty months.

State v. Gorman, 221 N.C. App. 330 (June 19, 2012). No statutory authority supported the trial court's orders extending the defendant's probation beyond the original 60-month period and they were thus void. The orders extending probation were not made within the last 6 months of probation and the defendant did not consent to the extension. The orders also resulted in an 8-year period of probation, a term longer that the statutory maximum. Turning to the issue of whether the original 60-month probation was tolled pending resolution of New Jersey criminal charges, the court found the record insufficient and remanded for further proceedings.

State v. Riley, 202 N.C. App. 299 (Feb. 2, 2010). The trial judge violated G.S. 15A-1351 by imposing a period of special probation that exceeded ¼ of the maximum sentence of imprisonment imposed. The trial judge also violated G.S. 15A-1343.2 by imposing a term of probation greater than 36 months without making the required specific findings supporting the period imposed.

Restitution

State v. Hardy, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this injury to real property case, the trial court did not err by ordering the defendant to pay $7,408.91 in restitution. A repair invoice provided sufficient evidence to support the award of restitution and the restitution award properly accounted for all damage directly and proximately caused by the defendant's injury to the property.

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue.

State v. Talbot, __ N.C. App. __, 758 S.E.2d 441 (June 3, 2014). In the face of the State's concession that there was no evidence supporting a restitution award, the court vacated the trial court's restitution order and remanded for a rehearing on the issue. The court noted: "In the interest of judicial economy, we urge prosecutors and trial judges to ensure that this minimal evidentiary threshold is met before entering restitution awards."

State v. Minton, __ N.C. App. __, 734 S.E.2d 608 (Nov. 6, 2012). The trial court did not err by requiring the defendant to pay $5,000 in restitution where trial evidence supported the restitution award and the trial court properly considered the defendant's resources.

State v. Anderson, 222 N.C. App. 138 (Aug. 7, 2012). The trial court erred by ordering the defendant to pay restitution when the State failed to present any evidence to support the restitution order. The State conceded the error.

State v. Mills, 221 N.C. App. 409 (June 19, 2012). There was sufficient evidence to support a restitution order for $730. The victim testified that before being robbed he had "two sets of keys, snuff, a pocket knife, a bandana, [his] money clip," and approximately $680 in cash. He later confirmed that $730 represented the money and the items taken during the crime.

State v. Mumford , 364 N.C. 394 (Oct. 8, 2010). The court reversed *State v. Mumford*, 201 N.C. App. 594 (Jan. 5, 2010) (trial court erred in its order requiring the defendant to pay restitution; vacating that portion of the trial court's order), and held that although the trial court erred by ordering the defendant to pay restitution when the defendant did not stipulate or otherwise unequivocally agree to the amount of restitution ordered, the error was not prejudicial. As to prejudice, the court reasoned: "[A]t the time the judgment is collected, defendant cannot be made to pay more than what is actually owed, that is, the amount actually due to the various entities that provided medical treatment to defendant's victims. Because defendant will pay the lesser of the actual amount owed or the amount ordered by the trial court, there is no prejudice to defendant."

State v. Watkins, 218 N.C. App. 94 (Jan. 17, 2012). The evidence supports the trial court's restitution award for the value of a Honda Accord automobile. The prosecutor introduced documentation that the car was titled in the name of Moses Blunt and that the robbery victim paid $3,790 to Blunt to purchase the car. The prosecutor submitted both the title registration of the car, as well as a copy of the purchase receipt. Additionally, the victim testified at trial that he had paid $3,790 for the car but due to insurance issues, the car was still titled in his roommate's name. Although the victim did not identify his roommate, the prosecutor's introduction of the actual title registration supports the fact that Blunt was the title owner and that the car was worth $3,790 at the time of the transaction, which occurred shortly before the robbery.

State v. Jones, 216 N.C. App. 519 (Nov. 1, 2011). In a drug case, the trial court erred by ordering the defendant to pay $1,200.00 as restitution for fees from a private lab (NarTest) that tested the controlled substances at issue. Under G.S. 7A-304(a)(7), the trial court "shall" order restitution in the amount of $600.00 for analysis of a controlled substance by the SBI. G.S. 7A-304(a)(8) allows the same restitution if a "crime laboratory facility operated by a local government" performs such an analysis as long as the "work performed at the local government's laboratory is the equivalent of the same kind of work performed by the [SBI]." The statute does not authorize restitution for analysis performed by an unlicensed private lab such as NarTest.

State v. Sullivan, 216 N.C. App. 495 (Nov. 1, 2011). The trial court erred by ordering restitution when the defendant did not stipulate to the amounts requested and no evidence was presented to support the restitution worksheet.

State v. Billinger, 213 N.C. App. 249 (July 5, 2011). The trial court erred by ordering the defendant to pay restitution in connection with a conviction for possessing a weapon of mass death and destruction where the State conceded that the restitution had no connection to that conviction.

State v. Smith, 210 N.C. App. 439 (Mar. 15, 2011). The trial court committed plain error by ordering the defendant to pay restitution when no evidence supported the amount ordered. The court noted that no objection is required to preserve for appellate review issues concerning restitution. It held that the prosecutor's unsworn statements and the State's restitution worksheet were not competent evidence to support the restitution ordered. The court rejected the notion that the defendant's silence or lack of objection to the restitution amount constituted a stipulation.

State v. Elkins, 210 N.C. App. 110 (Mar. 1, 2011). The restitution order was not supported by evidence presented at trial or sentencing. The prosecutor's unsworn statement regarding the amount of restitution was insufficient to support the order.

State v. McNeil, 209 N.C. App. 654 (Mar. 1, 2011). The trial court committed reversible error by ordering the defendant to pay restitution when the State presented no evidence to support the award. Although there was evidence that the victim's home was damaged during the breaking and entering, there was no evidence as to the cost of the damage.

State v. Moore, 365 N.C. 283 (Oct. 7, 2011). The court reversed *State v. Moore*, 209 N.C. App. 551 (Feb. 15, 2011) (holding that the evidence was insufficient to support an award of restitution of $39,332.49), and held that while there was some evidence to support the restitution award the evidence did not adequately support the particular amount awarded. The case involved a conviction for obtaining property by false pretenses; specifically, the defendant rented premised owned by the victim to others without the victim's permission. The defendant collected rent on the property and the "tenants" caused damage to it. At trial, a witness testified that a repair person estimated that repairs would cost "[t]hirty-something thousand dollars." There was also testimony that the defendant received $1,500 in rent. Although the court rejected the State's argument that testimony about costs of "thirty-something thousand dollars" is sufficient to support an award "anywhere between $30,000.01 and $39,999.99," it concluded that the testimony was not too vague to support any award. The court remanded to the trial court to calculate the correct amount of restitution.

State v. Best, 196 N.C. App. 220 (Apr. 7, 2009). The trial court erred in ordering restitution to the murder victims' families when there was no direct and proximate causal link between the defendant's actions and harm caused to those families. The defendant was convicted as an accessory after the fact to murder and none of the defendant's actions obstructed the murder investigation or assisted the principals in evading detection, arrest, or punishment.

State v. Blount, 209 N.C. App. 340 (Jan. 18, 2011). Because no evidence was presented in support of restitution and the defendant did not stipulate to the amount, the trial court erred by ordering restitution. During sentencing, the prosecutor presented a restitution worksheet requesting restitution for the victim to compensate for stolen items. The victim did not testify, no

additional documentation was submitted, and there was no stipulation to the worksheet.

State v. Swann, 197 N.C. App. 221 (May 19, 2009). Restitution of $510 was not supported by the evidence. The prosecutor had presented a restitution worksheet stating that the victim sought $510 in restitution. The worksheet was not supported by documentation, the victim did not testify, and the defendant did not stipulate to the amount. The prosecutor's statement that the amount represented "additional repairs and medical expenses" was insufficient to support the award.

State v. Mauer, 202 N.C. App. 546 (Feb. 16, 2010). The trial court erred by ordering restitution where no evidence was presented supporting the restitution worksheet. The defendant's silence when the trial court orally entered judgment cannot constitute a stipulation to restitution.

State v. Dallas, 205 N.C. App. 216 (July 6, 2010). In a larceny of motor vehicle case, the restitution award was not supported by competent evidence. Restitution must be supported by evidence adduced at trial or at sentencing; the unsworn statement of the prosecutor is insufficient to support restitution. In this case, the trial court ordered the defendant to pay $8,277.00 in restitution based on an unverified worksheet submitted by the State. However, the evidence at trial showed that the value of the stolen items was $1,200.00 - $1,400.00.

State v. Davis, 206 N.C. App. 545 (Aug. 17, 2010). The evidence was insufficient to support a restitution award. The State conceded that it did not introduce evidence to support the restitution request. However, it argued that the defendant stipulated to the amount of restitution when she stipulated to the factual basis for the plea and that the specific amounts of restitution owed were incorporated into the stipulated factual basis by reference to the restitution worksheets submitted to the court. The court rejected these arguments, concluding that a restitution worksheet, unsupported by testimony or documentation, cannot support a restitution order and that the defendant did not stipulate to the amounts awarded.

Right to be Present

State v. Leaks, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). The trial court violated the defendant's right to be present during sentencing by entering a written judgment imposing a longer prison term than that which the trial court announced in his presence during the sentencing hearing. In the presence of the defendant, the trial court sentenced him to a minimum term of 114 months and a maximum term of 146 months imprisonment. Subsequently, the trial court entered written judgment reflecting a sentence of 114 to 149 months active prison time. The court concluded: "Given that there is no indication in the record that defendant was present at the time the written judgment was entered, the sentence must be vacated and this matter remanded for the entry of a new sentencing judgment."

State v. Arrington, 215 N.C. App. 161 (Aug. 16, 2011). The defendant's right to be present when sentence is pronounced was not violated when the trial judge included in the judgment court costs and fees for community service that had not been mentioned in open court. The change in the judgment was not substantive. "[E]ach of the conditions imposed . . . was a non-discretionary byproduct of the sentence that was imposed in open court." Further, the court noted, payment of

costs does not constitute punishment and, therefore, the imposition of costs on the defendant outside of his presence did not infringe upon his right to be present when sentence is pronounced.

State v. Wright, 212 N.C. App. 640 (June 21, 2011). (1) Excluding the defendant from an in-chambers conference held prior to the sentencing hearing was harmless beyond a reasonable doubt. The in-chambers conference was recorded, the defendant was represented by counsel and given an opportunity to be heard and to make objections at the sentencing hearing, and the trial court reported the class level for each offense and any aggravating or mitigating factors on the record in open court. (2) Evidence of two awards from the Crime Victim's Compensation Commission properly supported the trial court's restitution award. However, because restitution exceeded the amounts stated in these awards, the court remanded for the trial court to amend the order accordingly.

Suppression of Conviction that Violated Right to Counsel

State v. Blocker, 219 N.C. App. 395 (Mar. 6, 2012). The trial court abused its discretion by summarily denying the defendant's motion under G.S. 15A-980 for suppression, in connection with sentencing, of a prior conviction which the defendant alleged was obtained in violation of her right to counsel. The trial court dismissed the motion as an impermissible collateral attack on a prior conviction that only could be raised by motion for appropriate relief. Relying on a prior unpublished opinion, the court held that although the defendant "could not seek to overturn her prior conviction" on this basis, G.S. 15A-980 gave her "the right to move to suppress that conviction's use in this case."

Trafficking Offenses

State v. Nunez, 204 N.C. App. 164 (May 18, 2010). The trial judge had discretion whether to run two drug trafficking sentences imposed at the same time concurrently or consecutively. G.S. 90-95(h) provides that, "[s]entences imposed pursuant to this subsection shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced hereunder." This means that if the defendant is already serving a sentence, the new sentence must run consecutively to that sentence. It does not mean that when a defendant is convicted of multiple trafficking offenses at a term of court that those sentences, as a matter of law, must run consecutively to each other.

Appeal

State v. Ziglar, 209 N.C. App. 461 (Feb. 1, 2011). Because the defendant was sentenced in the presumptive range, he was not entitled to an appeal as a matter of right on the issue whether his sentence was supported by the evidence. Furthermore, the defendant did not petition for review by way of a writ of certiorari.

Resentencing

See also G.S. 15A-1335, below under Post-Conviction

Generally

State v. Jarman, ___ N.C. App. ___, 767 S.E.2d 370 (Dec. 16, 2014). The court rejected the defendant's argument that the trial court did not appreciate that a resentencing hearing must be de novo.

State v. Paul, __ N.C. App. __, 752 S.E.2d 252 (Dec. 17, 2013). On remand for resentencing, the trial court did not violate the law of the case doctrine. The resentencing was de novo and the trial court properly considered the State's evidence of an additional prior felony conviction when calculating prior record level.

State v. Morston, 221 N.C. App. 464 (July 3, 2012). (1) The trial court properly conducted a de novo review on resentencing, even though the defendant was sentenced to the same term that he received at the original sentencing hearing. (2) At a resentencing during which new evidence was presented, the trial court did not err by failing to find a mitigating factor of limited mental capacity, a factor that had been found at the first sentencing hearing.

Application of Credits Against Sentence

State v. Bowden, ___ N.C. ___, 766 S.E.2d 320 (Dec. 19, 2014). Reversing the court of appeals, the court held that the defendant, who was in the class of inmates whose life sentence was deemed to be a sentence of 80 years, was not entitled to immediate release. The defendant argued that various credits he accumulated during his incarceration (good time, gain time, and merit time) must be applied to reduce his sentence of life imprisonment, thereby entitling him to immediate and unconditional release. The DOC has applied these credits towards privileges like obtaining a lower custody grade or earlier parole eligibility, but not towards the calculation of an unconditional release date. The court found the case indistinguishable from its prior decision in *Jones v. Keller*, 364 N.C. 249, 254 (2010).

Jones v. Keller, 364 N.C. 249 (Aug. 27, 2010). The trial court erred by granting the petitioner habeas corpus relief from incarceration on the grounds that he had accumulated various credits against his life sentence, imposed on September 27, 1976. The petitioner had argued that when his good time, gain time, and merit time were credited to his life sentence, which was statutorily defined as a sentence of 80 years, he was entitled to unconditional release. The court rejected that argument, concluding that DOC allowed credits to the petitioner's sentence only for limited purposes that did not include calculating an unconditional release date. DOC had asserted that it recorded gain and merit time for the petitioner in the event that his sentence was commuted, at which time they would be applied to calculate a release date; DOC asserted that good time was awarded solely to allow him to move to the least restrictive custody grade and to calculate a parole eligibility date. The court found that the limitations imposed by DOC on these credits were statutorily and constitutionally permissible and that, therefore, the petitioner's detention was lawful. The court also rejected the petitioner's ex post facto and equal protection arguments.

Brown v. North Carolina DOC, 364 N.C. 319 (Aug. 27, 2010). For the reasons stated in *Jones* (discussed above), the court held that the trial court erred by granting the petitioner habeas

corpus relief from incarceration on the grounds that she had accumulated various credits against her life sentence.

Lovette v. N. Carolina Dep't of Correction, 366 N.C. 471 (Mar. 8, 2013). In a per curiam decision, the court reversed the court of appeals for the reasons stated in the dissenting opinion. In the opinion below, *Lovette v. North Carolina Department of Correction*, 222 N.C. App. 452 (2012), the court of appeals, over a dissent, affirmed a trial court order holding that the petitioners had fully served their life sentences after credits had been applied to their unconditional release dates. Both petitioners were sentenced to life imprisonment under former G.S. 14-2, which provided that a life sentence should be considered as imprisonment for eighty years. They filed habeas petitions alleging that based on credits for "gain time," "good time," and "meritorious service" and days actually served, they had served their entire sentences and were entitled to be discharged from incarceration. The trial court distinguished *Jones v. Keller*, 364 N.C. 249 (2010) (in light of the compelling State interest in maintaining public safety, regulations do not require that the DOC apply time credits for purposes of unconditional release to those who committed first-degree murder during the 8 Apr. 1974 through 30 June 1978 time frame and were sentenced to life imprisonment), on grounds that the petitioners in the case at hand were not convicted of first-degree murder (one was convicted of second-degree murder; the other was convicted for second-degree burglary). The trial court went on to grant the petitioners relief. The State appealed. The court of appeals held that the trial court did not err by distinguishing the case from *Jones*. The court also rejected the State's argument that the trial court's order changed the petitioners' sentences and violated separation of powers. Judge Ervin dissented, concluding that the trial court's order should be reversed. According to Judge Ervin, the *Jones* applied and required the conclusion that the petitioners were not entitled to have their earned time credits applied against their sentences for purposes of calculating their unconditional release date.

Sequestration

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In this robbery case involving multiple victims, the trial court did not abuse its discretion by denying the defendant's motion to sequester the victim-witnesses where the defendant offered no basis for his motion.

State v. Sprouse, 217 N.C. App. 230 (Dec. 6, 2011). Based on the facts presented in this child sexual assault case, the trial court did not abuse its discretion by denying the defendant's request to sequester witnesses. The court noted however that "the better practice should be to sequester witnesses on request of either party unless some reason exists not to." (quotation omitted).

State v. Patino, 207 N.C. App. 322 (Oct. 5, 2010). The trial court did not abuse its discretion by denying the defendant's motion to sequester the State's witnesses. In support of sequestration, defense counsel argued that there were a number of witnesses and that they might have forgotten about the incident. The court noted that neither of these reasons typically supports a sequestration order and that counsel did not explain or give specific reasons to suspect that the State's witnesses would be influenced by each other's testimony. The court also held that a trial court is not required to explain or defend a ruling on a motion to sequester.

Sex Offenders

Reportable Convictions

Generally

State v. Smith, __ N.C. App. __, 749 S.E.2d 507 (Nov. 5, 2013). The trial court did not err by requiring the defendant to report as a sex offender after he was convicted of sexual battery, a reportable conviction. The court rejected the defendant's argument that because he had appealed his conviction, it was not yet final and thus did not trigger the reporting requirements.

PJCs

Walters v. Cooper, 367 N.C. 117 (Oct. 4, 2013). The court per curiam affirmed the decision below, *Walters v. Cooper*, __ N.C. App. __, 739 S.E.2d 185 (Mar. 19, 2013), in which the court of appeals had held, over a dissent, that a PJC entered upon a conviction for sexual battery does not constitute a "final conviction" and therefore cannot be a "reportable conviction" for purposes of the sex offender registration statute.

Child Abduction

State v. Arrington, __ N.C. App. __, 741 S.E.2d 453 (April 2, 2013). The trial court properly required the defendant to enroll in lifetime SBM. When deciding whether a conviction counts as a reportable conviction as an "offense against a minor", the trial court is not restricted to considering the elements of the offense; the trial court may make a determination as to whether or not the defendant was a parent of the abducted child. The defendant had a 2009 conviction for abduction of a child. Although the State did not present any independent evidence at the SBM hearing that the defendant was not the child's parent, the trial court previously made this determination at the 2009 sentencing hearing when it found the conviction to be a reportable offense. This prior finding supported the trial court's determination at the SBM hearing that the defendant's conviction for abduction of a child was a reportable conviction as an offense against a minor.

State v. Stanley, 205 N.C. App. 707 (July 20, 2010). A conviction for abduction of a child under G.S. 14-41 triggers registration requirements if the offense is committed against a minor and the person committing the offense is not the minor's parent. The court held that as used in G.S. 14-208.6(1i), the term parent includes only a biological or adoptive parent, not one who "acts as a parent" or is a stepparent.

Peeping

State v. Pell, 211 N.C. App. 376 (Apr. 19, 2011). (1) G.S. 14-202(l) (requiring sex offender registration for certain peeping offenses when a judge finds, in part, that the defendant is "a danger to the community") is not unconstitutionally vague. (2) The trial court erred by requiring the defendant to register as a sex offender when there was no competent evidence to support a finding that he was a danger to the community. "A danger to the community" refers to those defendants who pose a risk of engaging in sex offenses following release from incarceration. Here, the State's expert determined that the defendant represented a low to moderate risk of re-

offending and acknowledged that his likelihood of re-offending may be even lower after considering a revised risk assessment scale. The trial court also reviewed letters from the defendant's psychiatrist and counselor opining that the defendant's prior diagnoses of major depression, alcohol abuse, and paraphilia were in remission.

Lifetime Registration

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). The trial court erred by ordering lifetime sex offender registration and lifetime SBM because first-degree sexual offense is not an "aggravated offense" within the meaning of the sex offender statutes.

State v. Boyett, __ N.C. App. __, 735 S.E.2d 371 (Dec. 4, 2012). The trial court erred by requiring lifetime sex offender registration based on second-degree sexual offense convictions. Although the convictions qualify as reportable offenses requiring registration for 30 years, they do not constitute an aggravated offense requiring lifetime registration.

Termination of Registration

In re Hall, ___ N.C. App. ___, 768 S.E.2d 39 (Dec. 31, 2014). (1) The trial court did not err by relying on the federal SORNA statute to deny the defendant's petition to terminate his sex offender registration. The language of G.S. 14-208.12A shows a clear intent by the legislature to incorporate the requirements of SORNA into NC's statutory provisions governing the sex offender registration process and to retroactively apply those provisions to sex offenders currently on the registry. (2) The retroactive application of SORNA does not constitute an ex post facto violation. The court noted that it is well established that G.S. 14-208.12A creates a "non-punitive civil regulatory scheme." It went on to reject the defendant's argument that the statutory scheme is so punitive as to negate the legislature's civil intent.

State v. Moir, __ N.C. App. __, 753 S.E.2d 195 (Jan. 7, 2014), *review allowed*, __ N.C. __, 762 S.E.2d 196 (Aug. 19, 2014). In considering a petition to terminate registration, the trial court erred by concluding that the defendant was not a Tier 1 offender under the Adam Walsh Act. The Act, the court explained, defines offender status by the offense charged, not by the facts underlying the case. Here, the trial court based its ruling on the facts underlying the plea, not on the pled-to offense of indecent liberties.

In re Bunch, __ N.C. App. __, 742 S.E.2d 596 (May 21, 2013). (1) On the State's appeal from the trial court order terminating the defendant's sex offender registration, the court noted that when a defendant seeks to be removed from the registry because he was erroneously required to register, the more appropriate avenue for relief is a declaratory judgment; however, it found that a declaratory judgment is not the exclusive avenue for relief. It continued:

> But we would caution that those who seek to terminate registration as a sex offender under N.C. Gen. Stat. § 14-208.12A, for any reason other than fulfillment of the ten years of registration and other requirements of N.C. Gen. Stat. § 14-208.12A in the future will probably not succeed if the State does raise any objection or argument in opposition to the request.

(2) The fact that a person has not actually registered for 10 years in NC does not deprive the trial court of jurisdiction to rule on a petition to terminate.

In re McClain, __ N.C. App. __, 741 S.E.2d 893 (April 16, 2013). The court rejected the defendant's argument that the trial court erred by denying his petition for removal from the sex offender registry because the incorporation of the Adam Walsh Act and SORNA into G.S. 14-208.12A(a1)(2) was an unconstitutional delegation of legislative authority. The court reasoned in part that "[s]imply defining when particular conduct is unlawful by reference to an external standard . . . has not been deemed an unconstitutional delegation of legislative authority."

In re Dunn, __ N.C. App. __, 738 S.E.2d 198 (Jan. 15, 2013). Holding, in a case in which the trial court denied the defendant's motion to terminate his sex offender registration, that the superior court did not have jurisdiction to enter its order. Under G.S. 14-208.12A(a), a petition to terminate must be filed in the district where the person was convicted. Here, the defendant was convicted in Montgomery County but filed his petition to terminate in Cumberland County.

In re Hamilton, 220 N.C. App. 350 (May 1, 2012). (1) Amendments to the sex offender registration scheme's period of registration and automatic termination provision made after the defendant was required to register applied to the defendant. When the defendant was required to register in 2001, he was subject to a ten-year registration requirement which automatically terminated if he did not re-offend. In 2006 the registration statutes were amended to provide that registration could continue beyond ten years, even when the registrant had not reoffended. Also, the automatic termination language was deleted and a new provision was added providing that persons wishing to terminate registration must petition the superior court for relief. The court held that both legislative changes applied to the defendant. (2) The trial court erred by finding that the defendant's removal from the registry would not comply with the federal Adam Walsh Act.

In re Hutchinson, 218 N.C. App. 443 (Feb. 7, 2012). The State could not appeal an order terminating the defendant's sex offender registration requirement when it had consented to the trial court's action. The court rejected the State's argument that the trial court lacked jurisdiction to terminate the defendant because he had not been registered for 10 years.

In re Borden, 216 N.C. App. 579 (Nov. 1, 2011). The trial court erred by terminating the petitioner's sex offender registration. G.S. 14-208.12A provides that 10 years "from the date of initial county registration," a person may petition to terminate registration. In this case the convictions triggering registration occurred in 1995 in Kentucky. In 2010, after having been registered in North Carolina for approximately 1½ years, the petitioner received notice from Kentucky that he was no longer required to register there. He then filed a petition in North Carolina to have his registration terminated. The court concluded that the term "initial county registration" means the date of initial county registration in North Carolina, not the initial county registration in any jurisdiction. Since the petitioner had not been registered in North Carolina for at least ten years, the trial court did not have authority under G.S. 14-208.12A to terminate his registration.

Satellite-Based Monitoring (SBM)
Bring Back Hearing

State v. Mills, __ N.C. App. __, 754 S.E.2d 674 (Feb. 18, 2014). (1) Although the State presented no evidence at the bring-back hearing establishing that the defendant received proper notice by certified mail of the hearing or that he received notice of the basis upon which the State believed him eligible for SBM, by failing to object to the trial court's findings at the hearing, the defendant waived the right to challenge them on appeal. (2) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to conduct the hearing. The defendant argued that there was no competent evidence that he resided in the county where the hearing was held. G.S. 14-208.40B(b)'s requirement that an SBM hearing be brought in the county in which the offender resides addresses venue, not subject matter jurisdiction and therefore the defendant's failure to object at the hearing waived this argument on appeal.

State v. Manning, 221 N.C. App. 201 (June 5, 2012). (1) The DOC gave sufficient notice of a SBM hearing when its letter informed the defendant of both the hearing date and applicable statutory category. (2) The court rejected the defendant's argument that SBM infringed on his constitutional right to travel.

State v. Cowan, 207 N.C. App. 192 (Sept. 21, 2010). G.S. 14-208.40B (procedure for determining SBM eligibility when eligibility was not determined when judgment was imposed) applies to SBM proceedings initiated after December 1, 2007, even if those proceedings involve offenders who had been sentenced or had committed the offenses that resulted in SBM eligibility before that date. The defendant received a probationary sentence for solicitation of indecent liberties on August 30, 2007 and thus was subject to SBM requirements, which apply to any offender sentenced to intermediate punishment on or after August 16, 2006. He challenged the trial court's later order requiring him to enroll in SBM, arguing that G.S. 14-208.40B did not apply to offenses committed prior to December 1, 2007, the statute's effective date.

Constitutional Issues

State v. Jones, __ N.C. App. __, 750 S.E.2d 883 (Dec. 3, 2013). The trial court did not err by requiring the defendant to enroll in lifetime SBM. The court rejected the defendant's argument that under *United States v. Jones* (U.S. 2012) (government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search"), SBM was an unreasonable search and seizure. The court found *Jones* irrelevant to a civil SBM proceeding.

State v. Martin, __ N.C. App. __, 735 S.E.2d 238 (Nov. 20, 2012). The court affirmed the trial court's order requiring the defendant to enroll in SBM over the defendant's assertion that SBM enrollment violated his Fourth Amendment rights.

Constitutionality
Ex Post Facto

State v. Bowditch, 364 N.C. 335 (Oct. 8, 2010). Subjecting defendants to satellite-based monitoring (SBM) does not violate the constitutional prohibition against ex post facto laws. The defendants all pleaded guilty to multiple counts of taking indecent liberties with a child; all of the offenses occurred before the SBM statutes took effect. The defendants challenged their eligibility for SBM, arguing that their participation would violate prohibitions against ex post facto laws. The court rejected this argument, concluding that the SBM program was not intended to be criminal punishment and is not punitive in purpose or effect. The court first determined that in enacting the SBM program, the General Assembly's intention was to enact a civil, regulatory scheme, not to impose criminal punishment. It further concluded that, applying the *Mendoza-Martinez* factors, the SMB program is not so punitive either in purpose or effect as to negate the General Assembly's civil intent. For related cases, see *State v. Wagoner*, 364 N.C. 422 (Oct. 8, 2010) (for the reasons stated in *Bowditch*, the court affirmed *State v. Wagoner*, 199 N.C. App. 321 (Sept. 1, 2009) (holding, over a dissent, that requiring the defendant to enroll in SBM does not violate the constitutional prohibition against ex post facto law or double jeopardy)); *State v. Morrow*, 364 N.C. 424 (Oct. 8, 2010). For the reasons stated in *Bowditch*, the court affirmed *State v. Morrow*, 200 N.C. App. 123 (Oct. 6, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause)); *State v. Vogt*, 364 N.C. 425 (Oct. 8, 2010) (for the reasons stated in *Bowditch*, the court affirmed *State v. Vogt*, 200 N.C. App. 664 (Nov. 3, 2009) (concluding, over a dissent, that the SBM statute does not violate the ex post facto clause)); *State v. Hagerman*, 364 N.C. 423 (Oct. 8, 2010) (for the reasons stated in *Bowditch*, the court affirmed *State v. Hagerman*, 200 N.C. App. 614 (Nov. 3, 2009) (rejecting the defendant's *Apprendi* challenge to SBM; reasoning that because SBM is a civil remedy, it did not increase the maximum penalty for the crime)). For post-*Bowditch* Court of Appeals cases reaching the same conclusion, see *State v. Williams*, 207 N.C. App. 499 (Oct. 19, 2010) (court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy). For pre-*Bowditch* Court of Appeals cases holding that SBM does not violate the ex post facto clause, see *State v. Bare*, 197 N.C. App. 461 (June 16, 2009); *State v. Bowlin*, 204 N.C. App. 206 (May 18, 2010); *State v. Cowan*, 207 N.C. App. 192 (Sept. 21, 2010).

Double Jeopardy

State v. Anderson, 198 N.C. App. 201 (July 7, 2009). Because SBM is civil in nature, its imposition does not violate a defendant's right to be free from double jeopardy.

State v. Williams, 207 N.C. App. 499 (Oct. 19, 2010). Following prior case law, the court rejected the defendant's arguments that SBM violates prohibitions against ex post facto and double jeopardy.

Search

Grady v. North Carolina, 575 U.S. ___ (Mar. 30, 2015) (per curiam). Reversing the North Carolina courts, the Court held that under *Jones* and *Jardines*, satellite based monitoring for sex offenders constitutes a search under the Fourth Amendment. The Court stated: "a State … conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." The Court rejected the reasoning of the state court below, which had relied on the fact that the monitoring program was "civil in nature" to

conclude that no search occurred, explaining: "A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." The Court did not decide the "ultimate question of the program's constitutionality" because the state courts had not assessed whether the search was reasonable. The Court remanded for further proceedings.

Substantive Due Process

State v. Williams (No. COA13-1280), __ N.C. App. __, 761 S.E.2d 662 (July 15, 2014). The trial court did not err by ordering the defendant to enroll in lifetime SBM. The court rejected the defendant's argument that the SBM statute violates substantive due process by impermissibly infringing upon his right to be free from government monitoring of his location. The court also rejected the defendant's argument that as applied to him the statute violates substantive due process because it authorizes mandatory lifetime participation without consideration of his risk of reoffending.

Vagueness

State v. McCravey, 203 N.C. App. 627 (May 4, 2010). The statutory definition of an aggravated offense in G.S. 14-208.6(1a) is not unconstitutionally vague for failure to define the term "use of force."

Other

State v. Jarvis, 214 N.C. App. 84 (Aug. 2, 2011). (1) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to order SBM enrollment because the State failed to file a written pleading providing notice regarding the basis for SBM. (2) The court rejected the defendant's argument that the trial court violated his due process rights by ordering him to enroll in SBM without providing any notice of the ground triggering SBM. Because the defendant was placed on probation and as a condition of his probation was incarcerated for 120 days, his eligibility for SBM was determined by the trial court pursuant to G.S. 14-208.40A; neither the DOC nor the trial court was responsible for any type of notice regarding defendant's eligibility.

Notice of Proceeding

State v. Self, 217 N.C. App. 638 (Dec. 20, 2011). The court rejected the defendant's argument that the trial court lacked jurisdiction to conduct an SBM determination hearing because the DOC did not file a complaint or issue a summons to the defendant as required by the Rules of Civil Procedure. The court concluded that G.S. 14-208.40B(b), "which governs the notification procedure for an offender when there was no previous SBM determination at sentencing, does not require NCDOC to either file a complaint or issue a summons in order to provide a defendant with adequate notice of an SBM determination hearing." Moreover, it concluded, the defendant does not argue that the DOC's letter failed to comply with the notification provisions of G.S. 14-208.40B(b).

State v. Wooten, 194 N.C. App. 524 (Dec. 16, 2008). Affirming the trial court's order requiring the defendant to enroll in SBM for life as a recidivist based on convictions for indecent liberties with a minor in 1989 and 2006. The defendant's bring-back hearing was held in January, 2008, days before his release from prison. The defendant argued that the court lacked jurisdiction to hold the bring-back hearing because he did not receive notice of the hearing in the manner set out in G.S. 14-208.40B(b), that is, by certified mail "sent to the address provided by the offender pursuant to G.S. 14-208.7 [the sex offender registration statute]." Notice in this manner would have been impossible, because the defendant had not been released from prison and had not established a registration address. The court held that the failure to follow the precise letter of the statute's notice provisions was not a jurisdictional error.

State v. Stines, 200 N.C. App. 193 (Oct. 6, 2009). Requiring enrollment in the SBM program deprives an offender of a significant liberty interest, triggering procedural due process protections. The State violated the defendant's procedural due process rights by failing to give him sufficient notice in advance of the SBM hearing of the basis for the DOC's preliminary determination that he met the criteria for enrollment in the SBM program. G.S. 14-208.40B requires the DOC to notify the offender, in advance of the SBM hearing, of the basis for its determination that the offender falls within one of the categories in G.S. 14-208.40(a), making the offender subject to enrollment in the SBM program.

State v. Cowan, 207 N.C. App. 192 (Sept. 21, 2010). The defendant did not receive adequate notice of the basis for the Department of Correction's preliminary determination that he should be required to enroll in SBM under the version of G.S. 14-208.40B(b) applicable to the defendant's case. Specifically the notice failed to specify the category set out in G.S. 14-208.40(a) into which the Department had determined that the defendant fell or to briefly state the factual basis for its conclusion.

Aggravated Offense

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). The State conceded and the court held that the trial court erred by requiring the defendant to submit to lifetime SBM. The trial court imposed SBM based on its determination that the defendant's conviction for first-degree rape constituted an "aggravated offense" as defined by G.S. 14-208.6(1a). However, this statute became effective on 1 October 2001 and applies only to offenses committed on or after that date. Because the date of the offense in this case was 22 September 2001, the trial court erred by utilizing an inapplicable statutory provision in its determination.

State v. Talbert, __ N.C. App. __, 756 S.E.2d 98 (April 1, 2014). The trial court did not err by requiring the defendant to enroll in lifetime SBM after finding at the bring-back hearing that he committed an aggravated offense, second-degree rape on a physically helpless victim (G.S. 14-27.3(a)(2)). The court followed *State v. Oxendine*, 206 N.C. App. 205 (2010), and held that second-degree rape was an aggravated offense.

State v. Marlow, __ N.C. App. __, 747 S.E.2d 741 (Sept. 17, 2013). Where the defendant was convicted of first-degree statutory rape the trial court did not err by ordering the defendant to

enroll in lifetime SBM upon release from imprisonment. The offense of conviction involved vaginal penetration and force and thus was an aggravated offense.

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). The trial court erred by ordering lifetime sex offender registration and lifetime SBM because first-degree sexual offense is not an "aggravated offense" within the meaning of the sex offender statutes.

State v. Boyett, __ N.C. App. __, 735 S.E.2d 371 (Dec. 4, 2012). The trial court erred by ordering the defendant to enroll in lifetime satellite-based monitoring based on its determination that second-degree sexual offense was an aggravating offense. Considering the elements of the offense, second-degree sexual offense is not an aggravated offense.

State v. Sprouse, 217 N.C. App. 230 (Dec. 6, 2011). (1) Following prior case law, the court held that taking indecent liberties with a child is not an aggravated offense for purposes of lifetime SBM. (2) Relying on *State v. Clark*, 211 N.C. App. 60 (Apr. 19, 2011) (first-degree statutory rape involving a victim under 13 is an aggravated offense for purposes of SBM), the court held that statutory rape of a victim who is 13, 14, or 15 is an aggravated offense for purposes of lifetime SBM. (3) Neither statutory sex offense under G.S. 14-27.7A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) are aggravated offenses for purposes of SBM.

State v. Carter, 216 N.C. App. 453 (Nov. 1, 2011), *rev. on other grounds*, 366 N.C. 496 (Apr. 12, 2013). The trial court erroneously required the defendant to enroll in lifetime SBM on the basis that first-degree sexual offense was an aggravated offense. The court reiterated that first-degree sexual offense is not an aggravated offense. The court remanded for a risk assessment and a new SBM hearing.

State v. Mann, 214 N.C. App. 155 (Aug. 2, 2011). The trial court erred by finding that sex offense in a parental role (G.S. 14-27.7(a)) is an aggravated offense.

State v. Clark, 211 N.C. App. 60 (Apr. 19, 2011). Applying an elemental analysis, the court determined that first-degree rape under G.S. 14-27.2(a)(1) fits within the definition of an aggravated offense in G.S. 14-208.6(1a). An aggravated offense includes engaging in a sexual act involving vaginal, anal, or oral penetration with a victim (1) of any age through the use of force or the threat of serious violence or (2) who is less than 12 years old. Rape under G.S. 14-27.2(a)(1) cannot satisfy the second prong because it occurs when a person engages in vaginal intercourse with a child under the age of 13, not 12. However, the offense does fall within the first prong of the aggravated offense definition. Such a rape requires proof that a defendant engaged in vaginal intercourse with the victim. This contrasts with G.S. 14-27.4(a)(1), which allows a defendant to be convicted of first-degree sexual offense on the basis of cunnilingus, an act that does not require penetration. Also, vaginal intercourse with a person under the age of 13 necessarily involves the use of force or the threat of serious violence.

State v. Brown, 211 N.C. App. 427 (May 3, 2011). Citing *State v. Clark*, 211 N.C. App. 60 (Apr. 19, 2011), the court held that because rape of a child under the age of 13 necessarily involves the use of force or threat of serious violence, the offense is an aggravated offense requiring lifetime SBM. In dicta, it concluded: "Under the test created by this Court . . . there are no offenses that

'fit within' the second definition of 'aggravated offense,' i.e., an offense that includes 'engaging in a sexual act involving vaginal, anal, or oral penetration with a victim who is less than 12 years old.'"

State v. Oliver, 210 N.C. App. 609 (Apr. 5, 2011). First-degree sexual offense under G.S. 14-27.4(a)(1) and indecent liberties with a minor under G.S. 14-202.1 are not aggravated offenses as defined by G.S. 14-208.6(1a) requiring lifetime satellite-based monitoring.

State v. Treadway, 208 N.C. App. 286 (Dec. 7, 2010). Following *State v. Phillips*, 203 N.C. App. 326 (2010), the court held that first-degree sexual offense under G.S. 14-27.4(a)(1) (child victim under 13) is not an aggravated offense for purposes of SBM. To be an aggravated offense, the child must be less than 12 years old; "a child under the age of 13 is not necessarily also a child less than 12 years old." The court reversed and remanded for consideration of whether the defendant is a sexually violent predator, a recidivist, or whether his conviction involved the physical, mental, or sexual abuse of a minor, and based on the risk assessment performed by the Department of Correction, defendant requires the highest possible level of supervision and monitoring.

State v. Santos, 210 N.C. App. 448 (Mar. 15, 2011). The trial court erred by finding that first-degree sexual offense with a child under 13 is an aggravated offense for purposes of ordering lifetime satellite-based monitoring (SBM). As the State conceded, when making the relevant determination, the trial court only is to consider the elements of the offense of conviction, not the underlying facts giving rise to the conviction. In a footnote, the court noted that although the record contains several judgments imposing SBM with respect to indecent liberties, courts have held that indecent liberties is not an aggravated offense. The court declined to rule on this issue because it was not raised on appeal.

State v. Davison, 201 N.C. App. 354 (Dec. 8, 2009). Remanding for failure to properly conduct the SBM determination, as outlined in the court's opinion. The court also held that when determining whether an offense is an aggravated offense for purposes of SBM, the trial court may look only at the elements of the conviction offense and may not consider the facts supporting the conviction.

State v. McCravey, 203 N.C. App. 627 (May 4, 2010). Applying the "elements test," second-degree rape committed by force and against the victim's will is an aggravated offense triggering lifetime SBM.

State v. Oxendine, 206 N.C. App. 205 (Aug. 3, 2010). Following *McCravey*, the court granted the State's petition for writ of certiorari and remanded for entry of an order requiring lifetime SBM enrollment on the basis of the defendant's second-degree rape conviction, which involved a mentally disabled victim. A concurring opinion agreed that the second-degree rape conviction was an aggravated offense, but not as a direct result of *McCravey*.

State v. Phillips, 203 N.C. App. 326 (Apr. 6, 2010). Following *Davison* and holding that when considering whether a pleaded-to offense is an aggravated one for purposes of SBM, the trial court may look only to the elements of the offense, and not at the factual basis for the plea. In

this case, the defendant pleaded guilty to felonious child abuse by the commission of a sexual act in violation of G.S. 14-318.4(a2) and taking indecent liberties with a child. Following *Singleton* and holding that notwithstanding the factual basis for the plea, taking indecent liberties was not an aggravated offense. The court went on to hold that considering the elements only, the trial court erred when it determined that the defendant's conviction for felonious child abuse by the commission of any sexual act under G.S. 14-318.4(a2) was an aggravated offense.

State v. Brooks, 204 N.C. App. 193 (May 18, 2010). Sexual battery is not an aggravated offense for the purposes of SBM.

State v. Singleton, 201 N.C. App. 620 (Jan. 5, 2010), *rev. allowed*, 364 N.C. 131 (Apr. 14, 2010). Following *Davison* and holding that the pleaded-to offense of indecent liberties was not an aggravated offense under the elements test.

State v. King, 204 N.C. App. 198 (May 18, 2010). Following *Singleton* and holding that indecent liberties is not an aggravated offense.

Recidivist

State v. Arrington, __ N.C. App. __, 741 S.E.2d 453 (April 2, 2013). There was sufficient evidence that the defendant was a recidivist for purposes of lifetime SBM. The prior record worksheet and defense counsel's stipulation to the prior convictions support a finding that the defendant had been convicted of indecent liberties in 2005, even though it appears that the State did not introduce the judgment or record of conviction from that case, or a copy of defendant's criminal history.

State v. Wooten, 194 N.C. App. 524 (Dec. 16, 2008). Affirming the trial court's order requiring the defendant to enroll in SBM for life as a recidivist based on convictions for indecent liberties with a minor in 1989 and 2006. The defendant argued that his 1989 conviction for indecent liberties should not qualify him as a recidivist because that conviction was not itself reportable (convictions for indecent liberties are reportable for those convicted or released from a penal institution on or after January 1, 1996). The court held that a prior conviction need only be "described" in the statute defining reportable offenses. Thus, a prior conviction can qualify a person as a recidivist no matter how far back in time it occurred. The court also concluded that the defendant had not properly preserved the claim that SBM violates ex post facto.

Offense Involving Physical, Mental of Sexual Abuse of Minor

State v. Smith, 201 N.C. App. 681 (Jan. 5, 2010). Statutory rape constitutes an offense involving the physical, mental, or sexual abuse of a minor. Once the trial judge determines that the defendant has been convicted of such an offense, the trial judge should order the DOC to perform a risk assessment. The trial court then must decide, based on the risk assessment and any other evidence presented, whether defendant requires "the highest possible level of supervision and monitoring." If the trial court determines that the defendant requires such supervision and monitoring, then the court must order the offender to enroll in SBM for a period of time specified by the court.

State v. Cowan, 207 N.C. App. 192 (Sept. 21, 2010). Assuming without deciding that an elements-based approach should be used when determining eligibility for SBM under G.S. 14-208.40(a)(2), the trial court did not err by requiring the defendant, who had pleaded guilty to solicitation of indecent liberties, to enroll in SBM on the grounds that the offense involved the physical, mental, or sexual abuse of a minor. Interpreting the word "involve," the court concluded that eligibility for SBM under G.S. 14-208.40(a)(2) includes both completed acts and acts that create a substantial risk that such abuse will occur. The court determined that an attempt to take an indecent liberty has "within or as part of itself" the physical, mental, or sexual abuse of a minor. It concluded that although solicitation of an indecent liberty need not involve the commission of the completed crime, an effort to "counsel, entice, or induce" another to commit that crime also creates a substantial risk that the "physical, mental, or sexual abuse of a minor" will occur, so that such a solicitation has the sexual abuse of a minor "as a "necessary accompaniment."

State v. Jarvis, 214 N.C. App. 84 (Aug. 2, 2011). Citing *State v. Cowan*, 207 N.C. App. 192, 204 (Sept. 21, 2010), the court rejected the defendant's argument that the trial court erred by determining that indecent liberties involved the physical, mental, or sexual abuse of a minor.

Highest Level of Supervision and Monitoring

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). In this indecent liberties case, the trial court did not err by considering evidence regarding the age of the alleged victims, the temporal proximity of the events, and the defendant's increasing sexual aggressiveness; making findings of fact based on this evidence; and imposing SBM. Although the trial court could not rely on charges that had been dismissed, the other evidence supported the trial court's findings, was not part of the STATIC-99 evaluation, and could be considered by the trial court.

State v. Jones, __ N.C. App. __, 758 S.E.2d 444 (June 3, 2014). The trial court erred by requiring the defendant to enroll in lifetime SBM. Two of the trial court's additional findings supporting its order that the defendant—who tested at moderate-low risk on the Static 99—enroll in lifetime SBM were not supported by the evidence. Also, the additional finding that there was a short period of time between the end of probation for the defendant's 1994 nonsexual offense and committing the sexual offense at issue does not support the conclusion that he requires the highest possible level of supervision and monitoring. Although the 1994 offense was originally charged as a sexual offense, it was pleaded down to a non-sexual offense. The trial court may only consider the offense of conviction for purposes of the SBM determination.

State v. Thomas, __ N.C. App. __, 741 S.E.2d 384 (Feb. 19, 2013). (1) The trial court erred by concluding that the defendant required the highest level of supervision and monitoring and ordering him to enroll in SBM for ten years when the STATIC-99 risk assessment classified him as a low risk and the trial court's additional findings were not supported by the evidence. The trial court made additional findings that the victim suffered significant emotional trauma, that the defendant took advantage of a position of trust, and that the defendant had a prior record for a sex offense; it found that these factors "create some concern for the court on the likelihood of recidivism." The finding regarding trauma was based solely on unsworn statements by the

victim's mother, which were insufficient to support this finding. The defendant's prior record and likelihood of recidivism was already accounted for in the STATIC-99 and thus did not constitute additional evidence outside of the STATIC-99. However, because the State had presented evidence which could support a determination of a higher risk level, the court remanded for a new SBM hearing. (2) The trial court erred by concluding that indecent liberties was an offense against a minor as defined by G.S. 14-208.6(1m). However, that offense may constitute a sexually violent offense, and can thus support a SBM order.

State v. Stokes, 216 N.C. App. 529 (Nov. 1, 2011). The trial court erred by ordering lifetime SBM. The trial court concluded that the defendant was not a sexually violent predator or a recidivist and that although the offenses involved the physical, mental, or sexual abuse of a minor, he did not require the highest possible level of supervision and monitoring. The trial court's finding that the defendant did not require the highest possible level of supervision and monitoring did not support its order requiring lifetime SBM.

State v. Jarvis, 214 N.C. App. 84 (Aug. 2, 2011). The trial court erred by requiring the defendant to enroll in satellite-based monitoring (SBM) for ten years after finding that he required the highest level of supervision and monitoring. The DOC risk assessment classified the defendant as a low risk and only two of the trial court's four additional findings of fact were supported by competent evidence. One finding of fact involved the defendant's *Alford* plea and lack of remorse. Remanding, the court instructed that the trial court may consider whether the defendant's actions showed lack of remorse but indicated that no authority suggests that the fact of an *Alford* plea itself shows lack of remorse.

State v. Green, 211 N.C. App. 599 (May 3, 2011). Although one of its factual findings was erroneous, the trial court did not err by requiring the defendant to enroll in SBM for five years after finding that he required the highest possible level of supervision. The trial court based its conclusion on a DOC risk assessment of "moderate-low" and on three additional findings: (1) the victims were especially young, neither was able to advocate for herself, and one was possibly too young to speak; therefore the risk to similarly situated individuals is substantial; (2) the defendant has committed multiple acts of domestic violence; and (3) the defendant obtained no sex offender treatment. Distinguishing the determination at issue from the "aggravated offense" determination and the determination as to whether an offense involves the physical, mental, or sexual abuse of a minor, the court rejected the defendant's argument that the first additional finding was erroneous because it relied on the underlying facts of the conviction. The court concluded that this finding was supported by competent evidence, specifically, the defendant's stipulation to the prosecutor's summary of facts provided at the defendant's *Alford* plea. The court concluded that additional finding two was not supported by competent evidence. The only relevant evidence was the State's representation that the defendant pled guilty to an assault charge involving the victim's mother and a list of priors on his Prior Record Level worksheet, containing the following entry: "AWDWIKI G/L AWDW AND CT". The court concluded that additional finding three was supported by the defendant's admission that he had not completed the treatment. Finally, the court determined that the risk assessment and additional findings one and three supported the trial court's order.

State v. Kilby, 198 N.C. App. 363 (July 21, 2009). The trial judge erred in concluding that the

defendant required the highest possible level of supervision and monitoring when the Department of Correction risk assessment found that the defendant posed only a moderate risk and trial judge made no findings of fact that would support its conclusion beyond those stated on form AOC-CR-616.

State v. Causby, 200 N.C. App. 113 (Sept. 15, 2009). Following *Kilby* (discussed immediately above), on similar facts.

State v. Oxendine, 206 N.C. App. 205 (Aug. 3, 2010). Following *Kilby* and *Causby*, the court held that the trial court erroneously determined that the defendant required the highest level of supervision and monitoring. The Static 99 concluded that the defendant posed a low risk of re-offending and no other evidence supported the trial court's determination.

State v. Morrow, 200 N.C. App. 123 (Oct. 6, 2009), *aff'd*, 364 N.C. 424 (Oct. 8, 2010). In determining whether the defendant requires the highest possible level of supervision and monitoring, the trial court may consider any evidence relevant to the defendant's risk and is not limited to the DOC's risk assessment. Because evidence supporting a finding of high risk was presented in a probation revocation hearing held the same day (the defendant admitted that he failed to attend several sexual abuse treatment program sessions), the court remanded for an evidentiary hearing as to the defendant's risk.

State v. King, 204 N.C. App. 198 (May 18, 2010). Remanding for a determination of whether the defendant required the highest level of supervision and monitoring. Although the DOC's risk assessment indicated that the defendant was a moderate risk, there was evidence that he had violated six conditions of probation, including failure to be at home for two home visits, failure to pay his monetary obligation, failure to obtain approval before moving, failure to report his new address and update the sex offender registry, failure to enroll in and attend sex offender treatment, and failure to inform his supervising officer of his whereabouts, leading to the conclusion that he had absconded supervision. Noting that in *Morrow* (discussed above), the probation revocation hearing and the SBM hearing were held on the same day and before the same judge and in this case they were held at different times, the court found that distinction irrelevant. It stated: "The trial court can consider the number and frequency of defendant's probation violations as well as the nature of the conditions violated in making its determination. In particular, defendant's violations of failing to report his residence address and to update the sex offender registry as well as his failure to enroll in and attend sex offender treatment could support a finding that defendant poses a higher level of risk and is thus in need of SBM."

State v. Morrow, 200 N.C. App. 123 (Oct. 6, 2009) *aff'd*, 364 N.C. 424 (Oct. 8, 2010). It was error for the trial court to order that the defendant enroll in SBM for a period of 7-10 years; G.S. 14-208.40B(c) requires the trial court to set a definite period of time for SBM enrollment.

State v. Smith, 201 N.C. App. 681 (Jan. 5, 2010). Once the trial judge determines that the defendant has been convicted of such an offense, the trial judge should order the DOC to perform a risk assessment. The trial court then must decide, based on the risk assessment and any other evidence presented, whether defendant requires "the highest possible level of supervision and monitoring." If the trial court determines that the defendant requires such supervision and

monitoring, then the court must order the offender to enroll in SBM for a period of time specified by the court.

State v. Cowan, 207 N.C. App. 192 (Sept. 21, 2010). The trial court erred in requiring lifetime SBM under G.S. 14-208.40(a)(2); that provision subjects a person to SBM for a term of years.

Jurisdiction

State v. Jones, __ N.C. App. __, 758 S.E.2d 444 (June 3, 2014). The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to hold the SBM hearing in Craven County. The requirement that the SBM hearing be held in the county in which the defendant resides relates to venue and the defendant's failure to raise the issue before the trial court waives his ability to raise it for the first time on appeal.

State v. Miller, 209 N.C. App. 466 (Feb. 1, 2011). (1) The district court lacked subject matter jurisdiction to order the defendant to enroll in satellite-based monitoring (SBM) after a district court conviction for misdemeanor attempted sexual battery. G.S. 14-208.40B(b) requires that SBM hearings be held in superior court for the county in which the offender resides. (2) The superior court lacked subject matter jurisdiction to order the defendant to enroll in SBM after a de novo hearing on the district court's order than the defendant enroll. Hearings on SBM eligibility are civil proceedings. Pursuant to G.S. 7A-27(c), an appeal from a final judgment in a civil action in district court lies in the court of appeals, not in the superior court.

State v. Clayton, 206 N.C. App. 300 (Aug. 3, 2010). Because the trial court previously held a hearing pursuant to G.S. 14-208.40B (SBM determination after sentencing) and determined that the defendant was not required to enroll in SBM, the trial court lacked jurisdiction to later hold a second SBM hearing on the same reportable conviction. In this case, the defendant was summoned for the second SBM hearing after a probation violation. The trial court required the defendant to enroll in SBM based on the fact that his probation violation was sexual in nature. The court reasoned that a probation violation is not a crime and cannot constitute a new reportable conviction.

Appeal

State v. Singleton, 201 N.C. App. 620 (Jan. 5, 2010). Because a SBM order is a final judgment from the superior court, the Court of Appeals has jurisdiction to consider appeals from SBM monitoring determinations under G.S. 14-208.40B pursuant to G.S. 7A-27.

State v. Brooks, 204 N.C. App. 193 (May 18, 2010). A defendant's appeal from a trial court's order requiring enrollment in SBM for life is a civil matter. Thus, oral notice of appeal pursuant to N.C.R. App. P. 4(a)(1) is insufficient to confer jurisdiction on the court of appeals. Instead, a defendant must give notice of appeal pursuant to N.C.R. App. P. 3(a) as is proper "in a civil action or special proceeding[.]" For related cases, compare *State v. Clayton*, 206 N.C. App. 300 (Aug. 3, 2010) (following *Brooks* and treating the defendant's brief as a petition for writ of certiorari and granted the petition to address the merits of his appeal); *State v. Oxendine*, 206 N.C. App. 205 (Aug. 3, 2010) (same); *State v. Cowan*, 207 N.C. App. 192 (Sept. 21, 2010)

(same); *State v. May*, 207 N.C. App. 260 (Sept. 21, 2010) (same); *State v. Williams*, 207 N.C. App. 499 (Oct. 19, 2010) (same), with *State v. Inman*, 206 N.C. App. 324 (Aug. 3, 2010) (over a dissent, the court followed *Brooks* and held that because there was no written notice of appeal, it lacked jurisdiction to consider the defendant's appeal from a trial court order requiring SBM enrollment; the court declined to treat the defendant's appeal as a petition for writ of certiorari; the dissenting opinion would have treated the defendant's appeal as a writ of certiorari and affirmed the trial court's order.

Civil Commitment

United States v. Comstock, 560 U.S. 126 (May 17, 2010). The Court upheld the federal government's power to civilly commit a mentally ill, sexually dangerous federal prisoner beyond the date the prisoner would otherwise be released from prison. For a more detailed discussion of this case, click here.

Miscellaneous

State v. Hadden, __ N.C. App. __, 741 S.E.2d 466 (April 2, 2013). The trial court erred by requiring the defendant to enroll in SBM. After finding that the defendant did not fall into any of the categories requiring SBM under G.S. 14-208.40, the trial court nonetheless ordered SBM enrollment for 30 years, on grounds that his probation was revoked and he failed to complete sex offender treatment. The court remanded for reconsideration.

State v. Sims, 216 N.C. App. 168 (Oct. 4, 2011). (1) The court rejected the defendant's argument that since no civil summons was issued, the trial court had no jurisdiction to impose SBM; the trial court had jurisdiction under G.S. 14-208.40A to order SBM. (2) The trial judge erroneously concluded that the defendant had a reportable conviction on grounds that indecent liberties is an offense against a minor. However, since that offense is a sexually violent offense, no error occurred.

State v. Merrell, 212 N.C. App. 502 (June 7, 2011). The trial court erred by ordering the defendant to enroll in lifetime satellite-based monitoring. The defendant was convicted of attempted first-degree rape under G.S. 14-27.2, and indecent liberties under G.S. 14-202.1, both sexually violent offenses and thus reportable convictions. At the sentencing hearing, the court found that the offenses "did involve the physical, mental, or sexual abuse of a minor . . . but no risk assessment is required from the [DOC] because lifetime satellite-based monitoring is required . . . ." The trial court ordered that lifetime monitoring based upon a finding that defendant had been convicted of "rape of a child, G.S. 14-27.2A, or sexual offense with a child, G.S. 14-27.4A, or an attempt, solicitation, or conspiracy to commit such offense . . . as a principal." However, defendant was convicted under G.S. 14-27.2 and 14-202.1, not 14-27.2A or 14-27.4A. Moreover, the trial court did not find that defendant was a sexually violent predator or that defendant was a recidivist, and it found that the offense was not an aggravated offense. Therefore, the trial court erred in ordering lifetime satellite-based monitoring and in failing to order that a risk assessment be performed pursuant to G.S. 14-208.40A(d) prior to ordering enrollment in lifetime monitoring.

Civil No Contact Order

State v. Hunt, 221 N.C. App. 48 (June 5, 2012). The trial court did not err by entering a civil no contact order against the defendant pursuant to G.S. 15A-1340.50 (permanent no contact order prohibiting future contact by convicted sex offender with crime victim). The court held that because the statute imposes a civil remedy, it does not impose an impermissible criminal punishment under article XI, sec. I of the N.C. Constitution. The court also rejected the defendant's due process argument asserting that the State did not give him sufficient notice of its intent to seek the order. It held that the defendant was not entitled to prior notice by the State that it would seek the no contact order at sentencing. The court held that because the order was civil in nature, it presented no double jeopardy issues. Finally, the court held that the trial judge followed proper procedure in entering the order.

Spectators in the Courtroom

State v. Dean, 196 N.C. App. 180 (Apr. 7, 2009). The trial court did not abuse its discretion in ordering the removal of four spectators in a gang-related murder trial. Jurors had expressed concern for their safety, as jurors had in the first trial of this case. The trial court found that the spectators were talking in the courtroom in violation of a pretrial order and had not followed orders of the court.

Speedy Trial and Related Issues

Vermont v. Brillon, 556 U.S. 81 (Mar. 9, 2009). Delay caused by appointed defense counsel or a public defender is not attributable to the state in determining whether a defendant's speedy trial right was violated, unless the delay resulted from a systemic breakdown in the public defender system.

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). Although the issue does not appear to have been raised by the defendant on appeal in this second-degree murder case, the court noted: "[O]ur review of the record shows defendant was arrested on 1 September 2009 and was tried in August and September of 2013, almost four years later. . . . The record on appeal does not show any motions for speedy trial or arguments of prejudice from defendant." The court continued, in what may be viewed as a warning about trial delays:

> While we are unaware of the circumstances surrounding the delay in bringing defendant to trial, it is difficult to conceive of circumstances where such delays are in the interest of justice for defendant, his family, or the victim's family, or in the best interests of our citizens in timely and just proceedings.

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *temporary stay allowed*, ___ N.C. ___, 768 S.E.2d 551 (Dec. 31, 2014). The trial court did not err by denying the defendant's motion to dismiss on grounds of excessive pre-indictment delay. A challenge to a pre-indictment delay is predicated on an alleged violation of the due process clause. To prevail, a defendant must show both actual and substantial prejudice from the delay and that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical

advantage. Here, the defendant failed to show that he sustained actual and substantial prejudice as a result of the delay.

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). No speedy trial violation occurred when there was a 27-month delay between the indictments and trial. Among other things, the defendant offered no evidence that the State's neglect or willfulness caused a delay and failed to show actual, substantial prejudice caused by the delay.

State v. Friend, 219 N.C. App. 338 (Mar. 6, 2012). The defendant was not denied his speedy trial rights. The date of the offense and the initial charge was 7 March 2006. The defendant was tried upon a re-filed charge in district court on 13 Apr. 2009. The defendant never made a speedy trial motion in district court; his only speedy trial request was made in superior court on 4 February 2010. Because the defendant already had a trial in district court, the time of the delay runs from his appeal from district court on 13 Apr. 2009 until his superior court trial on 15 February 2010, a period of less than one year. Assuming arguendo that the delay exceeded one year, the claim still failed.

State v. Lee, 218 N.C. App. 42 (Jan. 17, 2012). The trial court did not err by denying the defendant's motion to dismiss the charges on grounds of a speedy trial violation. The time between arrest and trial was approximately twenty-two months. Although the defendant asserted that the State was responsible for the delay by not calendaring his competency hearing until nearly ten months after he completed a competency evaluation, the court could not determine what caused this scheduling delay. It noted that during this time the defendant filed numerous complaints with the State Bar concerning defense counsel and repeatedly asked the trial court to remove his counsel. Also, during this time one of the victims was out of the country receiving medical treatment for his injuries and was unavailable. Although troubled by the delay, the court concluded that given the defendant's actions regarding appointed counsel and the availability of the victim, "we cannot say the delay was due to any willfulness or negligence on the part of the State, especially in light of the fact that defendant has made no showing of such on appeal." The court went on to note that although the defendant repeatedly attempted to assert his speedy trial right, he failed to show actual and substantial prejudice resulting from the delay.

State v. Williamson, 212 N.C. App. 393 (June 7, 2011). (1) G.S. 15A-711 is not a speedy trial statute. G.S. 15A-711 provides an imprisoned criminal defendant the right to formally request that the prosecutor make a written request for his or her return to the custody of local law enforcement officers in the jurisdiction in which the defendant has other pending charges. The temporary release of the defendant to the local jurisdiction may not exceed 60 days. If the prosecutor is properly served with the defendant's request and fails to make a written request to the custodian of the institution where the defendant is confined within six months from the date the defendant's request is filed with the clerk of court, the charges pending against the defendant must be dismissed. The State's compliance with G.S. 15A-711 does not require that the defendant's trial occur within a given time frame. The State satisfies its statutory duty when the prosecutor timely makes the written request for the defendant's transfer, whether or not the trial actually takes place during the statutory period of six months plus the 60 days temporary release to local law enforcement officials. (2) Because the trial court failed to make the proper inquiry in response to the defendant's motion under G.S. 15A-711 (the proper inquiry is whether the

prosecutor made a timely written request for the defendant's transfer to a local law enforcement facility), the court vacated and remanded for a new hearing.

State v. Twitty, 212 N.C. App. 100 (May 17, 2011). (1) G.S. 15A-711(c) could not support the defendant's statutory speedy trial claim where he had no other criminal charges pending against him at the time he was confined and awaiting trial. (2) The court rejected the defendant's constitutional speedy trial claim. The defendant made no argument that the delay was caused by the neglect or willfulness of the prosecution; he did not properly assert his speedy trial right; and he failed to show actual prejudice.

State v. Howell, 211 N.C. App. 613 (May 3, 2011). (1) Remanding for additional findings of fact and conclusions of law, the court noted that G.S. 15A-711 does not guarantee a defendant the right to have a matter tried within a specific period of time and is not a "speedy trial" statute. (2) The court remanded for further action the trial court's order dismissing the charges based on a violation of the constitutional right to a speedy trial, finding that the trial court "reached its Sixth Amendment ruling under a misapprehension of the law and without conducting a complete analysis, including consideration of all the relevant facts and law in this case." The court's opinion details the required analysis.

State v. Leyshon, 211 N.C. App. 511 (May 3, 2011). The court rejected the defendant's speedy trial claim, finding that any delay was caused by his failure to state whether he asserted or waived his right to counsel, requiring four hearings on the issue.

State v. Graham, 200 N.C. App. 204 (Oct. 6, 2009). Concluding that the defendant's claim of pre-indictment delay was not covered by the Speedy Trial clause; reviewing the defendant's claim of pre-indictment delay as a violation of due process and finding no prejudice.

Venue

Skilling v. United States, 561 U.S. 358 (June 24, 2010). The defendant was tried for various federal crimes in connection with the collapse of Enron. The Court held that the defendant's Sixth Amendment right to trial by an impartial jury was not violated when the federal district court denied the defendant's motion to change venue because of pretrial publicity. The Court distinguished the case at hand from previous decisions and concluded that given the community's population (Houston, Texas), the nature of the news stories about the defendant, the lapse in time between Enron's collapse and the trial, and the fact that the jury acquitted the defendant of a number of counts, a presumption of juror prejudice was not warranted. The Court went on to conclude that actual prejudice did not infect the jury, given the voir dire process.

State v. Borders, __ N.C. App. __, 762 S.E.2d. 490 (Sept. 2, 2014). In this rape and murder case, the trial court did not abuse its discretion by denying the defendant's motion to change venue. All of the jurors either indicated that they had no prior knowledge of the incident or if they had read about it, they could put aside their knowledge about the case. The court distinguished *State v. Jerrett*, 309 N.C. 239 (1983), on grounds that here, six of the jurors had no knowledge of the case prior to jury selection, neither of the alternate jurors knew about the case prior to that time, individual voir dire was used, none of the jurors seated knew any of the State's witnesses, and

the population of the county where trial occurred was significantly larger than the county at issue in *Jerrett.*

Verdict
See also Unanimous Verdict Issues under Jury Instructions, above.

Generally

State v. Douglas, 197 N.C. App. 215 (May 19, 2009). Ordering a new trial because of a defective verdict form. On the verdict form, the jury answered "Yes" to each of these questions: "Did the defendant possess cocaine, a controlled substance, with the intent to sell or deliver it? Did the defendant sell cocaine, a controlled substance, to Officer Eugene Ramos?" Because the verdict form did not include the words "guilty" or "not guilty," the jury did not fulfill its constitutional responsibility to make an actual finding of defendant's guilt. The verdict form only required the jury to make factual findings on the essential elements of the crimes; it thus was a "true special verdict" and could not support the judgment.

Impeaching the Verdict

State v. Marsh, __ N.C. App. __, 747 S.E.2d 750 (Sept. 17, 2013). The defendant's MAR claim was without merit where it alleged ineffective assistance because of counsel's failure to assert that extraneous information had been presented to the jury. The court found that evidence proffered from a juror was not "extraneous prejudicial information" and thus was inadmissible under N.C.R. Evid. 606(b).

State v. Heavner, __ N.C. App. __, 741 S.E.2d 897 (May 7, 2013). Although the trial court erred by admitting in a motion for appropriate relief (MAR) hearing a juror's testimony about the impact on his deliberations of his conversation with the defendant's mother during trial, the trial court's findings supported its determination that there was no reasonable possibility the juror was affected by the extraneous information. After the defendant was found guilty it came to light that his mother, Ms. Elmore, spoke with a juror during trial. The defendant filed a MAR alleging that he did not receive a fair trial based on this contact. At the MAR hearing, the juror admitted that a conversation took place but said that he did not take it into account in arriving at a verdict. The trial court denied the MAR. Although it was error for the trial court to consider the juror's mental processes regarding the extraneous information, the judge's unchallenged findings of fact supported its conclusion that there was no reasonable possibility that the juror could have been affected by the information. The court noted that the juror testified that Elmore said only that her son was in trouble and that she was there to support him; she never said what the trouble was, told the juror her son's name, or specified his charges.

Mutually Exclusive Verdicts

State v. Mumford, 364 N.C. 394 (Oct. 8, 2010). The court reversed *State v. Mumford*, 201 N.C. App. 594 (Jan. 5, 2010), and held that because a not guilty verdict under G.S. 20-138.1 (impaired driving) and a guilty verdict under G.S. 20-141.4(a3) (felony serious injury by vehicle) were merely inconsistent, the trial court did not err by accepting the verdict where it was supported

with sufficient evidence. To require reversal, the verdicts would have to be both inconsistent and legally contradictory, also referred to as mutually exclusive verdicts (for example, guilty verdicts of embezzlement and obtaining property by false pretenses; the verdicts are mutually exclusive because property cannot be obtained simultaneously pursuant to both lawful and unlawful means). The court overruled *State v. Perry*, 305 N.C. 225 (1982) (affirming a decision to vacate a sentence for felonious larceny when the jury returned a guilty verdict for felonious larceny but a not guilty verdict of breaking or entering), and *State v. Holloway*, 265 N.C. 581 (1965) (per curiam) (ordering a new trial when the defendant was found guilty of felonious larceny, but was acquitted of breaking or entering and no evidence was presented at trial to prove the value of the stolen goods), to the extent they were inconsistent with its holding.

State v. Melvin, 364 N.C. 589 (Dec. 20, 2010). Reversing the court of appeals in 199 N.C. App. 469 (2009) (the trial court committed plain error by failing to instruct the jury that it could convict the defendant of either first-degree murder or accessory after the fact to murder, but not both), the court held that although the trial court erred by failing to give the instruction at issue, no plain error occurred. Citing its recent decision in *State v. Mumford*, 364 N.C. 394, 398-402 (2010), the court held that because guilty verdicts of first-degree murder and accessory after the fact to that murder would be legally inconsistent and contradictory, a defendant may not be punished for both. The court went on to explain that mutually exclusive offenses may be joined for trial; if substantial evidence supports each offense, both should be submitted to the jury with an instruction that the defendant only may be convicted of one of the offenses, but not both. Having found error, the court went on to conclude that no plain error occurred in light of the overwhelming evidence of guilt, the fact that the jury found the defendant guilty of both offenses, suggesting that it would have convicted him of the more serious offense, had it been required to choose between charges, and that the trial judge arrested judgment on the accessory after the fact conviction.

State v. Mosher, __ N.C. App. __, 761 S.E.2d 204 (Aug. 5, 2014). The jury did not return mutually exclusive verdicts when it found the defendant guilty of felony child abuse in violation of G.S. 14-318.4(a3) (the intentional injury version of this offense) and felony child abuse resulting in violation of G.S. 14-318.4(a4) (the willful act or grossly negligent omission version of this offense). The charges arose out of an incident where the victim was severely burned in a bathtub while under the defendant's care. Citing *State v. Mumford*, 364 N.C. 394, 400 (2010), the court noted that criminal offenses are mutually exclusive if "guilt of one necessarily excludes guilt of the other." The defendant argued that the mens rea component of the two offenses makes them mutually exclusive. The court concluded, however, that substantial evidence permitted the jury to find that two separate offenses occurred in succession such that the two charges were not mutually exclusive. Specifically, that the defendant acted in reckless disregard for human life by initially leaving the victim and her brother unattended in a tub of scalding hot water and that after a period of time, the defendant returned to the tub and intentionally held the victim in that water.

State v. Johnson, 214 N.C. App. 436 (Aug. 16, 2011). Guilty verdicts of trafficking in opium and selling and possessing with intent to sell and deliver a schedule III preparation of an opium derivative are not mutually exclusive. There is no support for the defendant's argument that a schedule III preparation of an opium derivative does not qualify as a "derivative . . . or

preparation of opium" for purposes of trafficking.

State v. Wade, 213 N.C. App. 481 (July 19, 2011). The trial court did not err by accepting a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury when the jury had acquitted the defendant of attempted first-degree murder. The verdicts were not mutually exclusive under *State v. Mumford*, 364 N.C. 394 (Oct. 8, 2010).

State v. Blackmon, 208 N.C. App. 397 (Dec. 7, 2010). The trial court properly denied the defendant's motion for judgment notwithstanding the verdict based on inconsistent verdicts. The jury found the defendant guilty of felonious larceny after a breaking or entering and of being a habitual felon but deadlocked on a breaking or entering charge. Citing, *State v. Mumford*, 364 N.C. 394 (Oct. 8, 2010), the court held that the verdicts were merely inconsistent and not mutually exclusive.

State v. Johnson, 208 N.C. App. 443 (Dec. 7, 2010). Guilty verdicts of breaking or entering and discharging a firearm into occupied property were not mutually exclusive. The defendant argued that he could not both be in the building and shooting into the building at the same time. The court rejected this argument noting that the offenses occurred in succession, the defendant would be guilty of the discharging offense regardless of whether or not he was standing on a screened-in porch at the time, and that in any event the defendant was not in the building when he was standing on the porch.

State v. Cole, 199 N.C. App. 151 (Aug. 18, 2009). The trial court did not err in accepting seemingly inconsistent verdicts of guilty of misdemeanor assault with a deadly weapon and not guilty of possession of a firearm by a felon.

Partial Verdict

State v. Sargeant, 365 N.C. 58 (Mar. 11, 2011). The court agreed with the court of appeals' decision in *State v. Sargeant*, 206 N.C. App. 1 (Aug. 3, 2010), which had held, over a dissent, that the trial court erred by taking a partial verdict. However, because the court concluded that a new trial was warranted on account of a prejudicial ruling on an unrelated evidence issue, it did not analyze whether the verdict error was prejudicial. The court of appeals' decision described the verdict issue as follows. The defendant was convicted of first-degree murder, first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property. At the end of the first day of deliberations, the jury had not reached a unanimous decision as to each of the charges. The trial court asked the jury to submit verdict sheets for any of the charges for which it had unanimously found the defendant guilty. The trial court then received the jury's verdicts finding the defendant guilty of first-degree kidnapping, robbery with a dangerous weapon, and burning of personal property, as well as first-degree murder on the bases of both felony murder and lying in wait. The only issue left for the jury to decide was whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The next morning, the court gave the jury a new verdict sheet asking only whether the defendant was guilty of first-degree murder on the basis of premeditation and deliberation. The jury returned a guilty verdict later that day. The court of appeals concluded that the trial court erred by taking a verdict as to lying in wait and felony murder when the jury had not yet agreed on premeditation and

deliberation. It reasoned that premeditation and deliberation, felony murder, and lying in wait are not crimes, but rather theories of first-degree murder and the trial court cannot take a verdict on a theory. Therefore, the court of appeals concluded, the trial court erred by taking partial verdicts on theories of first-degree murder. As noted above, the supreme court agreed that error occurred but declined to assess whether it was prejudicial.

Polling the Jury

State v. Hunt, 198 N.C. App. 488 (Aug. 4, 2009). The clerk was not required to question the jurors separately about each of the two offenses; the polling was proper when the clerk posed one question about both offenses, to each juror individually.

State v. Lackey, 204 N.C. App. 153 (May 18, 2010). Based on the facts of the case, the clerk properly polled the jury in accordance with G.S. 15A-1238.

Verdict Sheet

State v. Barbour, __ N.C. App. __, 748 S.E.2d 59 (Sept. 17, 2013). The trial court did not err by examining the verdict sheet returned by the jury, rejecting the verdict, and instructing the jury to answer each question. The trial court acted before consulting with counsel but did consult with counsel after the jury was removed from the courtroom. The court noted that "While it would have been preferable for the trial court to have excused the jury from the courtroom, and allowed counsel to view the verdict sheet and to be heard prior to the court's instructions to the jury, we can discern no prejudice to defendant based upon what [actually] happened." The court noted that because the trial court instructed the jury to re-mark the verdict sheet next to their original markings, the original markings were preserved.

Witnesses

Securing Attendance Of

State v. Hurt, __ N.C. App. __, 760 S.E.2d 341 (July 15, 2014). The trial court did not abuse its discretion by granting the State's motion to quash the subpoena of a prosecutor involved in an earlier hearing on the defendant's guilty plea. The court rejected the defendant's argument that the prosecutor's recitation of the factual basis for the plea was a judicial admission. Thus, the court rejected the defendant's argument that the trial court's decision to quash the subpoena deprived him of the opportunity to elicit binding admissions on the State. Additionally, the defendant could have proffered the prosecutor's statements through a transcript of the plea proceeding, which he introduced with respect to other matters.

State v. Brunson, 221 N.C. App. 614 (July 17, 2012). In a sexual assault case involving the defendant's stepdaughter, the trial court did not err by quashing a subpoena that would have required a district court judge to testify regarding statements made by the victim's mother to the judge in a DVPO proceeding. At trial the defense questioned the mother about whether she told the district court judge that the defendant committed first-degree rape and first-degree sex offense. The mother denied doing this. The defendant wanted to use the district court judge to impeach this testimony. The district court judge filed an affidavit indicating that he had no

independent recollection of the case. Even if the district court judge were to have testified as indicated, his testimony would have had no impact on the case; at most it would have established a lay person's confusion with legal terms rather than an attempt to convey false information. Also, most of the evidence supporting the conviction came from the victim herself.

Evidence

Alco-Sensor Results

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). Although the trial court erred by admitting evidence of the numerical result of an Alco-sensor test during a pretrial hearing on the defendant's motion to suppress, a new trial was not warranted. The numerical results were admitted only in the pre-trial hearing, not at trial and even without the numerical result, the State presented sufficient evidence to defeat the suppression motion.

Applicability of the Rules

Johnson v. Robertson, __ N.C. App. __, 742 S.E.2d 603 (May 21, 2013). The Rules of Evidence do not apply to DMV license revocation hearings pursuant to G.S. 20-16.2.

State v. Foster, 222 N.C. App. 199 (Aug. 7, 2012). The rules of evidence apply to proceedings related to post-conviction motions for DNA testing under G.S. 15A-269.

Introduction of Civil Judgment and Pleadings

State v. Young, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). In this murder case the court held that the court of appeals erred by concluding that the trial court committed reversible error in allowing into evidence certain materials from civil actions. The relevant materials included a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim and a child custody complaint that included statements that the defendant had killed his wife. The court of appeals had held that admission of this evidence violated G.S. 1-149 ("[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it") and Rule 403. The court held that the defendant did not preserve his challenge to the admission of the child custody complaint on any grounds. It further held that the defendant failed to preserve his G.S. 1-149 objection as to the wrongful death evidence and that his Rule 403 objection as to this evidence lacked merit. As to the G.S. 1-149 issue, the court found it dispositive that the defendant failed to object at trial to the admission of the challenged evidence on these grounds and concluded that the court of appeals erred by finding that the statutory language was mandatory and allowed for review absent an objection.

Authentication

State v. Snead, ___ N.C. App. ___, 768 S.E.2d 344 (Feb. 17, 2015), *temporary stay allowed*, __ N.C. __, 768 S.E.2d 568 (Mar. 9, 2015). In this store larceny case, the trial court committed prejudicial error by admitting as substantive evidence store surveillance video that was not properly authenticated. At trial Mr. Steckler, the store's loss prevention manager, explained how the store's video surveillance system worked and testified that he had reviewed the video images after the incident. Steckler also testified that the video equipment was "working properly" on the day of the incident. However, Steckler admitted he was not at the store on the date of the incident, nor was he in charge of maintaining the video recording equipment and ensuring its

proper operation. The court also found that Steckler's testimony was insufficient to establish chain of custody of the CD, which was created from the store videotape.

State v. Gray, __ N.C. App. __, 758 S.E.2d 699 (June 3, 2014), *review allowed*, __ N.C. __, 766 S.E.2d 635 (Dec. 18, 2014). The State adequately authenticated photographs of text messages sent between accomplices to an attempted robbery. A detective testified that he took pictures of text messages on an accomplice's cell phone while searching the phone incident to arrest. The detective identified the photographs in the exhibit as screen shots of the cell phone and testified that they were in substantially the same condition as when he obtained them. Another accomplice, with whom the first accomplice was communicating in the text messages, also testified to the authenticity of the exhibit. The court rejected the defendant's argument that to authenticate the text messages, the State had to call employees of the cell phone company.

State v. McCoy, __ N.C. App. __, 759 S.E.2d 330 (June 3, 2014). (1) An affidavit of indigency sworn to by the defendant before a court clerk was a self-authenticating document under Evidence Rule 902 and thus need not be authenticated under Rule 901. (2) The trial court properly allowed the jury to consider whether a signature on a pawn shop buy ticket matched the defendant's signature of his affidavit of indigency. The court compared the signatures and found that there was enough similarity between them for the documents to have been submitted to the jury for comparison.

State v. Carpenter, __ N.C. App. __, 754 S.E.2d 478 (Mar. 4, 2014). In an armed robbery case, the trial court did not err by admitting three photographs of the defendant and his tattoos, taken at the jail after his arrest. The photographs were properly authenticated where the officer who took them testified about the procedure used and that they fairly and accurately depicted the defendant's tattoo as it appeared when he was in custody.

State v. Murray, __ N.C. App. __, 746 S.E.2d 452 (Aug. 20, 2013). In this drug case where the defendant denied being the perpetrator and suggested that the drugs were sold by one of his sons, the State failed to properly authenticate two photographs used in photographic lineups as being of the defendant's sons. An informant involved in the drug buy testified that he had purchased drugs from the people depicted in the photos on previous occasions but not on the occasion in question. The State then offered an officer to establish that the photos depicted the defendant's sons. However, the officer testified that he wasn't sure that the photos depicted the defendant's sons. Given this lack of authentication, the court also held that the photos were irrelevant and should not have been admitted.

State v. Wilkerson, __ N.C. App. __, 733 S.E.2d 181 (Oct. 16, 2012). In a felony larceny after a breaking or entering case, the trial court did not abuse its discretion by determining that a text message sent from the defendant's phone was properly authenticated where substantial circumstantial evidence tended to show that the defendant sent the text message. The defendant's car was seen driving up and down the victim's street on the day of the crime in a manner such that an eyewitness found the car suspicious and called the police; the eyewitness provided a license plate number and a description of the car that matched the defendant's car, and she testified that the driver appeared to be using a cell phone; the morning after the crime, the car was found parked at the defendant's home with some of the stolen property in the trunk; the

phone was found on the defendant's person the following morning; around the time of the crime, multiple calls were made from and received by the defendant's phone; the text message itself referenced a stolen item; and by referencing cell towers used to transmit the calls, expert witnesses established the time of the calls placed, the process employed, and a path of transit tracking the phone from the area of the defendant's home to the area of the victim's home and back.

State v. Cook, 218 N.C. App. 245 (Jan. 17, 2012). For reasons discussed in the opinion, the court held that footage from a surveillance video was properly authenticated.

State v. Crawley, 217 N.C. App. 509 (Dec. 20, 2011). Cell phone records introduced by the State were properly authenticated. At trial the State called Ryan Harger, a custodian of records for Sprint/Nextel, a telecommunications company that transmitted the electronically recorded cell phone records to the police department. The defendant argued that the cell phone records were not properly authenticated because Harger did not himself provide the records to the police and that he could not know for certain if a particular document was, in fact, from Sprint/Nextel. The court noted that Harger, a custodian of records for Sprint/Nextel for 10 years, testified that: he is familiar with Sprint/Nextel records; he has testified in other cases; Sprint/Nextel transmitted records to the police and that he believed that was done by e-mail; the records were kept in the normal course of business; the documents he saw were the same as those normally sent to law enforcement; and the relevant exhibit included a response letter from Sprint, a screen print of Sprint's database, a directory of cell sites, and call detail records. Although Harger did not send the documents to the police, he testified that he believed them to be accurate and that he was familiar with each type of document. This was sufficient to show that the records were, as the State claimed, records from Sprint/Nextel, and any question as to the accuracy or reliability of such records is a jury question. The court went on to conclude that even if Harger's testimony did not authenticate the records, any error was not prejudicial, because an officer sufficiently authenticated another exhibit, a map created by the officer based on the same phone records. The officer testified that he received the records from Sprint/Nextel pursuant to a court order and that they were the same records that Harger testified to. He then testified as to how he mapped out cell phone records to produce the exhibit.

State v. Collins, 216 N.C. App. 249 (Oct. 4, 2011). The trial court did not err by admitting a videotape of a controlled buy as substantive evidence where the State laid a proper foundation for the videotape. The court rejected the defendant's argument that the State was required to proffer a witness to testify that the tape accurately depicted the events in question.

State v. Hartley, 212 N.C. App. 1 (May 17, 2011). A rectal swab taken from the victim was properly authenticated. An officer processed evidence at the crime scene, was present for the victim's autopsy, and obtained evidence from the doctor who performed the autopsy, including the rectal swabs, on 24 June 2004. The swabs were then placed in the custody of the Sheriff's Office. They were submitted to the SBI for analysis and later returned to the Sheriff's Office where they were kept until the time of trial. The court rejected the defendant's argument that the chain of custody was insufficient because the swabs were taken on 19 June 2004, but were not picked up by the officer until 24 June 2004, concluding that there was no reason to believe that the evidence was altered and the possibility that it was tampered with is remote.

State v. Elkins, 210 N.C. App. 110 (Mar. 1, 2011). The trial court erred by allowing the State to introduce three photographs, which were part of a surveillance video, when the photographs were not properly authenticated. However, given the evidence of guilt, no plain error occurred.

State v. Mobley, 206 N.C. App. 285 (Aug. 3, 2010). The trial court did not abuse its discretion by concluding that an audio recording of a booking-area phone call was properly authenticated under Rule 901 as having been made by the defendant. The State's authentication evidence showed: (1) the call was made to the same phone number as later calls made using the defendant's jail positive identification number; (2) the voice of the caller was similar to later calls placed from the jail using the defendant's jail positive identification number; (3) a witness familiar with the defendant's voice identified the defendant as the caller; (4) the caller identified himself as "Little Renny" and the defendant's name is Renny Mobley; and (5) the caller discussed circumstances similar to those involved with the defendant's arrest.

Best Evidence Rule

State v. Haas, 202 N.C. App. 345 (Feb. 2, 2010). Where an audio recording of a prior juvenile proceeding was available to all parties and the content of the recording was not in question, Rule 1002 was not violated by the admission of a written transcript of the proceeding.

***Bruton* Issues**

State v. Boozer, 210 N.C. App. 371 (Mar. 15, 2011). No *Bruton* issue occurred when the trial court admitted a co-defendant's admission to police that "I only hit that man twice." A co-defendant's statement which does not mention or refer to the defendant does not implicate the Confrontation Clause or *Bruton*. Here, the co-defendant's statement did not mention the defendant and thus its admission did not implicate his constitutional rights.

Competency of Witnesses

Child Witnesses

State v. Carter, 210 N.C. App. 156 (Mar. 1, 2011). The trial court did not abuse its discretion in determining that a four-year-old child sexual assault victim was competent to testify. The child was 2½ years old at the time the incident occurred. At trial, the child was non-responsive to some questions and gave contradictory responses to others.

Elderly Witnesses

State v. Forte, 206 N.C. App. 699 (Sept. 7, 2010). The trial court did not abuse its discretion by finding an elderly victim to be competent. The witness correctly testified to his full name and birth date and where he lived. He was able to correctly identify family members, the defendant, and his own signature. He understood that he was at the courthouse, that a trial was occurring, and his duty to tell the truth. His testimony also demonstrated his ability to tell the truth from a lie. Noting that some of his answers were ambiguous and vague and that he was unable to answer some questions, the court concluded that it would not be unusual for an elderly person to have

some difficulty in responding coherently to all of the voir dire questions.

Jurors

State v. Heavner, __ N.C. App. __, 741 S.E.2d 897 (May 7, 2013). Although the trial court erred by admitting in a motion for appropriate relief (MAR) hearing a juror's testimony about the impact on his deliberations of his conversation with the defendant's mother during trial, the trial court's findings supported its determination that there was no reasonable possibility the juror was affected by the extraneous information. After the defendant was found guilty it came to light that his mother, Ms. Elmore, spoke with a juror during trial. The defendant filed a MAR alleging that he did not receive a fair trial based on this contact. At the MAR hearing, the juror admitted that a conversation took place but said that he did not take it into account in arriving at a verdict. The trial court denied the MAR. Although it was error for the trial court to consider the juror's mental processes regarding the extraneous information, the judge's unchallenged findings of fact supported its conclusion that there was no reasonable possibility that the juror could have been affected by the information. The court noted that the juror testified that Elmore said only that her son was in trouble and that she was there to support him; she never said what the trouble was, told the juror her son's name, or specified his charges.

Personal Knowledge

State v. Warren, __ N.C. App. __, 738 S.E.2d 225 (Mar. 5, 2013). A hotel owner had personal knowledge and could testify to the responsibilities of the defendant, the hotel's general manger, with respect to removing deposits from the hotel safe and other related matters.

State v. Sharpless, 221 N.C. App. 132 (June 5, 2012). In a murder and assault case involving a home invasion and two victims, the trial court did not err by admitting testimony from the surviving victim that touched on the deceased victim's state of mind when he initially opened the door to the intruder. The surviving victim "merely gave his understanding and interpretation of what went on at the door based on his sitting in the next room and being able to hear the whole situation." As such, the surviving victim properly testified regarding his own beliefs of the sequence of events that took place at the door.

State v. Elkins, 210 N.C. App. 110 (Mar. 1, 2011). In an armed robbery case, a store clerk's testimony that he thought the defendant had a gun was not inadmissible speculation or conjecture. Based on his observations, the clerk believed that the defendant had a gun because the defendant was hiding his arm under his jacket. The clerk's perception was rationally based on his firsthand observation of the defendant and was more than mere speculation or conjecture.

Course of Conduct

State v. Howard, 215 N.C. App. 318 (Sept. 6, 2011). In an armed robbery prosecution, evidence of a break-in occurring hours after the incident in question was properly admitted under the "'course of conduct'" or 'complete story' exception." The evidence was necessary for the jury to understand how the defendant was identified as the perpetrator and how items stolen from the robbery victim and purchased with her credit card were recovered. The break-in evidence "was

necessary for the jury to understand the complete story and timeline of the events that took place on the night in question, and therefore was properly admitted under the 'course of conduct' exception." A footnote to the court's opinion suggests that this basis for admission was separate from and independent of admissibility under Rule 404(b).

Demonstrations and Experiments

State v. Witherspoon, 199 N.C. App. 141 (Aug. 18, 2009). Use of a mannequin's head and a newly-purchased couch to refute the defendant's version of the events on the day she shot her husband was properly allowed as a demonstration. Because the evidence did not constitute an experiment, the State did not have to show that the circumstances were substantially similar to those at the time of the actual shooting. As a demonstration, the evidence was admissible because it was relevant (it was probative of premeditation) and not unfairly prejudicial.

State v. Anderson, 200 N.C. App. 216 (Oct. 6, 2009). The State laid a proper foundation to establish the relevancy of a demonstration by an expert witness who used a doll to illustrate how shaken baby syndrome occurs and the amount of force necessary to cause the victim's injuries, where a demonstration of how the injuries were inflicted was relevant to defendant's intent to harm the victim. The demonstration did not have to be substantially similar to the manner in which the crime occurred because that standard applies to experiments, not demonstrations. Finally the demonstration was not unduly prejudicial and would not cause the jury decide the case on emotion.

Judicial Notice

State v. James, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this drug trafficking case where an SBI agent testified as an expert for the State and identified the substance in question as oxycodone, the court declined the defendant's request to take judicial notice of Version 4 and 7 of SBI Laboratory testing protocols. Among other things, the defendant did not present the protocols at trial, the State had no opportunity to test their veracity, and the defendant presented no information indicating that the protocols applied at the time of testing.

State v. Brown, 221 N.C. App. 383 (June 19, 2012). For purposes of determining whether there was sufficient evidence that a burglary occurred at nighttime, the court took judicial notice of the time of civil twilight and the driving distance between the victim's residence and an apartment where the defendant appeared at 6 am after having been out all night.

State v. King, 218 N.C. App. 384 (Feb. 7, 2012). The court took judicial notice of the clerk of superior court's records showing that the defendant paid $1,758.50, the total amount due for court costs and fines pursuant to a criminal judgment.

State v. Leyshon, 211 N.C. App. 511 (May 3, 2011). The trial court did not err by refusing to take judicial notice of provisions in the Federal Register when those provisions were irrelevant to the charged offense.

State v. McCormick, 204 N.C. App. 105 (May 18, 2010). In a burglary case, the trial court properly took judicial notice of the time of sunset and of civil sunset as established by the Naval Observatory and instructed the jury that it "may, but is not required to, accept as conclusive any fact judicially noticed."

Offers of Proof

State v. Dew, __ N.C. App. __, 738 S.E.2d 215 (Mar. 5, 2013). Where the defendant failed to make an offer of proof after the trial court sustained the State's objection to his cross-examination of a detective, he did not properly preserve the issue for appellate review.

Stipulations

State v. Huey, 204 N.C. App. 513 (June 15, 2010). The defendant moved to suppress on grounds that an officer stopped him without reasonable suspicion. At a hearing on the suppression motion, the State stipulated that the officer knew, at the time of the stop, that the robbery suspects the officer was looking for were approximately 18 years old. The defendant was 51 years old. However, at the hearing, the officer gave testimony contradicting this stipulation and indicating that he did not learn of the suspects' age until after he had arrested the defendant. The court concluded that the stipulation was binding on the State, even though the defendant made no objection when the officer testified.

Right to Present a Defense

Nevada v. Jackson, 569 U.S. __, 133 S. Ct. 1990 (June 3, 2013). The Court reversed the Ninth Circuit, which had held that the defendant, who was convicted of rape and other crimes, was entitled to federal habeas relief because the Nevada Supreme Court unreasonably applied clearly established Supreme Court precedent regarding a criminal defendant's constitutional right to present a defense. At his trial, the defendant unsuccessfully tried to introduce extrinsic evidence that the victim previously reported that the defendant had assaulted her but that the police had been unable to substantiate those allegations. The state supreme court held that this evidence was properly excluded. The Ninth Circuit granted habeas relief. The Court reversed, noting in part that it "has never held that the Confrontation Clause entitles a criminal defendant to introduce *extrinsic evidence* for impeachment purposes" (emphasis in original).

Relevancy--Rule 401
Character Evidence

State v. Hembree, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). In this capital murder case in which the State introduced 404(b) evidence regarding a murder of victim Saldana to show common scheme or plan, the trial court erred by allowing Saldana's sister to testify about Saldana's good character. Evidence regarding Saldana's character was irrelevant to the charged crime. For this reason the trial court also abused its discretion by admitting this evidence over the defendant's Rule 403 objection.

Context Evidence

State v. Garcia, __ N.C. App. __, 743 S.E.2d 74 (June 18, 2013). The trial court did not commit plain error by failing to redact portions of a transcript of the defendant's interrogation where the challenged statements were relevant. The court rejected the defendant's argument that the trial court should have redacted statements made by the detective, finding that they provided context for the defendant's responses. The court also rejected the defendant's argument that the detective's statements during the interrogation that the defendant was lying constituted improper opinion testimony on the defendant's credibility and that of the State's witnesses.

State v. Peterson, 205 N.C. App. 668 (July 20, 2010). Evidence of events leading up to the assault in question was relevant to complete the story of the crime.

Flight

State v. Capers, 208 N.C. App. 605 (Dec. 21, 2010). The defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again," was relevant as an implicit admission of guilt.

Gang Evidence

State v. Sterling, __ N.C. App. __, 758 S.E.2d 884 (May 6, 2014). In this felony-murder case, although the court was "uncertain of the relevance" of certain photos that the State introduced and questioned the defendant about regarding gang activity, the court found no plain error with respect to their introduction.

State v. Gayles, __ N.C. App. __, 756 S.E.2d 46 (April 1, 2014). In this murder case, the trial court did not err by excluding the defendant's proffered evidence about the victim's gang membership. The defendant asserted that the evidence was relevant to self-defense. However, none of the proffered evidence pertained to anything that the defendant actually knew at the time of the incident.

State v. Hinton, __ N.C. App. __, 738 S.E.2d 241 (Mar. 19, 2013). In an attempted murder and assault case, the trial court committed plain error by allowing an officer to testify about gangs and gang-related activity where the evidence was not relevant to guilt or to the aggravating factor that the crimes were gang-related. The State's theory was that the defendant attacked the victim because he was having a sexual relationship with the defendant's aunt, not because of gang activity. Thus, gang evidence "was neither relevant to the alleged criminal act nor to the aggravating factor of which the State had given notice of its intent to show." Additionally, the testimony carried the danger of unfair prejudice that substantially outweighed its non-existent probative value under Rule 403.

State v. Privette, 218 N.C. App. 459 (Feb. 7, 2012). (1) The trial court erred by admitting evidence concerning the history of the Bloods gang and the activities of various Bloods subsets. The court noted that "[e]vidence of gang membership is generally inadmissible unless it is relevant to the issue of guilt." Here, the court was unable to determine how the evidence was

relevant and concluded that its effect "was to depict a 'violent' gang subculture of which [the defendant] was a part and to impermissibly portray [the defendant] as having acted in accordance with gang-related proclivities." (2) The trial court did not err by allowing evidence about the hierarchy of gang structure when evidence regarding the defendant's position in the gang was relevant to the extortion-related charges. The evidence helped explain why the defendant thought that he could induce a third party to confess to a robbery; placed into context his statements that the third party would be murdered if he did not turn himself in; and helped explain the third party's decision to confess. (3) The trial court did not err by admitting photographs of the defendant's tattoos and related testimony describing the relationship between some of these tattoos and Bloods symbols where that evidence also explained the defendant's position in gang hierarchy (see discussion above). (4) Evidence of a telephone call between the defendant and his wife in which he described violent acts he would perform on her if she were a man was not relevant and had little purpose other than to show the defendant's violent propensities.

Guilt of Another

State v. McCoy, __ N.C. App. __, 745 S.E.2d 367 (Aug. 6, 2013). Trial court did not err by excluding defense evidence of guilt of another where the evidence was "sheer conjecture" and was not inconsistent with the defendant's guilt.

State v. Miles, 222 N.C. App. 593 (Aug. 21, 2012), *aff'd per curiam,* 366 N.C. 503 (Apr. 12, 2013). In a murder case, the trial court did not err by excluding evidence suggesting that the victim's wife committed the crime. Distinguishing cases where alternate perpetrators were positively identified and both direct and circumstantial evidence demonstrated the third parties' opportunity and means to murder, the defendant offered "merely conjecture" as to the wife's possible actions. Additionally, the State contradicted these "speculations" with testimony by the couple's daughters that they were with their mother on the night in question.

Identity of Perpetrator

State v. Young, __ N.C. App. __, 756 S.E.2d 768 (April 1, 2014), *rev'd on other grounds,* ___ N.C. ___ (Aug. 21, 2015). In this murder case where the defendant was charged with killing his wife, statements by the couple's child to daycare workers were relevant to the identity of the assailant. The child's daycare teacher testified that the child asked her for "the mommy doll." When the teacher gave the child a bucket of dolls, the child picked two dolls, one female with long hair and one with short hair, and hit them together. The teacher testified that she saw the child strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over."

Photographs

State v. Sterling, __ N.C. App. __, 758 S.E.2d 884 (May 6, 2014). In this felony-murder case, although the court was "uncertain of the relevance" of certain photos that the State introduced and questioned the defendant about regarding gang activity, the court found no plain error with respect to their introduction.

State v. Carpenter, __ N.C. App. __, 754 S.E.2d 478 (Mar. 4, 2014). In an armed robbery case, the trial court did not err by admitting three photographs of the defendant and his tattoos, taken at the jail after his arrest. The photographs were relevant to identity where crime scene surveillance camera footage clearly showed the location and general dimensions of one of the robber's tattoos, even though the specifics of it were not visible on the footage.

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). In this multiple murder case the trial court properly admitted crime scene and autopsy photographs of the victims' bodies. Forty-two crime scene photos were admitted to illustrate the testimony of the crime scene investigator who processed the scene. The trial court also admitted crime scene diagrams containing seven photographs. Additionally autopsy photos were admitted. The court easily concluded that the photos were relevant. Furthermore, the trial court did not abuse its discretion by finding the photographs admissible over the defendant's Rule 403 objection.

State v. Stevenson, 211 N.C. App. 583 (May 3, 2011). (1) In a case involving murder and other charges, the trial court properly admitted a picture of the defendant with a silver revolver to illustrate a witness's testimony that she saw the defendant at her apartment with a silver gun with a black handle. Before being received into evidence, the witness testified that the gun depicted appeared to be the same gun that the defendant had at her apartment. (2) The trial court did not abuse its discretion by concluding that the prejudice caused by the photograph did not substantially outweigh probative value.

State v. Blymyer, 205 N.C. App. 240 (July 6, 2010). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

Pornography

State v. Rorie, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). In this sex case involving a six-year-old victim, the trial court committed prejudicial error by excluding evidence that the defendant found the victim watching a pornographic video. The evidence was relevant to explain an alternate source of the victim's sexual knowledge, from which she could have fabricated the allegations in question.

Song Lyrics

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, the trial court did not err by admitting into

evidence lyrics of a song, "Man Killer," allegedly authored by defendant and containing lyrics about a murder, including "I'll take the keys to your car", "I'm just the one to make you bleed" and "I'll put my hands on your throat and squeeze." In this case the evidence showed that the victim's car had been moved, the victim had been stabbed, and that defendant said he strangled the victim. The court concluded: "In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant."

Weapons & Ammunition

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). In this homicide case, the trial court did not err by admitting evidence of four firearms found in the car when the defendant was arrested following a traffic stop. The State offered the evidence to show the circumstances surrounding defendant's flight. Defendant argued that the evidence was irrelevant and inadmissible because nothing connected the firearms to the crime. The court disagreed:

> Defendant ran away from the scene immediately after he stabbed [the victim]. Three days later, he was apprehended following a traffic stop in South Carolina. Defendant, who was riding as a passenger in another person's car, possessed a passport bearing a fictitious name. Also found in the car was a piece of paper with directions to a mosque located in Laredo, Texas. Four firearms were found inside the passenger compartment of the car: a loaded assault rifle, two sawed-off shotguns, and a loaded pistol. The circumstances surrounding defendant's apprehension in South Carolina, the passport, the paper containing directions to a specific place in Texas, and the firearms are relevant evidence of flight.

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). In a murder case, the trial court did not err by admitting testimony concerning nine-millimeter ammunition and a gun found at the defendant's house. Evidence concerning the ammunition was relevant because it tended to link the defendant to the scene of the crime, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that the defendant was the perpetrator. The trial court had ruled that evidence of the gun—which was not the murder weapon—was inadmissible and the State complied with this ruling on direct. However, in order to dispel any suggestion that the defendant possessed the nine-millimeter gun used in the shooting, the defendant elicited testimony that a nine-millimeter gun found in his house, in which the nine-millimeter ammunition was found, was not the murder weapon. The court held that the defendant could not challenge the admission of testimony that he first elicited.

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). In this multiple murder case where the defendant killed the victims with a shotgun, evidence of firearms and ammunition found in the defendant's residence, ammunition found in his truck, instructions for claymore mines found on his kitchen table, and unfruitful searches of two residences for such mines was relevant to show the defendant's advanced planning and state of mind.

State v. Rollins, __ N.C. App. __, 738 S.E.2d 440 (Mar. 19, 2013). In a murder case, the trial court did not err by admitting a knife found four years after the crime at issue. The defendant objected on relevancy grounds. The defendant's wife testified that he told her that he murdered

the victim with a knife that matched the description of the one that was found, the defendant was seen on the day of the murder approximately 150 yards from where the knife was found, and the knife was consistent with the description of the likely murder weapon provided by the State's pathologist. The court went on to find no abuse of discretion in admitting the knife under Rule 403.

State v. Huerta, 221 N.C. App. 436 (July 3, 2012). In a drug trafficking and maintaining a dwelling case, evidence that a handgun and ammunition were found in the defendant's home was relevant to both charges.

State v. Samuel, 203 N.C. App. 610 (May 4, 2010). In an armed robbery case, admission of evidence of two guns found in the defendant's home was reversible error where "not a scintilla of evidence link[ed] either of the guns to the crimes charged."

Blood Tests in Impaired Driving Cases

State v. Patterson, 209 N.C. App. 708 (Mar. 1, 2011). In a second-degree murder case based on impaired driving, the trial court did not commit plain error under Rule 403 by admitting the results of a chemical analysis of the defendant's blood. The defendant had argued that because the blood sample was taken approximately three hours after the accident, it was not taken "at any relevant time after the driving" as required by G.S. 20-138.1(a)(2). The court noted that the evidence suggested that the defendant did not consume any alcohol between the time of the accident and when the blood sample was drawn and that he did not allege that the test was improperly administered. The time interval between the defendant's operation of the vehicle and the taking of the sample goes to weight, not admissibility.

Standard of Review

State v. Houseright, 220 N.C. App. 495 (May 15, 2012). The court held that questions of relevance are reviewed de novo but with deference to the trial court's ruling.

State v. Rollins, 220 N.C. App. 443 (May 15, 2012). Following *Houseright* and holding that the court reviews "questions of relevance de novo although we give great deference to the trial court's relevancy determinations."

Miscellaneous Cases on Relevancy

State v. Lane, 365 N.C. 7 (Mar. 11. 2011). In a capital murder case, the trial court did not abuse its discretion by excluding expert testimony from a neuropharmacologist and research scientist who studies the effects of drugs and alcohol on the brain, proffered by the defense as relevant to the jury's determination of the reliability of the defendant's confession. The expert would have testified concerning the defendant's pattern of alcohol use and the potential consequences of alcohol withdrawal, including seizures. However, the expert repeatedly stated that he could not opine as to whether the confession was false or true or what the defendant's condition was at the time of the confession. Evidence had been presented indicating that the defendant was not intoxicated at the time of the interrogation and that he was an alcoholic. Given this evidence, the

jury could assess how alcohol withdrawal affected the reliability of the confession, if at all. As such, the expert's testimony would not assist the jury in understanding the evidence or determining a fact in issue under Rule 702.

State v. Holanek, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). In a case involving charges of obtaining property by false pretenses arising out of alleged insurance fraud, the trial court did not err by admitting testimony that the defendant did not appear for two scheduled examinations under oath as required by her insurance policy and failed to respond to the insurance company's request to reschedule the examination. The court rejected the defendant's argument that this evidence was not relevant, noting that to prove its case the State had to show that the defendant's acts were done "knowingly and decidedly … with intent to cheat or defraud." The evidence in question constituted circumstantial evidence that the defendant's acts were done with the required state of mind.

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this murder case, the defendant's statements about his intent to shoot someone in order to retrieve the keys to his grandmother's car, made immediately prior to the shooting of the victim, were relevant. The statements showed the defendant's state of mind near the time of the shooting and were relevant to the State's theory of premeditation and deliberation, even though both witnesses to the statements testified that they did not believe that the defendant was referring to shooting the victim.

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, the trial court properly allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. The report contained, among other things, Calloway's observations of defendant's drug use, possible mental illness, untruthfulness during the evaluation process and her opinion that defendant desired to "obliterate" the victim's relationship with the children. Because the report was arguably unfavorable to defendant and was found in defendant's car with handwritten markings throughout the document, the report and Calloway's testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that it created some basis for defendant's ill will, intent, or motive towards the victim.

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). In a sexual assault case involving DNA evidence, the trial court did not err by excluding as irrelevant defense evidence that police department evidence room refrigerators were moldy and that evidence was kept in a disorganized and non-sterile environment where none of the material tested in the defendant's case was stored in those refrigerators during the relevant time period.

State v. Britt, 217 N.C. App. 309 (Dec. 6, 2011). In a case in which the defendant was charged with murdering his wife, the trial court did not abuse its discretion by admitting a letter the defendant wrote years before his wife's death to an acquaintance detailing his financial hardships. Statements in the letter supported the State's theory that the defendant had a financial motive to kill his wife.

State v. Oliver, 210 N.C. App. 609 (Apr. 5, 2011). The trial court did not commit plain error by allowing the State to question two witnesses on rebuttal about whether they received money from the victim in exchange for making up statements when the defendant raised the issue of the victim's veracity on his cross examination.

State v. Espinoza-Valenzuela, 203 N.C. App. 485 (Apr. 20, 2010). In a child sexual abuse case, evidence of the defendant's prior violence towards the victims' mother, with whom he lived, was relevant to show why the victims were afraid to report the sexual abuse and to refute the defendant's assertion that the victims' mother was pressuring the victims to make allegations in order to get the defendant out of the house. Evidence that the victims' mother had been sexually abused as a child was relevant to explain why she delayed notifying authorities after the victims told her about the abuse and to rebut the defendant's assertion that the victims were lying because their mother did not immediately report their allegations.

State v. Ross, 207 N.C. App. 379 (Oct. 19, 2010). In the habitual felon phase of the defendant's trial, questions and answers contained in the Transcript of Plea form for the predicate felony pertaining to whether, at the time of the plea, the defendant was under the influence of alcohol or drugs and his use of such substances were irrelevant. Although admission of this evidence did not result in prejudice, the court noted that "*preferred method* for proving a prior conviction includes the introduction of the judgment," not the transcript of plea.

Limits on Relevancy

Rule 403

Expert Testimony

State v. King, 366 N.C. 68 (June 14, 2012). The court affirmed *State v. King*, 214 N.C. App. 114 (Aug. 2, 2011) (holding that the trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403). The trial court had concluded that although the expert's testimony was "technically" admissible under *Howerton* and was relevant, it was inadmissible under Rule 403 because recovered memories are of "uncertain authenticity" and susceptible to alternative possible explanations. The trial court found that "the prejudicial effect [of the evidence] increases tremendously because of its likely potential to confuse or mislead the jury." The supreme court held that the trial court did not abuse its discretion by excluding the repressed memory evidence under Rule 403. The court noted that its holding was case specific:

We promulgate here no general rule regarding the admissibility or reliability of repressed memory evidence under either Rule 403 or Rule 702. As the trial judge himself noted, scientific progress is "rapid and fluid." Advances in the area of repressed memory are possible, if not likely, and even . . . [the] defendant's expert, acknowledged that the theory of repressed memory could become established and that he would consider changing his position if confronted with a study conducted using reliable methodology that yielded evidence supporting the theory. Trial courts are fully capable of handling cases involving claims of repressed memory should new or different scientific evidence be presented.

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013). In this murder case, the trial court committed reversible error by excluding, under Rule 403, testimony by a defense expert

that certain incriminating computer files had been planted on the defendant's computer. Temporary internet files recovered from the defendant's computer showed that someone conducted a Google Map search on the laptop while it was at the defendant's place of work the day before the victim was murdered. The Google Map search was initiated by someone who entered the zip code associated with the defendant's house, and then moved the map and zoomed in on the exact spot where the victim's body later was found.

404(b) Evidence

State v. Jacobs, 363 N.C. 815 (Mar. 12, 2010). Holding that *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam*, 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

Photographs

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). In a capital murder case, the trial court did not abuse its discretion by allowing the State to introduce for illustrative purposes 18 autopsy photographs of the victim. Cynthia Gardner, M.D. testified regarding her autopsy findings, identified the autopsy photos, and said they accurately depicted the body, would help her explain the location of the injuries, and accurately depicted the injuries to which Dr. Gardner had testified. The photos were relevant and probative, not unnecessarily repetitive, not unduly gruesome or inflammatory, and illustrated both Gardner's testimony and the defendant's statement to the investigators.

State v. Carpenter, __ N.C. App. __, 754 S.E.2d 478 (Mar. 4, 2014). In an armed robbery case, the trial court did not err by admitting three photographs of the defendant and his tattoos, taken at the jail after his arrest. The court rejected the defendant's argument that the photographs should have been excluded under Rule 403 because they showed him in a jail setting. The court noted that the photographs did not clearly show the defendant in jail garb or in handcuffs; they only showed the defendant in a white t-shirt in a cinderblock room with large windows. Furthermore, the trial court specifically found that it was unable to determine from the pictures that they were taken in a jail.

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). In this multiple murder case the trial court properly admitted crime scene and autopsy photographs of the victims' bodies. Forty-two crime scene photos were admitted to illustrate the testimony of the crime scene investigator who processed the scene. The trial court also admitted crime scene diagrams containing seven photographs. Additionally autopsy photos were admitted. The court easily concluded that the photos were relevant. Furthermore, the trial court did not abuse its discretion by finding the photographs admissible over the defendant's Rule 403 objection.

State v. Blymyer, 205 N.C. App. 240 (July 6, 2010). The trial court did not commit plain error under Rules 401 or 403 by admitting photographs of the murder victim's body. The trial court

admitted 28 photographs and diagrams of the interior of the home where the victim was found, 12 of which depicted the victim's body. The trial court also admitted 11 autopsy photographs. An officer used the first set of photos to illustrate the position and condition of the victim's body and injuries sustained. A forensic pathology expert testified to his observations while performing the autopsy and the photographs illustrated the condition of the body as it was received and during the course of the autopsy. The photographs had probative value and that value, in conjunction with testimony by the officer and the expert was not substantially outweighed by their prejudicial effect.

State v. Stitt, 201 N.C. App. 233 (Dec. 8, 2009). The trial court did not err in admitting four objected-to photographs of the crime scene where the defendant did not did not object to 23 other crime scene photographs, the four objected-to photographs depicted different perspectives of the scene and focused on different pieces of evidence, the State used the photographs in conjunction with testimony for illustrative purposes only, and the photographs were not used to inflame the jury's passions.

Gang Affiliation

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). In a first-degree murder trial, the trial court did not err by admitting a jail letter that the defendant wrote to an accomplice in "Crip" gang code. In the letter, the defendant asked the accomplice to kill a third accomplice because he was talking to police. Rejecting the defendant's argument that the evidence should have been excluded under Rule 403, the court determined that the fact that the defendant solicited the murder of a State's witness was highly relevant and that the defendant's gang membership was necessary to understand the context and relevance of the letter, which had to be translated by an accomplice. Additionally, the trial court repeatedly instructed the jury that they were only to consider the gang evidence as an explanation for the note.

State v. Kirby, 206 N.C. App. 446 (Aug. 17, 2010). In a homicide case in which the defendant asserted self-defense, the trial court did not abuse its discretion by admitting evidence that the defendant had been selling drugs in the vicinity of the shooting and was affiliated with a gang. The evidence showed that both the defendant and the victim were gang members. The court held that gang affiliation and selling drugs were relevant to show that the defendant could have had a different objective in mind when the altercation took place and could refute the defendant's claim of self-defense.

Defendant's Stipulation

State v. Fortney, 201 N.C. App. 662 (Jan. 5, 2010). Following *State v. Little*, 191 N.C. App. 655 (2008), and *State v. Jackson*, 139 N.C. App. 721 (2000), and holding that the trial court did not abuse its discretion by allowing the State to introduce evidence of the defendant's prior conviction in a felon in possession case where the defendant had offered to stipulate to the prior felony. The prior conviction, first-degree rape, was not substantially similar to the charged offenses so as to create a danger that the jury might generalize the defendant's earlier bad act into a bad character and raise the odds that he perpetrated the charged offenses of drug possession, possession of a firearm by a felon, and carrying a concealed weapon.

Judge's Review of the Evidence

State v. Miller, 197 N.C. App. 78 (May 19, 2009). Trial judge was not required to view a DVD before ruling on a Rule 403 objection to portions of an interview of the defendant contained on it. Trial judge did not abuse his discretion by refusing to redact portions of the DVD. However, the court "encourage[d] trial courts to review the content of recorded interviews before publishing them to the jury to ensure that all out-of-court statements contained therein are either admissible for a valid nonhearsay purpose or as an exception to the hearsay rule in order to safeguard against an end-run around the evidentiary and constitutional proscriptions against the admission of hearsay." The court also "remind[ed] trial courts that the questions police pose during suspect interviews may contain false accusations, inherently unreliable, unconfirmed or false statements, and inflammatory remarks that constitute legitimate points of inquiry during a police investigation, but that would otherwise be inadmissible in open court." It continued: "[A]s such, the wholesale publication of a recording of a police interview to the jury, especially law enforcement's investigatory questions, might very well violate the proscriptions against admitting hearsay or Rule 403. In such instances, trial courts would need to redact or exclude the problematic portions of law enforcement's investigatory questions/statements."

Civil Pleadings

State v. Young, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). In this murder case the court held that the court of appeals erred by concluding that the trial court committed reversible error in allowing into evidence certain materials from civil actions. The relevant materials included a default judgment and complaint in a wrongful death suit stating that the defendant killed the victim and a child custody complaint that included statements that the defendant had killed his wife. The court of appeals had held that admission of this evidence violated G.S. 1-149 ("[n]o pleading can be used in a criminal prosecution against the party as proof of a fact admitted or alleged in it") and Rule 403. The court held that the defendant did not preserve his challenge to the admission of the child custody complaint on any grounds. It further held that the defendant failed to preserve his G.S. 1-149 objection as to the wrongful death evidence and that his Rule 403 objection as to this evidence lacked merit. On the 403 issue as to the wrongful death evidence, the court rejected the court of appeals' reasoning that substantial prejudice resulting from this evidence "irreparably diminished" defendant's presumption of innocence and "vastly outweighed [its] probative value." Instead, the court found that evidence concerning the defendant's response to the wrongful death and declaratory judgment action had material probative value. Although the evidence posed a significant risk of unfair prejudice, the trial court "explicitly instructed the jury concerning the manner in which civil cases are heard and decided, the effect that a failure to respond has on the civil plaintiff's ability to obtain the requested relief, and the fact that '[t]he entry of a civil judgment is not a determination of guilt by any court that the named defendant has committed any criminal offense.'"

Miscellaneous Cases

State v. Triplett, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this murder and robbery case, the court held that the trial court did not abuse its discretion by

prohibiting the defendant from introducing a tape-recorded voice mail message by the defendant's sister, a witness for the State, to show her bias and attack her credibility. Although the court found that the voice mail message was minimally relevant to show potential bias, the trial court did not abuse its discretion in its Rule 403 balancing. Because the sister was not a key witness for the State, any alleged bias on her part "becomes less probative." The trial court properly weighed the evidence's weak probative value against the confusion that could result by presenting the evidence, which related to a family feud that was tangential to the offenses being tried.

State v. Bishop, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). In this cyberbullying case based on electronic messages, the court rejected the defendant's argument that the trial court erred by admitting into evidence the defendant's Facebook posts that, among other things, stated that "there's no empirical evidence that your Jesus ever existed." The comments were relevant to show the defendant's intent to intimidate or torment the victim, as well as the chain of events causing the victim's mother to contact the police. The court rejected the defendant's argument that the posts were overly inflammatory.

State v. Baldwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The trial court did not abuse its discretion under Rule 403 by admitting the defendant's recorded interview with a police detective. Noting that the fact that evidence is prejudicial to the defendant does not make it unfairly so, the court concluded that the evidence's probative value was not substantially outweighed by the danger of unfair prejudice.

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this murder case, the court rejected the defendant's argument that the probative value of a recorded telephone call made by the defendant to his father was substantially outweighed by the danger of unfair prejudice. During the call, the defendant's father asked: "Now who you done shot now?" and "That same gun, right?"

State v. Jackson, __ N.C. App. __, 761 S.E.2d 724 (Aug. 5, 2014). In a first-degree murder trial, the trial court did not abuse its discretion by declining to exclude, under Rule 403, evidence of the defendant's mid-trial escape attempt. The court reasoned: "[T]he jury may have inferred from the fact that defendant attempted to escape that defendant was guilty of the charges against him. That inference is precisely the inference that makes evidence of flight relevant and it is not an unfair inference to draw."

State v. Jones, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), *aff'd*, 367 N.C. 299 (Mar. 7, 2014). In an identity theft case where the defendant was alleged to have used credit card numbers belonging to several victims, the trial court did not abuse its discretion under Rule 403 by admitting evidence that the defendant also was in possession of debit and EBT cards belonging other persons to show intent.

State v. Gomez, 209 N.C. App. 611 (Feb. 15, 2011). The trial court did not abuse its discretion under Rule 403 by admitting a recording of phone calls between the defendant and other persons that were entirely in Spanish. The defendant argued that because there was one Spanish-speaking

juror, the jurors should have been required to consider only the certified English translation of the recording.

State v. Walters, 209 N.C. App. 158 (Jan. 4, 2011). The trial court did not abuse its discretion under Rule 403 by admitting, for purposes of corroboration, a testifying witness's prior consistent statement. The court noted that although the statement was prejudicial to the defendant's case, mere prejudice is not the determining factor under Rule 403; rather, the issue is whether unfair prejudice substantially outweighs the probative value.

State v. Capers, 208 N.C. App. 605 (Dec. 21, 2010). The trial court did not abuse its discretion under Rule 403 by admitting the defendant's statement to an arresting officer that if the officer had come later the defendant "would have been gone and you would have never saw me again."

State v. Cook, 195 N.C. App. 230 (Feb 3, 2009). The trial judge did not err under Rule 403 in excluding evidence of the victim's alleged false accusation that another person had raped her. The circumstances surrounding that accusation were different from those at issue in the trial and the evidence could have caused confusion.

State v. Crandell, 208 N.C. App. 227 (Dec. 7, 2010). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. Although the testimony was prejudicial, the trial judge correctly ruled that its probative value (helping the jury understand the physical evidence) was not substantially outweighed by the degree of prejudice.

Pleas and Plea Discussions

State v. Oakes, 219 N.C. App. 490 (Mar. 20, 2012). The trial court committed plain error during the habitual felon phase of a trial by admitting into evidence plea transcripts for the defendant's prior felony convictions without redacting irrelevant information pertaining to the defendant's prior drug use, mental health counseling, and lenient sentencing. However, no prejudicial error occurred. The court expressly declined to determine whether admission of the transcripts violated G.S. 15A-1025.

State v. Haymond, 203 N.C. App. 151 (Apr. 6, 2010). Admission of the defendant's statements did not violate Evidence Rule 410 where it did not appear that the defendant thought that he was negotiating a plea with the prosecuting attorney or with the prosecutor's express authority when he made the statements at a court hearing. Instead, the statements were made in the course of the defendant's various requests to the trial court.

State v. Riley, 202 N.C. App. 299 (Feb. 2, 2010). G.S. 15A-1025 (the fact that the defendant or counsel and the prosecutor engaged in plea discussions or made a plea arrangement may not be received in evidence) was violated when the prosecutor asked the defendant whether he was charged with misdemeanor larceny as a result of a plea bargain.

Rape Shield

State v. Rorie, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In this child sex case, evidence that the victim was discovered watching a pornographic video, offered by the defendant to show the victim's sexual knowledge, is not evidence of sexual activity barred by the Rape Shield Statute. (2) Evidence offered by the defendant of the child victim's prior allegations and inconsistent statements about sexual assaults committed by others who were living in the house were not barred by the Rape Shield Statute, and the trial court erred by excluding this evidence. False accusations do not fall within the scope of the Rape Shield Statute and may be admissible to attack the victim's credibility. The court was careful however not to "hold the statements necessarily should have been admitted into evidence at trial;" it indicated that whether the victim's "prior allegations and inconsistent statements come into the evidence at trial should be determined on retrial subject to a proper Rule 403 analysis."

State v. Martin, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). In this sexual offense with a student case, the trial court committed reversible error by concluding that the defendant's evidence was per se inadmissible under the Rape Shield Rule. The case involved charges that the defendant, a substitute teacher, had the victim perform oral sex on him after he caught her in the boys' locker room. At trial the defendant sought to introduce evidence that when he found the victim in the locker room, she was performing oral sex on football players. He sought to introduce this evidence to show that the victim had a motive to falsely accuse him of sexual assault. After an in camera hearing the trial court concluded that the evidence was per se inadmissible because it did not fit under the Rape Shield Rule's four exceptions. Citing case law, the court determined that "that there may be circumstances where evidence which touches on the sexual behavior of the complainant may be admissible even though it does not fall within one of the categories in the Rape Shield Statute." Here, the defendant's defense was that he did not engage in any sexual behavior with the victim but that she fabricated the story to hide the fact that he caught her performing oral sex on the football players in the locker room. The court continued:

> Where the State's case in any criminal trial is based largely on the credibility of a prosecuting witness, evidence tending to show that the witness had a motive to falsely accuse the defendant is certainly relevant. The motive or bias of the prosecuting witness is an issue that is common to criminal prosecutions in general and is not specific to only those crimes involving a type of sexual assault.
>
> The trial court erred by concluding that the evidence was inadmissible per se because it did not fall within one of the four categories in the Rape Shield Statute. Here, the trial court should have looked beyond the four categories to determine whether the evidence was, in fact, relevant to show [the victim]'s motive to falsely accuse Defendant and, if so, conducted a balancing test of the probative and prejudicial value of the evidence under Rule 403 or was otherwise inadmissible on some other basis (e.g., hearsay). (footnote omitted).

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). In a rape case, the trial court erred by excluding defense evidence that the victim and her neighbor had a consensual sexual encounter the day before the rape occurred. This prior sexual encounter was relevant because it may have provided an alternative explanation for the existence of semen in her vagina; "because the trial court excluded relevant evidence under Rule 412(b)(2), it committed error." However,

the court went on to conclude that no prejudice occurred, in part because multiple DNA tests identified the defendant as the perpetrator.

State v. Okwara, __ N.C. App. __, 733 S.E.2d 576 (Oct. 16, 2012). In the context of an appeal from a contempt proceeding, the court held that by asking the victim at trial about a possible prior instance of rape between the victim and a cousin without first addressing the relevance and admissibility of the question during an in camera hearing, defense counsel violated the Rape Shield Statute.

State v. Khouri, 214 N.C. App. 389 (Aug. 16, 2011). The trial court did not err by sustaining the State's objection under the Rape Shield Statute. After the victim had already testified that she was unsure whether her aborted child was fathered by the defendant or her boyfriend, the defense questioned a witness in order to show that the victim had sexual relations with a third man. Introducing such evidence would not have shown that the alleged acts were not committed by defendant given evidence that already had been admitted. Additional evidence would have only unnecessarily humiliated and embarrassed the victim while having little probative value.

State v. Edmonds, 212 N.C. App. 575 (June 21, 2011). (1) In a child sex case, the trial judge did not err by limiting the defendant's cross-examination of the prosecuting witness regarding inconsistent statements about her sexual history, made to the police and medical personnel. The evidence did not fit within any exception to Rule 412. The court went on to hold that any probative value of the evidence for impeachment purposes was outweighed by its prejudicial effect. (2) The trial court did not err by refusing to admit the victim's unredacted medical records containing statements regarding her prior sexual history, given that the records had little if any probative value.

State v. Cook, 195 N.C. App. 230 (Feb. 3, 2009). The trial judge did not err under Rule 412 in excluding evidence of the victim's prior sexual activity with a boy named C.T. and with her boyfriend. As to the activity with C.T., the defendant failed to offer evidence that it occurred during the in camera hearing (when the victim denied having sex with C.T.), or at trial. Additionally, the defendant failed to establish the relevance of the sexual activity when it allegedly occurred shortly before the incidents at issue but the victim's scarring indicated sexual activity that had occurred a month or more earlier. As to the sexual activity with the boyfriend, the defendant failed to present evidence during the in camera hearing that the activity could have caused the victim's internal scarring.

State v. Adu, 195 N.C. App. 269 (Feb. 3, 2009). In a child sex case, the defendant proffered evidence of a third person's sexual abuse of the victim as an alternative explanation for the victim's physical trauma. The trial judge properly excluded this evidence under Rule 412(b)(2) because it did not show that the third person's abuse involved penetration and thus an alternative explanation for the trauma to the victim's vaginal area.

Character Evidence
Of Defendant

State v. Walston, ___ N.C. ___, 766 S.E.2d 312 (Dec. 19, 2014). In a child sexual abuse case, although evidence of the defendant's law abidingness was admissible under Rule 404(a)(1), evidence of his general good character and being respectful towards children was not admissible. On appeal, the defendant's argument focused on the exclusion of character evidence that he was respectful towards children. The court found that this evidence did not relate to a pertinent character trait, stating: "Being respectful towards children does not bear a special relationship to the charges of child sexual abuse . . . nor is the proposed trait sufficiently tailored to those charges." It continued:

> Such evidence would only be relevant if defendant were accused in some way of being disrespectful towards children or if defendant had demonstrated further in his proffer that a person who is respectful is less likely to be a sexual predator. Defendant provided no evidence that there was a correlation between the two or that the trait of respectfulness has any bearing on a person's tendency to sexually abuse children.

State v. Clapp, __ N.C. App. __, 761 S.E.2d 710 (Aug. 5, 2014). (1) In a child sexual assault case, the trial court did not err by refusing the defendant's request to instruct the jury that it could consider evidence concerning his character for honesty and trustworthiness as substantive evidence of his guilt or innocence. At trial, five witnesses testified that the defendant was honest and trustworthy. The defendant requested an instruction in accordance with N.C.P.J.I. 105.60, informing the jury that a person having a particular character trait "may be less likely to commit the alleged crime(s) than one who lacks the character trait" and telling the jury that, if it "believe[d] from the evidence [that the defendant] possessed the character trait" in question, it "may consider this in [its] determination of [Defendant's] guilt or innocence[.]" The trial court would have been required to deliver the requested instruction if the jury could reasonably find that an honest and trustworthy person was less likely to commit the crimes at issue in this case than a person who lacked those character traits. Although "an individual's honesty and trustworthiness are certainly relevant to an individual's credibility, we are unable to say that a person exhibiting those character traits is less likely than others to commit a sexual offense [such as the ones charged in this case]." (2) In a child sexual assault case, in which the defendant was charged with having sexual contact with student athletes who came to him for help with sports injuries, the trial court did not err by refusing to allow a defense witness to testify that the defendant possessed the character trait of working well with children and not having an unnatural lust or desire to have sexual relations with children. The defendant argued that the evidence should have been admitted since it related to a pertinent character trait that had a special relationship to the charged crimes. Citing *State v. Wagoner*, 131 N.C. App. 285, 293 (1998) (the trial court properly excluded evidence showing the defendant's "psychological make-up," including testimony that he was not a high-risk sexual offender, on the theory that such evidence, which amounted to proof of the defendant's normality, did not tend to show the existence or non-existence of a pertinent character trait), the court concluded that the evidence in question "constituted nothing more than an attestation to Defendant's normalcy" and was properly excluded.

State v. Tatum-Wade, __ N.C. App. __, 747 S.E.2d 382 (Aug. 20, 2013). In this tax evasion case, the trial court erred by excluding the defendant's character evidence. The facts indicated that the defendant believed advice from others that by completing certain Sovereign Citizen papers, she

would be exempt from having to pay taxes. The defendant's witness was permitted to testify to the opinion that the defendant was a truthful, honest, and law-abiding citizen. However, the trial court excluded the witness's testimony regarding the defendant's trusting nature. The court agreed with the defendant that her character trait of being trusting of others was pertinent to whether she willfully attempted to evade paying taxes. The court found the error harmless.

State v. Williams, 220 N.C. App. 130 (Apr. 17, 2012). In a murder case where a defense witness testified that the defendant was not a violent person, thereby placing a pertinent character trait at issue, no plain error occurred when the State cross-examined the witness about whether she knew of the defendant's prior convictions or his pistol whipping of a person.

Of Victim

Victim's Violence

State v. Jacobs, 363 N.C. 815 (Mar. 12, 2010). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and of the victim's time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind.

State v. Gayles, __ N.C. App. __, 756 S.E.2d 46 (April 1, 2014). In this murder case, the trial court did not err by excluding the defendant's proffered evidence about the victim's gang membership. The defendant asserted that the evidence was relevant to self-defense. However, none of the proffered evidence pertained to anything that the defendant actually knew at the time of the incident.

State v. McGrady, __ N.C. App. __, 753 S.E.2d 361 (Jan. 21, 2014), *review allowed*, 367 N.C. 505 (June 11, 2014). In murder case involving a claim of self-defense, the trial court did not err by excluding the defense expert testimony, characterized by the defendant as pertaining to the victim's proclivity toward violence. The court noted that where self-defense is at issue, evidence of a victim's violent or dangerous character may be admitted under Rule 404(a)(2) when such character was known to the accused or the State's evidence is entirely circumstantial and the nature of the transaction is in doubt. The court concluded that the witness's testimony did not constitute evidence of the victim's character for violence. On voir dire, the witness testified only that that the victim was an angry person who had thoughts of violence; the witness admitted having no information that the victim actually had committed acts of violence. Additionally, the court noted, there was no indication that the defendant knew of the victim's alleged violent nature and the State's case was not entirely circumstantial. The court also rejected the defendant's argument that the trial court's ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules.

Victim's Good Character

State v. Buie, 194 N.C. App. 725 (Jan. 6, 2009). The trial judge erred under Rule 404(a)(2) in allowing the state to offer evidence of the victim's good character. The court concluded that the defense had not offered evidence of the victim's bad character, even though defense counsel had forecast evidence of the victim's bad character in an opening statement.

Of Witness

State v. Lewis, 365 N.C. 488 (Apr. 13, 2012). The court of appeals properly found that the trial court abused its discretion by excluding, at a retrial, evidence of remarks that the lead investigator, Detective Roberts, made to a juror at the defendant's first trial. After the defendant's conviction, he filed a motion for appropriate relief (MAR) alleging that his trial had been tainted because of improper communication between Roberts and a juror, Deputy Hughes. At a hearing on the MAR, the defendant presented evidence that when his case was called for trial Hughes was in the pool of prospective jurors. While in custody awaiting trial, Hughes had twice transported the defendant to Central Prison in Raleigh. On one of those trips, the defendant told Hughes that he had failed a polygraph examination. Also, Hughes had assisted Roberts in preparing a photographic lineup for the investigation. While undergoing voir dire, Hughes acknowledged that he knew the defendant and had discussed the case with him. While he had misgivings about being a juror, Hughes said that he believed he could be impartial. Because the defendant insisted that Hughes remain on the jury, his lawyer did not exercise a peremptory challenge to remove Hughes from the panel. The evidence at the MAR hearing further showed that during a break in the trial proceedings, Roberts made the following statement to Hughes: "if we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" Hughes did not report this communication to the trial court. Although the trial court denied the MAR, the court of appeals reversed, ordering a new trial. Prior to the retrial, the State filed a motion in limine seeking to suppress all evidence raised in the MAR hearing. Defense counsel opposed the motion, arguing that Roberts' earlier misconduct was directly relevant to his credibility. The trial court allowed the State's motion. The defendant was again convicted and appealed. The court of appeals held that the trial court abused its discretion by granting the State's motion. The supreme court affirmed, holding that the trial court should have allowed defense counsel to cross-examine Roberts regarding his statements to Hughes to show Roberts' bias against the defendant and pursuant to Rule 608(b) to probe Roberts' character for untruthfulness. The court went on to reject the State's argument that the evidence was properly excluded under Rule 403, noting that defense counsel understood that the line of questioning would inform the jurors that the defendant had been convicted in a prior trial but believed the risk was worth taking. Finally, the court held that the trial court's error prejudiced the defense given Roberts' significant role in the case.

Of 404(b) Victim

State v. Hembree, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). In this capital murder case in which the State introduced 404(b) evidence regarding a murder of victim Saldana to show common scheme or plan, the trial court erred by allowing Saldana's sister to testify about Saldana's good character. Evidence regarding Saldana's character was irrelevant to the charged crime. For this reason the trial court also abused its discretion by admitting this evidence over the defendant's Rule 403 objection.

Crawford Issues & Confrontation Clause
Limitations on Cross Examination

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). The court rejected the defendant's argument that his confrontation clause rights were violated when the trial court released an out-of-state witness from subpoena. The State subpoenaed the witness from New York to testify at the trial. The witness testified at trial and the defendant had an opportunity to cross-examine him. After the witness stepped down from the witness stand, the State informed the trial court judge that the defense had attempted to serve a subpoena on the witness the day before. The State argued that the subpoena was invalid. The witness refused to speak with the defense outside of court and the trial court required the defense to decide whether to call the individual as a witness before 2:00 p.m. that day. When the appointed time arrived, the defense indicated it had not yet decided whether it would be calling the individual as a witness and the trial court judge released the witness from the summons. The defendant's confrontation rights were not violated where the witness was available at trial and the defendant had the opportunity to cross-examine him. Additionally, under G.S. 15A-814, the defendant's subpoena was invalid.

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). The trial court did not violate the defendant's confrontation rights by barring him from cross-examining two of the State's witnesses, Moore and Jarrell, about criminal charges pending against them in counties in different prosecutorial districts than the district in which defendant was tried. The court noted that the Sixth Amendment right to confrontation generally protects a defendant's right to cross-examine a State's witness about pending charges in the same prosecutorial district as the trial to show bias in favor of the State, since the jury may understand that pending charges may be used by the State as a weapon to control the witness. However, the trial judge has wide latitude to impose reasonable limits on such cross-examination based on, for example, concern that such interrogation is only marginally relevant. Here, the defendant failed to provide any evidence of discussions between the district attorney's office in the trial county and district attorneys' offices in the other counties where the two had pending charges. Additionally, Jarrell testified on cross-examination and Moore testified on voir dire that each did not believe testifying in this case could help them in any way with proceedings in other counties. On these facts, the court concluded that testimony regarding the witnesses' pending charges in other counties was, at best, marginally relevant. Moreover, the court noted, both Jarrell and Moore were thoroughly impeached on a number of other bases separate from their pending charges in other counties.

State v. Lowery, 219 N.C. App. 151 (Feb. 21, 2012). The court rejected the defendant's argument that his constitutional right to confront witnesses against him was violated when the trial court refused to permit defense counsel to cross examine the defendant's accomplices about conversations they had with their attorneys regarding charge concessions the State would make to them if they testified against the defendant. The court held that the accomplices' private conversations with their attorneys were protected by the attorney-client privilege and that the privilege was not waived when the accomplices took the stand to testify against the defendant.

Non-Hearsay/Not For the Truth of the Matter Asserted

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, the confrontation clause was not violated when the trial court allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. Defendant argued that Calloway's report and testimony violated the confrontation clause because they contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial. The court rejected this argument concluding that the report and testimony were not admitted for the truth of the matter asserted but to show "defendant's state of mind." In fact, the trial court gave a limiting instruction to that effect, noting that the evidence was relevant "only to the extent it may have been read by . . . defendant" and "had some bearing" on how he felt about the custody dispute with his wife.

State v. Carter, __ N.C. App. __, 765 S.E.2d 56 (Nov. 18, 2014). Where no hearsay statements were admitted at trial, the confrontation clause was not implicated.

State v. Rollins, __ N.C. App. __, 738 S.E.2d 440 (Mar. 19, 2013). (No violation of the defendant's confrontation rights occurred when an officer testified to statements made to him by others where the statements were not introduced for their truth but rather to show the course of the investigation, specifically why officers searched a location for evidence.

State v. Mason, 222 N.C. App. 223 (Aug. 7, 2012). The defendant's confrontation rights were not violated when an officer testified to the victim's statements made to him at the scene through the use of a telephonic translation service. The defendant argued that his confrontation rights were violated when the interpreter's statements were admitted through the officer's testimony. These statements were outside of the confrontation clause because they were not admitted for the truth of the matter asserted but rather for corroboration.

State v. Ross, 216 N.C. App.337 (Oct. 18, 2011). Because evidence admitted for purposes of corroboration is not admitted for the truth of the matter asserted, *Crawford* does not apply to such evidence.

State v. Castaneda, 215 N.C. App. 144 (Aug. 16, 2011). Because the statements at issue were not admitted for the truth of the matter asserted and therefore were not hearsay, their admission did not implicate the confrontation clause. The statements at issue included statements of an officer during an interrogation of the defendant. In his statements, the officer repeated things the police had been told by others. The officer's statements were not offered for their truth but rather to provide context for defendant's answers.

State v. Batchelor, 202 N.C. App. 733 (Mar. 2, 2010). Statements of a non-testifying informant to a police officer were non-testimonial when offered not for the truth of the matter asserted but rather to explain the officer's actions in the court of the investigation.

Substitute Analyst and Related Cases

Williams v. Illinois, 567 U.S. __, 132 S. Ct. 2221 (June 18, 2012). In a plurality opinion the Court affirmed the holding below that the defendant's confrontation clause rights were not

violated when the State's DNA expert testified to an opinion based on a report done by a non-testifying analyst. The defendant Sandy Williams was charged with, among things, sexual assault of L.J. After the incident in question L.J. was taken to the emergency room, where a doctor performed a vaginal exam and took vaginal swabs. The swabs and other evidence were sent to the Illinois State Police (ISP) Crime Lab for testing and analysis. An analyst confirmed the presence of semen in the swabs. About six months later, the defendant was arrested on unrelated charges and a blood sample was drawn from him pursuant to a court order. An analyst extracted a DNA profile from the sample and entered it into ISP Crime Lab database. Meanwhile, L.J.'s swabs from the earlier incident were sent to Cellmark Diagnostic Laboratory for DNA analysis. Cellmark returned the swabs to the ISP Crime Lab, having derived a DNA profile for the person whose semen was recovered from L.J. At trial, ISP forensic biologist Sandra Lambatos testified as an expert for the State. Lambatos indicated that it is a commonly accepted practice in the scientific community for one DNA expert to rely on the records of another DNA analyst to complete her work and that Cellmark's testing and analysis methods were generally accepted in the scientific community. Over a defense objection, Lambatos then testified to the opinion that the DNA profile received from Cellmark matched the defendant's DNA profile from the blood sample in the ISP database. Cellmark's report was not introduced into evidence. Also, while Lambatos referenced documents she reviewed in forming her opinion, she did not read the contents of the Cellmark report into evidence. At the conclusion of Lambatos' testimony, the defendant moved to strike the evidence of Cellmark's testing based upon a violation of his confrontation clause rights. The motion was denied and the defendant was convicted. On appeal to the Illinois Supreme Court the defendant again argued that Lambatos' testimony violated his rights under *Crawford* and *Melendez-Diaz*. The Illinois court disagreed, reasoning that because the Cellmark report supplied a basis for Lambatos' opinion, it was not admitted for the truth of the matter asserted. The U.S. Supreme Court affirmed. Justice Alito wrote the plurality opinion, which was joined by the Chief Justice and Justices Kennedy and Breyer. The plurality determined that no confrontation clause violation occurred for two reasons. First, the Cellmark report fell outside of the scope of the confrontation clause because it was not introduced for the truth of the matter asserted. In this respect, the plurality was careful to distinguish the Court's prior decisions in *Bullcoming* and *Melendez-Diaz*, which it characterized as involving forensic reports that were introduced for that purpose. Second, the plurality concluded that no confrontation clause violation occurred because the report was non-testimonial. Justice Thomas concurred in judgment only. He agreed that the report was non-testimonial, though he reached this conclusion through different reasoning. Thomas disagreed with that portion of the plurality opinion concluding that the report was not introduced for the truth for the matter asserted. Justices Kagan, Scalia, Ginsburg and Sotomayor dissented, noting among other things, the "significant confusion" created by the fractured opinion.

Melendez-Diaz v. Massachusetts, 557 U.S. 305 (June 25, 2009). Forensic laboratory reports are testimonial and thus subject to the rule of *Crawford v. Washington*, 541 U.S. 36 (2004). For a detailed analysis of this case, see the paper entitled "*Melendez-Diaz* & the Admissibility of Forensic Laboratory Reports & Chemical Analyst Affidavits in North Carolina Post-*Crawford,"* posted online here.

Bullcoming v. New Mexico, 564 U.S. ___, 131 S. Ct. 2705 (June 23, 2011). In a straightforward application of *Melendez-Diaz v. Massachusetts*, 557 U.S. 305 (June 25, 2009) (holding that

forensic laboratory reports are testimonial and thus subject to *Crawford*), the Court held that substitute analyst testimony in an impaired driving case violated *Crawford*. The defendant was arrested on charges of driving while intoxicated (DWI). Evidence against him included a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures, but had neither participated in nor observed the test on the defendant's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, New Mexico's high court held, live testimony of another analyst satisfied the constitutional requirements. The Court reversed, holding that "surrogate testimony of that order does not meet the constitutional requirement."

State v. Ortiz-Zape, 367 N.C. 1 (June 27, 2013). Reversing the Court of Appeals' decision in an unpublished case, the court held that no confrontation clause violation occurred when an expert in forensic science testified to her opinion that the substance at issue was cocaine and that opinion was based upon the expert's independent analysis of testing performed by another analyst in her laboratory. At trial the State sought to introduce Tracey Ray of the CMPD crime lab as an expert in forensic chemistry. During voir dire the defendant sought to exclude admission of a lab report created by a non-testifying analyst and any testimony by any lab analyst who did not perform the tests or write the lab report. The trial court rejected the defendant's confrontation clause objection and ruled that Ray could testify about the practices and procedures of the crime lab, her review of the testing in this case, and her independent opinion concerning the testing. However, the trial court excluded the non-testifying analyst's report under Rule 403. The defendant was convicted and appealed. The Court of Appeals reversed, finding that the Ray's testimony violated the confrontation clause. The NC Supreme Court disagreed. The court viewed the US Supreme Court's decision in *Williams v. Illinois* as "indicat[ing] that a qualified expert may provide an independent opinion based on otherwise inadmissible out-of-court statements in certain contexts." Noting that when an expert gives an opinion, the expert opinion itself, not its underlying factual basis, constitutes substantive evidence, the court concluded:

> Therefore, when an expert gives an opinion, the expert is the witness whom the defendant has the right to confront. In such cases, the Confrontation Clause is satisfied if the defendant has the opportunity to fully cross-examine the expert witness who testifies against him, allowing the factfinder to understand the basis for the expert's opinion and to determine whether that opinion should be found credible. Accordingly, admission of an expert's independent opinion based on otherwise inadmissible facts or data of a type reasonably relied upon by experts in the particular field does not violate the Confrontation Clause so long as the defendant has the opportunity to cross-examine the expert. We emphasize that the expert must present an independent opinion obtained through his or her own analysis and not merely "surrogate testimony" parroting otherwise inadmissible statements.

(quotations and citations omitted). Turning to the related issue of whether an expert who bases an opinion on otherwise inadmissible facts and data may, consistent with the Confrontation Clause, disclose those facts and data to the factfinder, the court stated:

> Machine-generated raw data, typically produced in testing of illegal drugs, present a unique subgroup of . . . information. Justice Sotomayor has noted there is a difference between a lab report certifying a defendant's blood-alcohol level and machine-generated results, such as a printout from a gas chromatograph. The former is the testimonial statement of a person, and the latter is the product of a machine. . . . Because machine-generated raw data, if truly machine-generated, are not statements by a person, they are neither hearsay nor testimonial. We note that representations[ ] relating to past events and human actions not revealed in raw, machine-produced data may not be admitted through "surrogate testimony." Accordingly, consistent with the Confrontation Clause, if of a type reasonably relied upon by experts in the particular field, raw data generated by a machine may be admitted for the purpose of showing the basis of an expert's opinion.

(quotations and citations omitted). Turning to the case at hand, the court noted that here, the report of the non-testifying analyst was excluded under Rule 403; thus the only issue was with Ray's expert opinion that the substance was cocaine. Applying the standard stated above, the court found that no confrontation violation occurred. Providing additional guidance for the State, the court offered the following in a footnote: "we suggest that prosecutors err on the side of laying a foundation that establishes compliance with Rule . . . 703, as well as the lab's standard procedures, whether the testifying analyst observed or participated in the initial laboratory testing, what independent analysis the testifying analyst conducted to reach her opinion, and any assumptions upon which the testifying analyst's testimony relies." Finally, the court held that even if error occurred, it was harmless beyond a reasonable doubt given that the defendant himself had indicated that the substance was cocaine.

State v. Brewington, 367 N.C. 29 (June 27, 2013). Reversing the Court of Appeals, the Court held that no *Crawford* violation occurred when the State proved that the substance at issue was cocaine through the use of a substitute analyst. The seized evidence was analyzed at the SBI by Assistant Supervisor in Charge Nancy Gregory. At trial, however, the substance was identified as cocaine, over the defendant's objection, by SBI Special Agent Kathleen Schell. Relying on Gregory's report, Schell testified to the opinion that the substance was cocaine; Gregory's report itself was not introduced into evidence. Relying on *Ortiz-Zape* (above), the court concluded that Schell presented an independent opinion formed as a result of her own analysis, not mere surrogate testimony.

State v. Craven, 367 N.C. 51 (June 27, 2013). The court held that admission of lab reports through the testimony of a substitute analyst (Agent Schell) violated the defendant' confrontation clause rights where the testifying analyst did not give her own independent opinion, but rather gave "surrogate testimony" that merely recited the opinion of non-testifying testing analysts that the substances at issue were cocaine. Distinguishing *Ortiz-Zape* (above), the court held that here the State's expert did not testify to an independent opinion obtained from the expert's own analysis but rather offered impermissible surrogate testimony repeating testimonial out-of-court statements made by non-testifying analysts. With regard to the two lab reports at issue, the testifying expert was asked whether she agreed with the non-testifying analysts' conclusions. When she replied in the affirmative, she was asked what the non-testifying analysts' conclusions were and the underlying reports were introduced into evidence. The court concluded: "It is clear . . . that Agent Schell did not offer—or even purport to offer—her own independent analysis or

opinion [of the] . . . samples. Instead, Agent Schell merely parroted [the non-testifying analysts'] . . . conclusions from their lab reports." Noting that the lab reports contained the analysts' certification prepared in connection with a criminal investigation or prosecution, the court easily determined that they were testimonial. The court went on to find that this conclusion did not result in error with regard to the defendant's conspiracy to sell or deliver cocaine conviction. As to the defendant's conviction for sale or delivery of cocaine, the six participating Justices were equally divided on whether the error was harmless beyond a reasonable doubt. Consequently, as to that charge the Court of Appeals' decision holding that the error was reversible remains undisturbed and stands without precedential value. However, the court found that the Court of Appeals erroneously vacated the conviction for sale or delivery and that the correct remedy was a new trial.

State v. Hurt, 367 N.C. 80 (June 27, 2013). In a substitute analyst case, the court per curiam and for the reasons stated in *Ortiz-Zape* (above), reversed the Court of Appeals' decision in *State v. Hurt*, 208 N.C. App. 1 (2010) (applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case and holding that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts pertaining to DNA analysis).

State v. Williams, 367 N.C. 64 (June 27, 2013). Reversing the Court of Appeals, the court held that any confrontation clause violation that occurred with regard to the use of substitute analyst testimony was harmless beyond a reasonable doubt where the defendant testified that the substance at issue was cocaine. When cocaine was discovered near the defendant, he admitted to the police that a man named Chris left it there for him to sell and that he had sold some that day. The substance was sent to the crime lab for analysis. Chemist DeeAnne Johnson performed the analysis of the substance. By the time of trial however, Johnson no longer worked for the crime lab. Thus, the State presented Ann Charlesworth of the crime lab as an expert in forensic chemistry to identify the substance at issue. Over objection, she identified the substance as cocaine. The trial court also admitted, for the purpose of illustrating Charlesworth's testimony, Johnson's lab reports. At trial, the defendant reiterated what he had told the police. The defendant was convicted and he appealed. The Court of Appeals reversed, finding that Charlesworth's substitute analyst testimony violated the defendant's confrontation rights. The NC Supreme Court held that even if admission of the testimony and exhibits was error, it was harmless beyond a reasonable doubt because the defendant himself testified that the seized substance was cocaine.

State v. Brent, 367 N.C. 73 (June 27, 2013). Reversing the Court of Appeals, the court held that by failing to make a timely objection at trial and failing to argue plain error in the Court of Appeals, the defendant failed to preserve the question of whether substitute analyst testimony in a drug case violated his confrontation rights. The court noted that at trial the defendant objected to the testimony related to the composition of the substance only outside the presence of the jury; he did not object to admission of either the expert's opinion or the raw data at the time they were offered into evidence. He thus failed to preserve the issue for review. Furthermore, the defendant failed to preserve his challenge to admission of the raw data by failing to raise it in his brief before the Court of Appeals. Moreover, the court concluded, even if the issues had been preserved, under *Ortiz-Zape* (above), the defendant would lose on the merits.

State v. Hough, 367 N.C. 79 (June 27, 2013). With one Justice not taking part in the decision and the others equally divided, the court, per curiam, left undisturbed the decision below, *State v. Hough*, 202 N.C. App. 674 (Mar. 2, 2010). In the decision below, the Court of Appeals held that no *Crawford* violation occurred when reports done by non-testifying analyst as to composition and weight of controlled substances were admitted as the basis of a testifying expert's opinion on those matters. [Author's note: Because the Justices were equally divided, the decision below, although undisturbed, has no precedential value.]

State v. Burrow, 366 N.C. 326 (Dec. 14, 2012). The court vacated and remanded *State v. Burrow*, 218 N.C. App. 373 (Feb. 7, 2012), after allowing the State's motion to amend the record to include a copy of the State's notice under G.S. 90-95 indicating an intent to introduce into evidence a forensic report without testimony of the preparer. In the opinion below, the court of appeals had held that the trial court committed plain error by allowing the State to admit a SBI forensic report identifying the substance at issue as oxycodone when neither the preparer of the report nor a substitute analyst testified at trial.

State v. Locklear, 363 N.C. 438 (Aug. 28, 2009). A *Crawford* violation occurred when the trial court admitted opinion testimony of two non-testifying experts regarding a victim's cause of death and identity. The testimony was admitted through the Chief Medical Examiner, an expert in forensic pathology, who appeared to have read the reports of the non-testifying experts into evidence, rather than testifying to an independent opinion based on facts or data reasonable relied upon by experts in the field. For a more detailed discussion of this case, see my blog post.

State v. Barnes, __ N.C. App. __, 741 S.E.2d 457 (April 2, 2013). In a murder case, the defendant's right of confrontation was not violated when Dr. Jordan, an expert medical examiner, testified that in his opinion the cause of death was methadone toxicity. As part of his investigation, Jordan sent a specimen of the victim's blood to the Office of the Chief Medical Examiner for analysis. During trial, Jordan testified that in his opinion the cause of death was methadone toxicity and that his opinion was based upon the blood toxicology report from the Chief Medical Examiner's Office. When defense counsel raised questions about the test showing methadone toxicity, the trial court allowed the State to call as a witness Jarod Brown, the toxicologist at the State Medical Examiner's Officer who analyzed the victim's blood. Noting the evolving nature of the confrontation question presented, the court concluded that even assuming arguendo that Jordan's testimony was erroneous, any error was cured by the subsequent testimony and cross-examination of Brown, who performed the analysis.

State v. Ward, __ N.C. App. __, 742 S.E.2d 550 (April 2, 2013). In a drug case, the trial court did not err by allowing one analyst to testify to the results of an analysis done by another non-testifying analyst. The analysis at issue identified the pills as oxycodone. The defendant did not object to the analyst's testimony at trial or to admission of the underlying report into evidence. Because the defendant and defense counsel stipulated that the pills were oxycodone, no plain error occurred.

State v. Poole, __ N.C. App. __, 733 S.E.2d 564 (Oct. 16, 2012). (1) Admission of a forensic report identifying a substance as a controlled substance without testimony of the preparer violated the defendant's confrontation clause rights. (2) The trial court erred by allowing a

substitute analyst to testify that a substance was a controlled substance based on the same forensic report where the substitute analyst did not perform or witness the tests and merely summarized the conclusions of the non-testifying analyst.

State v. Harris, 221 N.C. App. 548 (July 17, 2012). (1) The defendant's confrontation rights were not violated when the State's expert testified about DNA testing on the victim's rape kit done by a non-testifying trainee. The trainee worked under the testifying expert's direct observation and supervision and the findings were his own. (2) The court rejected the defendant's argument that his constitutional rights were violated when a second DNA expert testified that she matched a DNA extract on a specimen taken from the defendant to the profile obtained from the rape kit. Having found that the first expert properly testified about the rape kit profile, the court rejected this argument. (3) No violation of the defendant's confrontation clause rights occurred when the second expert testified that the probability of an unrelated, randomly chosen person who could not be excluded from the DNA mixture taken from the rape kit was extremely low. The defendant argued that the population geneticists who made the probability determination were unavailable for cross-examination about the reliability of their statistical methodology. The court concluded that admission of the statistical information was not error where the second expert was available for cross-examination and gave her opinion that the DNA profile from the rape kit matched the defendant's DNA profile and the statistical information on which she relied was of a type reasonably relied upon by experts in the field. Even assuming that unavailability of the purported population geneticists who prepared the statistical data violated the defendant's rights, the error did not rise to the level of plain error.

State v. McMillan, 214 N.C. App. 320 (Aug. 2, 2011). Assuming arguendo that the defendant properly preserved the issue for appeal, no confrontation clause violation occurred when the State's expert forensic pathologist, Dr. Deborah Radisch, testified about the victim's autopsy and gave her own opinion concerning cause of death. Distinguishing *State v. Locklear*, 363 N.C. 438 (Aug. 28, 2009), and *Bullcoming v. New Mexico*, ___ U.S. ___, 131 S. Ct. 2705 (June 23, 2011), and following *State v. Blue*, 207 N.C. App. 267 (Oct. 5, 2010), the court noted that Dr. Radisch was present for the autopsy and testified as to her own independent opinion as to cause of death.

State v. Hartley, 212 N.C. App. 1 (May 17, 2011). (1) In a triple murder case, no confrontation clause violation occurred when the State's expert medical examiner was allowed to testify in place of the pathologist who performed the autopsies. The medical examiner provided her own expert opinion and did not simply regurgitate the non-testifying examiner's reports. The testifying expert made minimal references to the autopsy reports, which were never introduced into evidence, and her testimony primarily consisted of describing the victims' injuries as depicted in 28 autopsy photographs. She described the type of wounds, the pain they would have inflicted, whether they would have been fatal, and testified to each victim's cause of death. With regard to one victim who had been sexually assaulted, the expert explained, through use of photographs, that the victim had been asphyxiated, how long it would have taken for her to lose consciousness, and that the blood seen in her vagina could have been menstrual blood or the result of attempted penetration. The expert's testimony as to the impact of the various trauma suffered by the victims was based primarily on her inspection of the photographs that were admitted into evidence and her independent experience as a pathologist. Although the expert referred to the non-testifying pathologist's reports, she did not recite findings from them. To the

extent that she did, no prejudice resulted given her extensive testimony based strictly on her own personal knowledge as a pathologist, including the effect of the victims' various injuries and their cause of death. Finally, the court concluded, even if any error occurred, it was harmless beyond a reasonable doubt. (2) The court noted in a footnote that the autopsy photographs were properly admitted as the basis of the testifying expert's opinion and therefore admission of them did not violate the defendant's confrontation rights.

State v. Garnett, 209 N.C. App. 537 (Feb. 15, 2011). Holding, in a drug case, that although the trial court erred by allowing the State's expert witness to testify as to the identity and weight of the "leafy green plant substance" where the expert's testimony was based on analysis performed by a non-testifying forensic analyst, the error was not prejudicial in light of the overwhelming evidence of guilt.

State v. Mobley, 200 N.C. App. 570 (Nov. 3, 2009). No *Crawford* violation occurred when a substitute analyst testified to her own expert opinion, formed after reviewing data and reports prepared by non-testifying expert. For a more detailed discussion of this case, see my blog post.

State v. Galindo, 200 N.C. App. 410 (Oct. 20, 2009). A *Crawford* violation occurred when the State's expert gave an opinion, in a drug trafficking case, as to the weight of the cocaine at issue, based "solely" on a laboratory report by a non-testifying analyst. For a more detailed discussion of this case, see my blog post.

State v. Brennan, 203 N.C. App. 698 (May 4, 2010). Applying *Locklear* and *Mobley*, both discussed above, the court concluded that testimony of a substitute analyst identifying a substance as cocaine base violated the defendant's confrontation clause rights. The court characterized the substitute analyst's testimony as "merely reporting the results of [non-testifying] experts." Rather than conduct her own independent review, the testifying analyst's review "consisted entirely of testifying in accordance with what the underlying report indicated." For more discussion of this case, see the blog post.

State v. Grady, 206 N.C. App. 566 (Aug. 17, 2010). Even if the defendant's confrontation clause rights were violated when the trial court allowed a substitute analyst to testify regarding DNA testing done by a non-testifying analyst, the error was harmless beyond a reasonable doubt.

State v. Blue, 207 N.C. App. 267 (Oct. 5, 2010). The trial court did not err by allowing the Chief Medical Examiner to testify regarding an autopsy of a murder victim when the Medical Examiner was one of three individuals who participated in the actual autopsy. The Medical Examiner testified to his own observations, provided information rationally based on his own perceptions, and did not testify regarding anyone else's declarations or findings.

Remote Testimony

State v. Seelig, __ N.C. App. __, 738 S.E.2d 427 (Mar. 19, 2013). In a case in which the defendant was charged with obtaining property by false pretenses for selling products alleged to be gluten free but which in fact contained gluten, the trial court did not err by allowing an ill witness to testify by way of a two-way, live, closed-circuit web broadcast. The witness testified

regarding the results of laboratory tests he performed on samples of the defendant's products. The trial court conducted a hearing and found that the witness had a history of panic attacks, had suffered a severe panic attack on the day he was scheduled to fly from Nebraska to North Carolina for trial, was hospitalized as a result, and was unable to travel to North Carolina because of his medical condition. Applying the test of *Maryland v. Craig*, the court found these findings sufficient to establish that allowing the witness to testify remotely was necessary to meet an important state interest of protecting the witness's ill health. Turning to *Craig's* second requirement, the court found that reliability of the witness's testimony was otherwise assured, noting, among other things that the witness testified under oath and was subjected to cross-examination. [Author's note: For an extensive discussion of the use of remote testimony at trial, see my paper here.]

State v. Lanford, __ N.C. App. __, 736 S.E.2d 619 (Jan. 15, 2013). The trial court did not err by allowing a child victim to testify out of the defendant's presence by way of a closed circuit television. Following *State v. Jackson*, 216 N.C. App. 238 (Oct. 4, 2011) (in a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system; *Maryland v. Craig* survived *Crawford* and the procedure satisfied *Craig*'s procedural requirements), the court held that no violation of the defendant's confrontation rights occurred. The court also held that the trial court's findings of fact about the trauma that the child would suffer and the impairment to his ability to communicate if required to face the defendant in open court were supported by the evidence.

State v. Jackson, 216 N.C. App. 238 (Oct. 4, 2011). (1) In a child sexual assault case, the defendant's confrontation rights were not violated when the trial court permitted the child victim to testify by way of a one-way closed circuit television system. The court held that *Maryland v. Craig* survived *Crawford* and that the procedure satisfied *Craig's* procedural requirements. (2) The court also held that the child's remote testimony complied with the statutory requirements of G.S. 15A-1225.1.

Notice & Demand Statutes

State v. Whittington, 367 N.C. 186 (Jan. 24, 2014). (1) *Melendez-Diaz* did not impact the "continuing vitality" of the notice and demand statute in G.S. 90-95(g); when the State satisfies the requirements of the statute and the defendant fails to file a timely written objection, a valid waiver of the defendant's constitutional right to confront the analyst occurs. (2) The State's notice under the statute in this case was deficient in that it failed to provide the defendant a copy of the report and stated only that "[a] copy of report(s) will be delivered upon request." However, the defendant did not preserve this issue for appeal. At trial he asserted only that the statute was unconstitutional under *Melendez-Diaz*; he did not challenge the State's notice under the statute. Justice Hudson dissented, joined by Justice Beasley, arguing that the majority improperly shifts the burden of proving compliance with the notice and demand statute from the State to defendant.

State v. Burrow, __ N.C. App. __, 742 S.E.2d 619 (June 4, 2013). In this drug trafficking case, notice was properly given under the G.S. 90-95(g) notice and demand statute even though it did

not contain proof of service or a file stamp. The argued-for service and filing requirements were not required by *Melendez-Diaz* or the statute. The notice was stamped "a true copy"; it had a handwritten notation that saying "ORIGINAL FILED," "COPY FAXED," and "COPY PLACED IN ATTY'S BOX." The defendant did not argue that he did not in fact receive the notice.

State v. Ward, __ N.C. App. __, 742 S.E.2d 550 (April 2, 2013). The court rejected the defendant's argument that the State's failure to comply with the requirements of the G.S. 90-95 notice and demand statute with respect to the analyst's report created error. In addition to failing to object to admission of the report, both the defendant and defense counsel stipulated that the pills were oxycodone. The court also rejected the defendant's argument that his stipulation was not a knowing, voluntary and intelligent waiver of his right to confront the non-testifying analyst, noting that such a stipulation does not require the formality of a guilty plea.

State v. Jones, 221 N.C. App. 236 (June 5, 2012). A SBI forensic report identifying a substance as cocaine was properly admitted when the State gave notice under the G.S. 90-95(g) notice and demand statute and the defendant lodged no objection to admission of the report without the testimony of the preparer.

State v. Steele, 201 N.C. App. 689 (Jan. 5, 2010). The court upheld the constitutionality of G.S. 90-95(g)'s notice and demand statute for forensic laboratory reports in drug cases. Since the defendant failed to object after the State gave notice of its intent to introduce the report without the presence of the analyst, the defendant waived his Confrontation Clause rights.

State v. Blackwell, 207 N.C. App. 255 (Sept. 21, 2010). The court ordered a new trial in a drug case in which the trial court admitted laboratory reports regarding the identity, nature, and quantity of the controlled substances where the State had not complied with the notice and demand provisions in G.S. 90-95(g) and (g1). Instead of sending notice directly to the defendant, who was *pro se*, the State sent notice to a lawyer who was not representing the defendant at the time.

Testimonial/Nontestimonial Distinction

Ohio v. Clark, 576 U.S. __ (June 18, 2015). In this child abuse case the Court held that statement by the victim, L.P., to his preschool teachers were non-testimonial. In the lunchroom, one of L.P.'s teachers, Ramona Whitley, observed that L.P.'s left eye was bloodshot. She asked him "[w]hat happened," and he initially said nothing. Eventually, however, he told the teacher that he "fell." When they moved into the brighter lights of a classroom, Whitley noticed "[r]ed marks, like whips of some sort," on L.P.'s face. She notified the lead teacher, Debra Jones, who asked L.P., "Who did this? What happened to you?" According to Jones, L.P. "seemed kind of bewildered" and "said something like, Dee, Dee." Jones asked L.P. whether Dee is "big or little;" L.P. responded that "Dee is big." Jones then brought L.P. to her supervisor, who lifted the boy's shirt, revealing more injuries. Whitley called a child abuse hotline to alert authorities about the suspected abuse. The defendant, who went by the nickname Dee, was charged in connection with the incident. At trial, the State introduced L.P.'s statements to his teachers as evidence of the defendant's guilt, but L.P. did not testify. The defendant was convicted and appealed. The Ohio

Supreme Court held that L.P.'s statements were testimonial because the primary purpose of the teachers' questioning was not to deal with an emergency but rather to gather evidence potentially relevant to a subsequent criminal prosecution. That court noted that Ohio has a "mandatory reporting" law that requires certain professionals, including preschool teachers, to report suspected child abuse to government authorities. In the Ohio court's view, the teachers acted as agents of the State under the mandatory reporting law and obtained facts relevant to past criminal conduct. The Supreme Court granted review and reversed. It held:

> In this case, we consider statements made to preschool teachers, not the police. We are therefore presented with the question we have repeatedly reserved: whether statements to persons other than law enforcement officers are subject to the Confrontation Clause. Because at least some statements to individuals who are not law enforcement officers could conceivably raise confrontation concerns, we decline to adopt a categorical rule excluding them from the Sixth Amendment's reach. Nevertheless, such statements are much less likely to be testimonial than statements to law enforcement officers. And considering all the relevant circumstances here, L.P.'s statements clearly were not made with the primary purpose of creating evidence for [the defendant's] prosecution. Thus, their introduction at trial did not violate the Confrontation Clause.

The Court reasoned that L.P.'s statements occurred in the context of an ongoing emergency involving suspected child abuse. The Court continued, concluding that "[t]here is no indication that the primary purpose of the conversation was to gather evidence for [the defendant]'s prosecution. On the contrary, it is clear that the first objective was to protect L.P." In the Court's view, "L.P.'s age fortifies our conclusion that the statements in question were not testimonial." It added: "Statements by very young children will rarely, if ever, implicate the Confrontation Clause." The Court continued, noting that as a historical matter, there is strong evidence that statements made in similar circumstances were admissible at common law. The Court noted, "although we decline to adopt a rule that statements to individuals who are not law enforcement officers are categorically outside the Sixth Amendment, the fact that L.P. was speaking to his teachers remains highly relevant." The Court rejected the defendant's argument that Ohio's mandatory reporting statutes made L.P.'s statements testimonial, concluding: "mandatory reporting statutes alone cannot convert a conversation between a concerned teacher and her student into a law enforcement mission aimed primarily at gathering evidence for a prosecution."

Michigan v. Bryant, 562 U.S. 344 (Feb. 28, 2011). Justice Sotomayor, writing for the Court, held that a mortally wounded shooting victim's statements to first-responding officers were non-testimonial under *Crawford*. In the early morning, Detroit police officers responded to a radio dispatch that a man had been shot. When they arrived at the scene, the victim was lying on the ground at a gas station. He had a gunshot wound to his abdomen, appeared to be in great pain, and had difficulty speaking. The officers asked the victim what happened, who had shot him, and where the shooting occurred. The victim said that the defendant shot him about 25 minutes earlier at the defendant's house. The officers' 5-10 minute conversation with the victim ended when emergency medical personnel arrived. The victim died within hours. At trial, the victim's statements to the responding officers were admitted and the defendant was found guilty of, among other things, murder.

The Court held that because the statements were non-testimonial, no violation of confrontation rights occurred. The Court noted that unlike its previous decisions in *Davis* and

Hammon, the present case involved a non-domestic dispute, a victim found in a public location suffering from a fatal gunshot wound, and a situation where the perpetrator's location was unknown. Thus, it indicated, "we confront for the first time circumstances in which the 'ongoing emergency' . . . extends beyond an initial victim to a potential threat to the responding police and the public at large." Slip Op. at 12. This new scenario, the Court noted, "requires us to provide additional clarification . . . to what *Davis* meant by 'the primary purpose of the interrogation is to enable police assistance to meet an ongoing emergency.'" *Id.* It concluded that when determining whether this is the primary purpose of an interrogation, a court must objectively evaluate the circumstances in which the encounter occurs and the parties' statements and actions. *Id.* It explained that the existence of an ongoing emergency "is among the most important circumstances informing the 'primary purpose' of an interrogation." *Id.* at 14. As to the statements and actions of those involved, the Court concluded that the inquiry must focus on both the declarant and the interrogator.

Applying this analysis to the case at hand, the Court began by examining the circumstances of the interrogation to determine if an ongoing emergency existed. Relying on the fact that the victim said nothing to indicate that the shooting was purely a private dispute or that the threat from the shooter had ended, the Court found that the emergency was broader than those at issue in *Davis* and *Hammon*, encompassing a threat to the police and the public. *Id.* at 27. The Court also found it significant that a gun was involved. *Id.* "At bottom," it concluded, "there was an ongoing emergency here where an armed shooter, whose motive for and location after the shooting were unknown, had mortally wounded [the victim] within a few blocks and a few minutes of the location where the police found [the victim]." *Id.* The Court continued, determining that given the circumstances of the emergency, it could not say that a person in the victim's situation would have had the primary purpose of establishing past facts relevant to a criminal prosecution. *Id.* at 29. As to the motivations of the police, the Court concluded that they solicited information from the victim to meet the ongoing emergency. *Id.* at 30. Finally, it found that the informality of the situation and interrogation further supported the conclusion that the victim's statements were non-testimonial.

Justice Thomas concurred in the judgment, agreeing that the statements were non-testimonial but resting his conclusion on the lack of formality that attended them. Justices Scalia and Ginsburg dissented. Justice Kagan took no part in the consideration or decision of the case.

State v. Clark, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this driving while license revoked case, the court held that DMV records were non-testimonial. The documents at issue included a copy of the defendant's driving record certified by the DMV Commissioner; two orders indefinitely suspending his drivers' license; and a document attached to the suspension orders and signed by a DMV employee and the DMV Commissioner. In this last document, the DMV employee certified that the suspension orders were mailed to the defendant on the dates as stated in the orders, and the DMV Commissioner certified that the orders were accurate copies of the records on file with DMV. The court held that the records, which were created by the DMV during the routine administration of its affairs and in compliance with its statutory obligations to maintain records of drivers' license revocations and to provide notice to motorists whose driving privileges have been revoked, were non-testimonial.

State v. Gardner, __ N.C. App. __, __ S.E.2d __ (Dec. 2, 2014). In a sex offender residential restriction case, the court held that because GPS tracking reports were non-testimonial business

records, their admission did not violate the defendant's confrontation rights. The GPS records were generated in connection with electronic monitoring of the defendant, who was on post-release supervision for a prior conviction. The court reasoned:

> [T]he GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant's Confrontation Clause rights.

State v. Call, __ N.C. App. __, 748 S.E.2d 185 (Oct. 1, 2013). (1) In a larceny by merchant case, statements made by a deceased Wal-Mart assistant manager to the store's loss prevention coordinator were non-testimonial. The loss prevention coordinator was allowed to testify that the assistant manager had informed him about the loss of property, triggering the loss prevention coordinator's investigation of the matter. The court stated:

> [The] statement was not made in direct response to police interrogation or at a formal proceeding while testifying. Rather, [the declarant] privately notified his colleague . . . about a loss of product at the Wal-Mart store. This statement was made outside the presence of police and before defendant was arrested and charged. Thus, the statement falls outside the purview of the Sixth Amendment. Furthermore, [the] statement was not aimed at defendant, and it is unreasonable to believe that his conversation with [the loss prevention coordinator] would be relevant two years later at trial since defendant was not a suspect at the time this statement was made.

(2) Any assertions by the assistant manager contained in a receipt for evidence form signed by him were non-testimonial. The receipt—a law enforcement document—established ownership of the baby formula that had been recovered by the police, as well as its quantity and type; its purpose was to release the property from the police department back to the store.

State v. Glenn, 220 N.C. App. 23 (Apr. 17, 2012). A non-testifying victim's statement to a law enforcement officer was testimonial. In the defendant's trial for kidnapping and other charges, the State introduced statements from a different victim ("the declarant") who was deceased at the time of trial. The facts surrounding the declarant's statements were as follows: An officer responding to a 911 call concerning a possible sexual assault at a Waffle House restaurant found the declarant crying and visibly upset. The declarant reported that while she was at a bus stop, a driver asked her for directions. When she leaned in to give directions, the driver grabbed her shirt and told her to get in the vehicle. The driver, who had a knife, drove to a parking lot where he raped and then released her. The declarant then got dressed and walked to the Waffle House. The trial court determined that because the purpose of the interrogation was to resolve an ongoing emergency, the declarant's statements were nontestimonial. Distinguishing the U.S. Supreme Court's decision in *Michigan v. Bryant*, the court of appeals disagreed. The court noted that when the officer arrived "there was no ongoing assault, the declarant had no signs of trauma, no suspect was present, and the officer did not search the area for the perpetrator or secure the scene. The officer asked the declarant if she wanted medical attention (she refused) and what

happened. Thus, the court concluded, the officer "assessed the situation, determined there was no immediate threat and then gathered the information." Furthermore, the declarant told the officer that the perpetrator voluntarily released her. The court concluded that even if the officer believed there was an ongoing emergency when he first arrived, he determined that no ongoing emergency existed when he took the statement. The court also determined that there was no ongoing threat to the victim, law enforcement or the public. It noted that the defendant voluntarily released the declarant and drove away and there was no indication that he would return to harm her further. As for danger to the officer, the court found no evidence that the defendant was ever in the Waffle House parking lot or close enough to harm the officer with his weapon, which was a knife not a gun. The court also concluded that because "the evidence suggested defendant's motive was sexual and did not rise to the level of endangering the public at large." Regarding the overall circumstances of the encounter, the court noted that because there was only one officer, "the circumstances of the questioning were more like an interview," in which the officer asked what happened and the declarant narrated the events. It continued, noting that since the declarant "had no obvious injuries, and initially refused medical attention, the primary purpose of her statement could not have been to obtain medical attention." Furthermore, she "seemed to have no difficulty in recalling the events, and gave [the officer] a detailed description of the events, implying that her primary purpose was to provide information necessary for defendant's prosecution." In fact, the court noted, she told the officer that she wanted to prosecute the suspect. The court concluded that the statement was "clearly" testimonial:

[T]here was no impending danger, because the driver released [the declarant] and [the declarant] was waiting at a restaurant in a presumably safe environment. In addition, [the officer] questioned her with the requisite degree of formality because the questioning was part of an investigation, outside the defendant's presence. [The officer] wanted to determine "what happened" rather than "what is happening." Furthermore, [the declarant's] statement deliberately recounted how potentially criminal events from the past had progressed and the interrogation occurred after the described events ended. Finally, [the declarant] gave the officer a physical description of the driver, how he was dressed, his approximate age, and the type of vehicle he was driving. For a criminal case, this information would be "potentially relevant to later criminal prosecution." (citations omitted).

Unavailability

Hardy v. Cross, 565 U.S. __, 132 S. Ct. 490 (Dec. 12, 2011). Reversing the Seventh Circuit, the Court held that the state court was not unreasonable in determining that the prosecution established the victim's unavailability for purposes of the confrontation clause. In the defendant's state court trial for kidnaping and sexual assault, the victim testified. After a mistrial, a retrial was scheduled for March 29, 2000. On March 20, the prosecutor informed the trial judge that the victim could not be located. On March 28, the State moved to have the victim declared unavailable and to introduce her prior testimony at the retrial. The State represented that it had remained in constant contact with the victim and her mother and that every indication had been that the victim, though very frightened, would testify. On March 3, however, the victim's mother and brother told the State's investigator that they did not know where the victim was; the mother also reported that the victim was "very fearful and very concerned" about testifying. About a week later, the investigator interviewed the victim's father, who had no idea where she was. On

March 10, the victim's mother told the State that the victim had run away the day before. Thereafter, the prosecutor's office and police attempted to find the victim. Their efforts included: constant visits her home, at all hours; visits to her father's home; conversations with her family members; checks at, among other places, the Medical Examiner's office, local hospitals, the Department of Corrections, the victim's school, the Secretary of State's Office, the Department of Public Aid, and with the family of an old boyfriend of the victim. On a lead that the victim might be with an ex-boyfriend 40 miles away, a police detective visited the address but the victim had not been there. The State's efforts to find the victim continued until March 28, the day of the hearing on the State's motion. That morning, the victim's mother informed the detective that the victim had called approximately two weeks earlier saying that she did not want to testify and would not return. The victim's mother said that she still did not know where the victim was or how to contact her. The trial court granted the State's motion and admitted the victim's earlier testimony. The defendant was found guilty of sexual assault. On appeal, the state appellate court agreed that the victim was unavailable and that the trial court had properly admitted her prior testimony. The defendant then filed a petition for a writ of habeas corpus arguing that the state court had unreasonably applied clearly established Supreme Court precedents holding that the confrontation clause precludes the admission of the prior testimony of an allegedly unavailable witness unless the prosecution made a good-faith effort to obtain the declarant's presence at trial. The federal district court denied the petition; the Seventh Circuit reversed.

The Court began its analysis by noting that under *Barber v. Page*, 390 U. S. 719 (1968), "a witness is not 'unavailable' for purposes of the . . . confrontation requirement unless the prosecutorial authorities have made a good-faith effort to obtain his presence at trial." Here, the state court holding that the prosecution conducted the requisite good-faith search for the victim was not an unreasonable application of its precedents. The Seventh Circuit found that the State's efforts were inadequate for three main reasons. First, it faulted the State for failing to contact the victim's current boyfriend or any of her other friends in the area. But, the Court noted, there was no evidence suggesting that these individuals had information about her whereabouts. Second, the Seventh Circuit criticized the State for not making inquiries at the cosmetology school where the victim had been enrolled. However, because the victim had not attended the school for some time, there is no reason to believe that anyone there had better information about her location than did her family. Finally, the Seventh Circuit found that the State's efforts were insufficient because it failed to serve her with a subpoena after she expressed fear about testifying at the retrial. The Court noted: "We have never held that the prosecution must have issued a subpoena if it wishes to prove that a witness who goes into hiding is unavailable for Confrontation Clause purposes, and the issuance of a subpoena may do little good if a sexual assault witness is so fearful of an assailant that she is willing to risk his acquittal by failing to testify at trial." It concluded: "when a witness disappears before trial, it is always possible to think of additional steps that the prosecution might have taken to secure the witness' presence, but the Sixth Amendment does not require the prosecution to exhaust every avenue of inquiry, no matter how unpromising." (citation omitted).

Prior Opportunity to Cross-Examine

State v. Rollins, __ N.C. App. __, 738 S.E.2d 440 (Mar. 19, 2013). No violation of the defendant's confrontation rights occurred when the trial court admitted an unavailable witness's

testimony at a proceeding in connection with the defendant's *Alford* plea under the Rule 804(b)(1) hearsay exception for former testimony. The witness was unavailable and the defendant had a prior opportunity to cross-examine her at the plea hearing.

State v. Ross, 216 N.C. App. 337 (Oct. 18, 2011). Defense counsel's cross-examination of a declarant at a probable cause hearing satisfied *Crawford*'s requirement of a prior opportunity for cross-examination.

Burden of Producing the Witness

Briscoe v. Virginia, 559 U.S. __, 130 S. Ct. 1316 (Jan. 25, 2010). Certiorari was granted in this case four days after the Court decided *Melendez-Diaz.* The case presented the following question: If a state allows a prosecutor to introduce a certificate of a forensic laboratory analysis, without presenting the testimony of the analyst who prepared the certificate, does the state avoid violating the Confrontation Clause by providing that the accused has a right to call the analyst as his or her own witness? The Court's two-sentence per curiam decision vacated and remanded for "further proceedings not inconsistent with the opinion in *Melendez-Diaz."*

Applicability to Sentencing Proceedings

United States v. Umana, 750 F.3d 320 (April 23, 2014). In this federal death penalty case, the court relied on *Williams v. New York*, 337 U.S. 241 (1949), to hold that the confrontation clause does not apply in the sentence selection phase (where the jury exercises discretion in selecting a life sentence or the death penalty) of a federal capital trial. The court noted that under the Federal Death Penalty Act, the jury finds the facts necessary to support the imposition of the death penalty in the guilt and eligibility phases of trial and that "[i]t is only during th[o]se phases that the jury makes 'constitutionally significant' factual findings." The court's holding pertained only to the sentence selection phase.

State v. Hurt, 367 N.C. 80 (June 27, 2013). In a substitute analyst case, the court per curiam and for the reasons stated in *Ortiz-Zape* (above, under substitute analysts), reversed the Court of Appeals' decision in *State v. Hurt*, 208 N.C. App. 1 (2010) (applying *Crawford* to a non-capital *Blakely* sentencing hearing in a murder case and holding that *Melendez-Diaz* prohibited the introduction of reports by non-testifying forensic analysts pertaining to DNA analysis). Reversing on other grounds, the court did not indicate that *Crawford* was inapplicable to a non-capital sentencing proceeding.

Forfeiture by Wrongdoing

State v. Weathers, 219 N.C. App. 522 (Mar. 20, 2012). The trial court properly applied the forfeiture by wrongdoing exception to the *Crawford* rule. At the defendant's trial for first-degree murder and kidnapping, an eyewitness named Wilson was excused from testifying further after becoming distraught on the stand. The trial court determined that Wilson's testimony would remain on the record under the forfeiture by wrongdoing exception and denied the defendant's motion for a mistrial. At a hearing on the issue Wilson disclosed that, as they were being transported to the courthouse for trial, the defendant threatened to kill Wilson and his family. A

detention officer testified that she heard the threat. Also, in a taped interview with detectives and prosecutors, Wilson repeatedly expressed concern for his life and the lives of his family members. Finally, the defendant made several phone calls that showing an intent to intimidate Wilson. In one call to his grandmother, the defendant repeatedly referred to Wilson as "nigger" and said he would "straighten this nigger out". During the phone calls, the defendant joked about the "slick moves" he used to prevent Wilson from testifying. In other calls, the defendant instructed acquaintances to come to court to intimidate Wilson while he was testifying. One of those acquaintances said he would be in court on the morning of 2 March 2011. On that date, Wilson, who already had been hesitant and fearful on the stand, became even more emotional and "broke down" upon seeing a young man dressed in street clothes indicative of gang attire enter the courtroom. These facts were sufficient to establish that the defendant intended to and did intimidate Wilson. The court rejected the defendant's argument that application of the doctrine was improper because Wilson never testified that he chose to remain silent out of fear of the defendant. The court stated: "It would be nonsensical to require that a witness testify against a defendant in order to establish that the defendant has intimidated the witness into not testifying. Put simply, if a witness is afraid to testify against a defendant in regard to the crime charged, we believe that witness will surely be afraid to finger the defendant for having threatened the witness, itself a criminal offense."

Corroboration

State v. Duffie, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015). In this robbery case, the court held that no plain error occurred when the trial court admitted into evidence for purposes of corroboration a videotape of an interview with the defendant's accomplice, when the accomplice testified at trial. The defendant asserted that the accomplice's statements in the videotape contradicted rather than corroborated his trial testimony. The court disagreed noting that the accomplice's statements during the interview established a timeline of the robberies, an account of how they were committed, and the parties' roles in the crimes and that all of these topics were covered in his testimony at trial. While the accomplice did add the additional detail during the interview that he likely would not have committed the robberies absent the defendant's involvement, this did not contradict his trial testimony.

State v. Moore, __ N.C. App. __, 763 S.E.2d 561 (Oct. 7, 2014). The trial court did not abuse its discretion by allowing the State to admit, for purposes of corroboration, a prior consistent statement made by a State's witness. The court rejected the defendant's argument that the prior statement differed significantly from the witness's trial testimony.

State v. Barrett, __ N.C. App. __, 746 S.E.2d 413 (Aug. 6, 2013). No plain error occurred when the trial court admitted the child victim's prior statements to corroborate her trial testimony. Any differences between the statements and the victim's trial testimony were "minor inconsistencies."

State v. Brown, 211 N.C. App. 427 (May 3, 2011), *aff'd* 365 N.C. 465 (Mar. 9, 2012). In a case in which the defendant was charged with sexually assaulting his minor child, the court held that no plain error occurred when the trial judge admitted the victim's prior statements that at the time in question the defendant sexually assaulted both her and her sister. The victim testified at trial that her sister was present when the assault occurred did not state that the sister was

assaulted. Although the victim's prior statements did not exactly mirror her in-court testimony, they did not contradict it and, in fact, the additional information strengthened and added credibility to her version of the events by explaining and expanding upon the sister's presence during the incident.

State v. Johnson, 209 N.C. App. 682 (Mar. 1, 2011). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

State v. Walker, 204 N.C. App. 431 (June 15, 2010). A witness's out-of-court statement to an officer was properly admitted to corroborate her trial testimony. Although the witness's out-of-court statement contained information not included in her in-court testimony, the out-of-court statement was generally consistent with her trial testimony and the trial court gave an appropriate limiting instruction.

State v. Cook, 195 N.C. App. 230 (Feb. 3, 2009). Officer's testimony relating an incident of digital penetration described to him by the victim was properly admitted to corroborate victim's testimony, even though the victim did not mention the incident in her testimony. The victim testified that the first time she remembered the defendant touching her was in the "summer time of 2002" and that he touched her other times including incidents in December 2003 and July 2004. The victim's established a course of sexual misconduct by defendant and the officer testified to an incident within defendant's course of conduct that did not directly contradict the victim's testimony. The officer's testimony sufficiently strengthened the victim's testimony to warrant its admission as corroborative evidence.

State v. Horton, 200 N.C. App. 74 (Sept. 15, 2009). In a child sexual assault case, prior statements of the victim made to an expert witness regarding "grooming" techniques employed by the defendant were properly admitted to corroborate the victim's trial testimony. Although the prior statements provided new or additional information, they tended to strengthen the child's testimony that she had been sexually abused by the defendant.

Direct Examination

State v. Mann, __ N.C. App. __, 768 S.E.2d 138 (Dec. 2, 2014). In a peeping case, the trial court did not abuse its discretion by allowing the prosecutor to ask leading questions of the victim; the questions were not leading because they did not suggest an answer.

State v. Earls, __ N.C. App. __, 758 S.E.2d 654 (June 3, 2014). (1) The trial court did not abuse its discretion by allowing the prosecution to use leading questions when examining a child sexual assault victim. The prosecutor was attempting to ask a 14-year-old victim questions about her father's sexual conduct toward her. She was very reluctant to testify. The prosecutor repeatedly urged the victim to tell the truth, regardless of what her answer would be. The prosecutor attempted to refresh her recollection with her prior statements, but she still refused to specify what the defendant did. The court concluded: "Leading questions were clearly necessary here to

develop the witness's testimony." (2) The trial court did not err by allowing the prosecutor to ask a 14-year-old child sexual assault victim to write down what the defendant did to her and then allowing the prosecutor to read the note to the jury. Although the child answered some questions, she was reluctant to verbally answer the prosecutor's question about what the defendant did to her. The prosecutor then asked the victim to write down the answer to the question. The victim wrote that the defendant penetrated her vaginally.

State v. Powell, __ N.C. App. __, 732 S.E.2d 491 (Oct. 2, 2012). The prosecutor did not impermissibly vouch for the credibility of a State's witness by asking whether any promises were made to the witness in exchange for his testimony.

State v. Streater, 197 N.C. App. 632 (July 7, 2009). The trial court erred when it allowed the State to question its witness on direct examination about whether she had told the truth.

State v. Wade, 198 N.C. App. 257 (July 21, 2009). The trial judge erred by overruling defense counsel's objection to a question posed by the prosecutor to a State's witness alluding to the fact that a superior court judge had found that there was probable cause to search the defendant. The court reiterated the rule that a trial judge's legal determination on evidence made in a hearing outside of the jury's presence should not be disclosed to the jury.

Cross-Examination, Impeachment, Opening the Door, Invited Error & Rebuttal

See also Use of Defendant's Silence at Trial, below

State v. Lewis, 365 N.C. 488 (Apr. 13, 2012). (1) The court of appeals properly found that the trial court abused its discretion by excluding, at a retrial, evidence of remarks that the lead investigator, Detective Roberts, made to a juror at the defendant's first trial. After the defendant's conviction, he filed a motion for appropriate relief (MAR) alleging that his trial had been tainted because of improper communication between Roberts and a juror, Deputy Hughes. At a hearing on the MAR, the defendant presented evidence that when his case was called for trial Hughes was in the pool of prospective jurors. While in custody awaiting trial, Hughes had twice transported the defendant to Central Prison in Raleigh. On one of those trips, the defendant told Hughes that he had failed a polygraph examination. Also, Hughes had assisted Roberts in preparing a photographic lineup for the investigation. While undergoing voir dire, Hughes acknowledged that he knew the defendant and had discussed the case with him. While he had misgivings about being a juror, Hughes said that he believed he could be impartial. Because the defendant insisted that Hughes remain on the jury, his lawyer did not exercise a peremptory challenge to remove Hughes from the panel. The evidence at the MAR hearing further showed that during a break in the trial proceedings, Roberts made the following statement to Hughes: "if we have . . . a deputy sheriff for a juror, he would do the right thing. You know he flunked a polygraph test, right?" Hughes did not report this communication to the trial court. Although the trial court denied the MAR, the court of appeals reversed, ordering a new trial. Prior to the retrial, the State filed a motion in limine seeking to suppress all evidence raised in the MAR hearing. Defense counsel opposed the motion, arguing that Roberts' earlier misconduct was directly relevant to his credibility. The trial court allowed the State's motion. The defendant was again convicted and appealed. The court of appeals held that the trial court abused its discretion

by granting the State's motion. The supreme court affirmed, holding that the trial court should have allowed defense counsel to cross-examine Roberts regarding his statements to Hughes to show Roberts' bias against the defendant and pursuant to Rule 608(b) to probe Roberts' character for untruthfulness. The court went on to reject the State's argument that the evidence was properly excluded under Rule 403, noting that defense counsel understood that the line of questioning would inform the jurors that the defendant had been convicted in a prior trial but believed the risk was worth taking. Finally, the court held that the trial court's error prejudiced the defense given Roberts' significant role in the case. (2) The court held that on retrial the defendant may cross-examine relevant witnesses about the procedures used to identify another party as a co-defendant and about whether that person later established an alibi.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). (1) In the guilt phase of a capital trial, the trial court did not err by limiting the defendant's recross-examination of law enforcement officers about whether an alleged accomplice cooperated with the police. The defendant failed to establish how the accomplice's cooperation was relevant to the defendant's guilt. Furthermore, the State's questioning did not elicit responses that required explanation or rebuttal or otherwise opened the door for the defendant's questions. (2) In the sentencing phase of a capital trial, the trial court did not abuse its discretion by overruling the defendant's objection to the State's cross-examination of a defense expert seeking to elicit a concession that other experts might disagree with his opinions regarding whether the defendant was malingering. (3) In the sentencing phase of a capital trial, the trial court did not err by failing to intervene ex mero motu when the prosecutor asked the defendant's expert witness whether he was ethically obligated to record the defendant's test results on a score sheet and about the defendant's scores in the scale for violence potential.

State v. Godbey, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In a case where the defendant was charged with assaulting a court security officer, no error occurred when the State was allowed to cross-examine the defendant about another criminal proceeding in which he was the prosecuting witness and that he referenced in his direct examination. On direct, the defendant explained that he was at the courthouse on the day in question to find out why the prior case had been dismissed. The court concluded that by testifying about the earlier case on direct, he opened the door to cross-examination. The court rejected the defendant's argument that the evidence detailing dismissal of the charge constituted a "judicial opinion" on his credibility, reasoning: "a charge may be dismissed for a variety of reasons; for example, a witness's unimpeached and credible testimony may simply not establish the elements of a criminal offense."

State v. Royster, __ N.C. App. __, 763 S.E.2d 577 (Oct. 21, 2014). In a murder case, the trial court did not err by admitting testimony concerning nine-millimeter ammunition and a gun found at the defendant's house. Evidence concerning the ammunition was relevant because it tended to link the defendant to the scene of the crime, where eleven shell casings of the same brand and caliber were found, thus allowing the jury to infer that the defendant was the perpetrator. The trial court had ruled that evidence of the gun—which was not the murder weapon—was inadmissible and the State complied with this ruling on direct. However, in order to dispel any suggestion that the defendant possessed the nine-millimeter gun used in the shooting, the defendant elicited testimony that a nine-millimeter gun found in his house, in which the nine-

millimeter ammunition was found, was not the murder weapon. The court held that the defendant could not challenge the admission of testimony that he first elicited.

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). The trial court did not abuse its discretion by allowing the State to impeach its own witness where the impeachment was not mere subterfuge to introduce otherwise inadmissible evidence. The court held that it need not decide whether the record showed that the State was genuinely surprised by the witness's reversal because the witness's testimony was "vital" to the State's case and the trial court gave a proper limiting instruction.

State v. Council, __ N.C. App. __, 753 S.E.2d 223 (Jan. 21, 2014). In a felony assault and robbery case, no plain error occurred when the trial court ruled that the defendant could not question the victim about an unrelated first-degree murder charge pending against him in another county at the time of trial. Normally it is error for a trial court to bar a defendant from cross-examining a State's witness regarding pending criminal charges, even if those charges are unrelated to those at issue. In such a situation, cross-examination can impeach the witness by showing a possible source of bias in his or her testimony, to wit, that the State may have some undue power over the witness by virtue of its ability to control future decisions related to the pending charges. However, in this case the plain error standard applied. Given that the victim's "credibility was impeached on several fronts at trial" the court found that no plain error occurred. Moreover the court noted, the victim's most important evidence—his identification of the defendant as the perpetrator—occurred before the murder allegedly committed by the victim took place. As such, the court reasoned, his identification could not have been influenced by the pending charge. For similar reasons the court rejected the defendant's claim that counsel rendered ineffective assistance by failing to object to the State's motion in limine to bar cross-examination of the victim about the charge.

State v. Black, __ N.C. App. __, 735 S.E.2d 195 (Oct. 16, 2012). (1) In this child sexual abuse case, the trial court did not err by allowing the State to ask a DSS social worker about a 2009 DSS petition alleging that the victim was neglected, sexually abused and dependent where the defendant opened the door to this testimony. Before the witness testified, the defendant had cross-examined two child witnesses about their testimony at the 2009 DSS hearing, pointing out inconsistencies. This cross-examination opened the door for the State to ask the DSS social worker about the 2009 hearing. (2) The trial court did not impermissibly allow the State to use extrinsic evidence to impeach the defendant on a collateral matter. On cross-examination, the defendant denied that she had told anyone that the victim began masturbating at an early age, given the victim a vibrator, or taught the victim how to masturbate. In rebuttal, the State called a social worker to testify that the defendant told her that the victim started masturbating at age seven or eight and that she gave the victim a vibrator. The defendant's prior statements were not used solely to impeach but as substantive evidence in the form of admissions.

State v. Graham, __ N.C. App. __, 733 S.E.2d 100 (Oct. 16, 2012). (1) In this child sexual abuse case, the trial court did not err by allowing an emergency room doctor who examined one of the children to testify to the child's credibility where the defendant elicited this evidence during his own cross-examination. (2) The trial court did not err by allowing into evidence the defendant's statement that he was investigated in Michigan for similar sexual misconduct decades prior to the

current incident. On direct examination the defendant stated that he had "never been in trouble before" and that he had no interaction with the police in connection with a criminal case. These statements opened the door for the State to inquire as to the Michigan investigation.

State v. Davis, 222 N.C. App. 562 (Aug. 21, 2012). In a child sexual assault case in which the defendant was charged with committing acts on his son, the trial court erred by allowing the State to cross-examine the defendant with questions summarizing the results of a psychological evaluation, not admitted into evidence, that described the defendant as a psychopathic deviant. The evaluation was done by Milton Kraft, apparently in connection with an investigation and custody case relating to the son. Kraft did not testify at trial and his report was not admitted into evidence. The court rejected the State's argument that the defendant opened the door to the questioning. The noted testimony occurred on redirect and thus could not open the door to cross-examination. Through cross-examination the State placed before the jury expert evidence that was not otherwise admissible.

State v. Sharpless, 221 N.C. App. 132 (June 5, 2012). The court rejected the State's argument that the defendant opened the door to admission of otherwise inadmissible hearsay evidence (a 911 call). Reversed and remanded for a new trial.

State v. Ellison, 213 N.C. App. 300 (July 19, 2011), *aff'd on other grounds*, 366 N.C. 439. In a drug trafficking case, the trial court did not abuse its discretion by allowing the State's witness to identify the substance as an opium derivative on rebuttal. Under G.S. 15A-1226, a trial judge may, in his or her discretion, permit a party to introduce additional evidence prior to the verdict and offer new evidence which could have been offered in the party's case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal.

State v. Avent, 222 N.C. App. 147 (Aug. 7, 2012). In a murder case, the trial court did not abuse its discretion by allowing the State to impeach two witnesses with their prior inconsistent statements to the police. Both witnesses testified that they were at the scene but did not see the defendant. The State then impeached them with their prior statements to the police putting the defendant at the scene, with one identifying the defendant as the shooter. Both of the witnesses' statements to the police were material and both witnesses admitted having made them. Use of the inconsistent statements did not constitute subterfuge on the State's part to present otherwise inadmissible evidence, where there was no evidence indicating that the State was not genuinely surprised by the witnesses' testimony.

State v. Banks, 210 N.C. App. 30 (Mar. 1, 2011). Because the witness admitted having made a prior statement to the police, it was not error to allow the State to impeach her with the prior inconsistent statement when she claimed not to remember what she had said and the trial court gave a limiting instruction. The court distinguished the case from one in which the witness denies having made the prior statement. Even if use of the prior inconsistent statement was error, no prejudice resulted.

State v. Carter, 210 N.C. App. 156 (Mar. 1, 2011). Any error in connection with the admission of statements elicited from a witness on cross-examination was invited. The defendant, having invited error, waived all right to appellate review, including plain error review.

State v. Wilson, 197 N.C. App. 154 (May 19, 2009). Once a witness denies having made a prior inconsistent statement, a party may not introduce the prior statement in an attempt to discredit the witness because the prior statement concerns only a collateral matter, i.e., whether the statement was ever made. Here, the defendant cross-examined a witness named Morgan regarding statements Morgan supposedly made to a person named Daughtridge. Morgan admitted making some statements to Daughtridge but denied telling Daughtridge, among other things that the victim had a gun on the day of the shooting. The defendant argued that he should have been allowed to impeach Morgan by introducing a tape recording of a statement Daughtridge gave to the police in which she said that Morgan told her that the victim had a gun on the day of the shooting. Under Rule 608(b), the defendant was limited to Morgan's answers on cross-examination.

State v. Smith, 206 N.C. App. 404 (Aug. 17, 2010). The State properly impeached the defendant with prior inconsistent statements. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with a drug dealer. Although the defendant gave statements prior to trial, he never mentioned that meeting. At trial, the State attempted to impeach him with this fact. The court noted that to qualify as inconsistent, the prior statement must have eliminated "a material circumstance presently testified to which would have been natural to mention in the prior statement." The court noted that the defendant voluntarily gave the police varying explanations for why the child stopped breathing (he threw up and then stopped breathing after falling asleep; he drowned in the tub). An alleged meeting while the child was in the tub would have been natural to include in these prior statements. Thus, the court concluded, his prior inconsistent statements were properly used for impeachment.

State v. Choudhry, 206 N.C. App. 418 (Aug. 17, 2010). Because the State did not offer a portion of a co-defendant's inadmissible hearsay statement into evidence, it did not open the door to admission of the statement. The only evidence in the State's case pertaining to the statement was an officer's testimony recounting the defendant's response after being informed that the co-defendant had made a statement to the police.

State v. Ligon, 206 N.C. App. 458 (Aug. 17, 2010). In a sexual exploitation of a minor and indecent liberties case, the court held that the defendant opened the door to admission of hearsay statements by the child victim and her babysitter.

State v. Reavis, 207 N.C. App. 218 (Sept. 21, 2010). The defendant opened the door to the State's cross-examination of a defense expert regarding prior offenses. On direct examination, the defendant's psychiatric expert reviewed the defendant's history of mental illness, including mention of his time in prison in 1996 for robbery. Defense counsel presented evidence as to defendant's time in prison, the year of the crime, the type of crime, defendant's time on probation, and a probation violation which returned him to prison. On cross-examination, the State questioned the expert about the defendant's time in prison, the defendant's previous "pleas which ultimately sent [defendant] to prison[,]" and the exact dates and times of the incidents, one of which led to the defendant's incarceration. The defendant raised no objection until the State presented police reports from the defendant's prior robbery conviction. Because the expert had

testified about the robbery, the State could inquire into his knowledge of the events which led to the conviction.

State v. Boyd, 209 N.C. App. 418 (Feb. 1, 2011). Although some portion of a videotape of the defendant's interrogation was inadmissible, the defendant opened the door to the evidence by, among other things, referencing the content of the interview in his own testimony.

State v. Gabriel, 207 N.C. App. 440 (Oct. 19, 2010). The trial court did not err by admitting a witness's out of court statements. When a State's witness gave trial testimony inconsistent with his prior statements to the police, the State cross-examined him regarding his prior statements. After the witness denied making the statements, the trial court overruled a defense objection and admitted, for purposes of impeachment by the State, a transcript of the witness's prior statements. (1) The court rejected the argument that this constituted improper use of extrinsic evidence for impeachment. The rule against using extrinsic evidence to impeach a witness on collateral matters prohibits the introduction of the substance of a prior statement to impeach a witness's denial that he or she made the prior statement because the truth or falsity of that denial was a collateral matter. However, when the witness not only denies making the prior statements but also testifies inconsistently with them, the rule does not prohibit impeaching a witness's inconsistent testimony with the substance of the prior statements. Here, the substance of the witness's prior statements properly was admitted to impeach his inconsistent testimony, not his denial. (2) The court rejected the defendant's argument that the State used the guise of impeaching its own witness as subterfuge for admitting otherwise inadmissible evidence. Distinguishing prior case law, the court noted that the trial judge gave an appropriate limiting instruction, the evidence was important to the State's case, and nothing suggested that the State expected the witness's testimony.

State v. Treadway, 208 N.C. App. 286 (Dec. 7, 2010). The defendant could not complain of the victim's hearsay statements related by an expert witness in the area of child mental health when the defendant elicited these statements on cross-examination.

Prior Acts--404(b) Evidence

General Standard

State v. Towe, 210 N.C. App. 430 (Mar. 15, 2011), *aff'd on other grounds,* 366 N.C. 56 (June 14, 2012). Remanding for other reasons, the court admonished the trial court to carefully determine the materiality of *each* purpose for which 404(b) evidence is offered. The trial court had remarked that the incidents could show motive, identity, and common plan or scheme. The court noted: "admission of this evidence was clearly problematic in at least one respect: the trial court failed to determine whether the purposes for which the evidence was offered were at issue." The court clarified that the defendant's identity is not at issue when the case hinges on whether the alleged crime occurred, but it may be at issue when the defendant contends someone else committed the alleged crime. Motive is at issue, it explained, when a defendant denies committing the crime charged.

Act Must Be Sufficiently Connected to Defendant

State v. McKnight, ___ N.C. App. ___, 767 S.E.2d 689 (Jan. 20, 2015). In this drug trafficking case in which the defendant was prosecuted for possessing and transporting drugs in his car, the trial court erred by admitting evidence of drug contraband found in a home. The defendant picked up two boxes from suspected drug trafficker Travion Stokes, put them in his car, was stopped by officers and was charged with drug crimes in connection with controlled substances found in the boxes. The defendant claimed that he did not know what was in the boxes and that he was simply doing a favor for Stokes by bringing them to a home on Shellburne Drive. The police got a warrant for the home at Shellburne Drive and found drug contraband there. The State successfully admitted this evidence over the defendant's objection at trial under Rule 404(b) to show the defendant's knowledge that the boxes he was transporting contained controlled substances. Relying on *State v. Moctezuma*, 141 N.C. App. 90 (2000), the court held this was error, finding that no evidence connected the *defendant* to the contraband found in the Shellburne Drive home.

Evidence Admissible
Defendant's Sex Acts/Related Conduct With Another

State v. Beckelheimer, 366 N.C. 127 (June 14, 2012). Reversing *State v. Beckelheimer*, 211 N.C. App. 362 (Apr. 19, 2011), the court held that the trial judge did not err by admitting 404(b) evidence. The defendant was charged with sexual offense and indecent liberties. At the time of the alleged offense the defendant was 27. The victim was the defendant's 11-year-old male cousin. The victim testified that after inviting him to the defendant's bedroom to play video games, the defendant climbed on top of the victim and pretended to be asleep. He placed his hands in the victim's pants, unzipped the victim's pants, and performed oral sex on the victim while holding him down. The victim testified that on at least two prior occasions the defendant placed his hands on the victim's genital area outside of his clothes while pretending to be asleep. At trial, witness Branson testified about sexual activity between himself and the defendant. Branson, then 24 years old, testified that when he was younger than 13 years old, the defendant, who was 4½ years older, performed various sexual acts on him. Branson and the defendant would play video games together and spend time in the defendant's bedroom. Branson described a series of incidents during which the defendant first touched Branson's genital area outside of his clothes while pretending to be asleep and then reached inside his pants to touch his genitals and performed oral sex on him. Branson also related an incident in which he performed oral sex on the defendant in an effort to stop the defendant from digital anal penetration. The court found that Branson's testimony was properly admitted to show modus operandi. The conduct was sufficiently similar to the acts at issue given the victim's ages, where they occurred, and how they were brought about. The court of appeals improperly focused on the differences between the acts rather than their similarities (among other things, the court of appeals viewed the acts with Branson as consensual and those with the victim as non-consensual and relied on the fact that the defendant was only 4½ years older than Branson but 16 years older than the victim). The court went on to conclude that given the similarities between the incidents, the remoteness in time was not so significant as to render the prior acts irrelevant and that the temporal proximity of the acts was a question of evidentiary weight. Finally, the court held that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

State v. Waddell, ___ N.C. App. ___, 767 S.E.2d 921 (Feb 3, 2015). In this felony indecent exposure case where the defendant exposed himself to a 14-year old boy, his mother and grandmother, the trial court did not err by admitting 404(b) evidence from two adult women who testified that the defendant exposed himself in public on other occasions. The court rejected the defendant's argument that the other acts were insufficiently similar to the charged conduct and only "generic features of the charge of indecent exposure," noting that the 404(b) testimony revealed that the defendant exposed himself to adult women, who were either alone or in pairs, in or in the vicinity of businesses near the courthouse in downtown Fayetteville, and each instance involved the defendant exposing his genitals with his hand on or under his penis. The court also rejected the defendant's argument that because the current charge was elevated because the exposure occurred in the presence of a child under 16 and the prior incidents involved adult women, the were not sufficiently similar, noting that the defendant acknowledged in his brief that in this case he did in fact expose himself to an adult woman as well. The court also rejected the defendant's argument that the evidence should have been excluded under the Rule 403 balancing test.

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). In this child sexual abuse case, the trial court properly admitted 404(b) evidence from several witnesses. As to two of the witnesses, the defendant argued that the incidents they described were too remote and insufficiently similar. The court concluded that although the sexual abuse of these witnesses occurred 10-20 years prior to trial, the lapses of time between the instances of sexual misconduct involving the witnesses and the victims can be explained by the defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to the witnesses and what happened to the victims: each victim was a minor female who was either the daughter or the niece of the defendant's spouse or live-in girlfriend; the abuse frequently occurred at the defendant's residence, at night, and while others slept nearby; and the defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that the defendant engaged in a pattern of conduct of sexual abuse over a long period of time and the evidence meets Rule 404(b)'s requirements of similarity and temporal proximity. Testimony by a third witness was properly admitted under Rule 404(b) where it "involved substantially similar acts by defendant against the same victim and within the same time period." The trial court also performed the proper Rule 403 balancing and gave a proper limiting instruction to the jury.

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). In a sexual exploitation of a minor case, the trial court did not commit plain error by admitting evidence that the defendant set up a webcam in a teenager's room; videotaped her dancing in her pajamas; and inappropriately touched her while they rode four-wheelers. Although the court had an issue with the third piece of evidence, it concluded that any error did not rise to the level of plain error.

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In a child sex case, the trial court did not err by allowing a child witness, A.L., to testify to sexual intercourse with the defendant. The court found the incidents sufficiently similar, noting among other things, that A.L. was assaulted in the same car as K.C. Although A.L. testified that the sex was consensual, she was fourteen years old at the time and thus could not legally consent to the sexual intercourse. The court found the seven-year gap between the incidents did not make the incident with A.L. too remote.

State v. Noble, __ N.C. App. __, 741 S.E.2d 473 (April 16, 2013). In an involuntary manslaughter case where the victim, who was under 21, died from alcohol poisoning and the defendant was alleged to have aided and abetted the victim in the possession or consumption of alcohol, the trial court did not err by admitting 404(b) evidence that the defendant provided her home as a place for underage individuals, including the victim, to possess and consume alcohol; that the defendant offered the victim and other underage persons alcohol at parties; that the defendant purchased alcohol at a grocery store while accompanied by the victim; and the defendant was cited for aiding and abetting the victim and other underage persons to possess or consume alcohol one week before the victim's death. The evidence was relevant to prove plan, knowledge, and absence of mistake or accident.

State v. Walston, __ N.C. App. __, 747 S.E.2d 720 (Aug. 20, 2013), *rev'd on other grounds*, __ N.C. __, 766 S.E.2d 312 (Dec. 19, 2014). In a child sex case, the trial court did not err by admitting 404(b) evidence of the defendant's prior sexual conduct. The court found the prior acts sufficiently similar and that the requirement of temporal proximity was met.

State v. Houseright, 220 N.C. App. 495 (May 15, 2012). In a child sex case involving a female victim, the trial court did not err by admitting 404(b) evidence in the form of testimony from another female child (E.S.) who recounted the defendant's sexual activity with her. The evidence was relevant to show plan and intent. Because the defendant's conduct with E.S. took place within the same time period as the charged offenses and with a young girl of similar age, it tends to make more probable the existence of a plan or intent to engage in sexual activity with young girls. Additionally, the defendant's plan to engage in sexual activity with young girls was relevant to the charges being tried. Finally, there was no abuse of discretion under the Rule 403 balancing test. On the issue of similarity, the court focused on the fact both E.S. and the victim were the same age and that the defendant was an adult; there was no discussion of the similarity of the actual acts.

State v. Khouri, 214 N.C. App. 389 (Aug. 16, 2011). In sexual assault case involving a child victim, no error occurred when the trial court admitted 404(b) evidence that the defendant engaged in sexual contact with another child to show common plan or scheme. The court rejected the defendant's argument that the acts were not sufficiently similar, concluding that both incidents occurred while the victims were in the care of the defendant, their grandfather; the victims were around the same age when the conduct began; for both victims, the conduct occurred more than once; and with both victims, the defendant initiated the conduct by talking to them about whether they were old enough for him to touch their private parts. The court also determined that the acts met the temporal proximity requirement.

State v. Oliver, 210 N.C. App. 609 (Apr. 5, 2011). In a case in which the defendant was charged with sexual offense, indecent liberties and crime against nature against a ten-year-old female victim, no plain error occurred when the trial court admitted evidence of the defendant's prior bad acts against two other teenaged females. The evidence was introduced to show common scheme or plan, identity, lack of mistake, motive and intent. The defendant's acts with respect to the victim and the first female were similar: the defendant had a strong personal relationship with one of their parents, used the threat of parental disbelief and disapproval to coerce submission

and silence, initiated sexual conduct after wrestling or roughhousing, digitally penetrated her vagina, and forced her to masturbate him. Only two years separated the incidents and both involved a similar escalation of sexual acts. As to the evidence of the prior bad acts with the second female — that the defendant kissed her when she was thirteen — the court held that admission of that testimony was not plain error.

State v. Register, 206 N.C. App. 629 (Sept. 7, 2010). In a child sexual abuse case involving a female victim, the trial court did not err by allowing testimony from four individuals (three females and one male) that the defendant sexually abused them when they were children. The events occurred 14, 21, and 27 years prior to the abuse at issue. Citing *State v. Jacob*, 113 N.C. App. 605 (1994), and *State v. Frazier*, 121 N.C. App. 1 (1995), the court rejected the defendant's argument that the evidence lacked sufficient temporal proximity to the events in question. The challenged testimony, showing common plan, established a strikingly similar pattern of sexually abusive behavior by the defendant over a period of 31 years in that: the defendant was married to each of the witnesses' mothers or aunt; the victims were prepubescent; the incidents occurred when the defendant's wife was at work and he was watching the children; and the abuse involved fondling, fellatio, or cunnilingus, mostly taking place in the defendant's wife's bed. Although there was a significant gap in time between the last abuse and the events in question, that gap was the result of defendant's not having access to children related to his wife and thus did not preclude admission under Rule 404(b). Finally, the court held that trial judge did not abuse his discretion by admitting this evidence under Rule 403.

Defendant's Possession of Pornography

State v. Brown, 365 N.C. 465 (Mar. 9, 2012). In a per curiam opinion, the court affirmed the decision below in *State v. Brown*, 211 N.C. App. 427 (May 3, 2011) (in a case in which the defendant was charged with sexually assaulting his minor child, the court rejected the defendant's argument that the trial court erred by admitting evidence that he possessed pornographic materials ("Family Letters," a publication purporting to contain letters regarding individuals' sexual exploits with family members); the defendant argued that the evidence was inadmissible under Rule 404(b) absent a showing that he used the materials during the crimes or showed them to the victim at or near the time of the crimes; the court concluded that the evidence was properly admitted to show motive and intent; as to motive, it stated: "evidence of a defendant's incestuous pornography collection sheds light on that defendant's desire to engage in an incestuous relationship, and that desire serves as evidence of that defendant's motive to commit the underlying act – engaging in sexual intercourse with the victim/defendant's child – constituting the offense charged"; as to intent, it concluded that the defendant's desire to engage in incestuous sexual relations may reasonably be inferred from his possession of the incestuous pornography, a fact relevant to the attempted rape charge; the court also found the evidence relevant to show a purpose of arousing or gratifying sexual desire in connection with an indecent liberties charge; finally, the court concluded that the evidence passed the Rule 403 balancing test, noting that it was admitted with a limiting instruction).

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In a child sex case, the trial court did not err by admitting adult pornography found in the defendant's home to establish motive or intent where the defendant showed the victim both child and adult pornography.

Furthermore the trial court did not abuse its discretion by admitting this evidence under Rule 403. The trial court limited the number of magazines that were admitted and gave an appropriate limiting instruction.

Defendant's Possession of Substances

State v. Hanif, __ N.C. App. __, 743 S.E.2d 690 (July 2, 2013). In a counterfeit controlled substance case where the defendant was alleged to have sold tramadol hydrochloride, representing it to be Vicodin, evidence that he also possessed Epsom salt in a baggie was properly admitted under Rule 404(b). The salt bore a sufficient similarity to crack cocaine in appearance and packaging that it caused an officer to do a field test to determine if it was cocaine. Under these circumstances, evidence that the defendant possessed the salt was probative of intent, plan, scheme, and modus operandi.

Defendant's Homicide, Assault, or Related Conduct

State v. Locklear, 363 N.C. 438 (Aug. 28. 2009). In this capital murder case, the trial court did not err in admitting evidence that the defendant committed another murder 32 months earlier. Evidence of the prior murder was admitted to show knowledge, plan, opportunity, modus operandi, and motive. The court found the two crimes sufficiently similar and rejected the defendant's argument that because the trial court declined to join the offenses for trial, they lacked the necessary similarity. The court noted that remoteness is less significant when the prior bad act is used to show intent, motive, knowledge, or lack of accident and that it generally goes to weight not admissibility.

State v. Mangum, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this case where the defendant was convicted of second-degree murder for killing her boyfriend, the trial court did not err by introducing 404(b) evidence pertaining to an incident between the defendant and another boyfriend, Walker, which occurred 14 months before the events in question. The court found strong similarities between the incidents, noting that both involved the defendant and her current boyfriend; the escalation of an argument that led to the use of force; the defendant's further escalation of the argument; and the defendant's deliberate decision to obtain a knife from the kitchen. Given these similarities, the court found that the Walker evidence was probative of the defendant's motive, intent, and plan. Next, the court found that the prior incident was not too remote.

State v. Foust, 220 N.C. App. 63 (Apr. 17, 2012). In a rape case, the trial court did not err by admitting evidence that the defendant assaulted a male visiting the victim's home and called the victim a whore and slut upon arriving at her house and finding a male visitor. Rejecting the defendant's argument that these incidents bore no similarity to the rape at issue, the court noted that the victim was present for both incidents and that her state of mind was relevant to why she did not immediately report the rape.

State v. Dean, 196 N.C. App. 180 (Apr. 7, 2009). In a murder case, evidence of an assault committed by the defendant two days before the murder was admissible to show identity when ballistics evidence showed that the same weapon was used in both the murder and the assault.

The court rejected the defendant's argument that the probative value of the prior assault was diminished because of the dissimilarity of the incidents.

State v. Paddock, 204 N.C. App. 280 (June 1, 2010). In a case in which the defendant was found guilty of felonious child abuse inflicting serious bodily injury and first-degree murder, the trial court did not abuse its discretion by admitting 404(b) evidence showing that the defendant engaged in continual and systematic abuse of her other children to show a common plan, scheme, system or design to inflict cruel suffering for the purpose of punishment, persuasion, and sadistic pleasure; motive; malice; intent; and lack of accident.

Defendant's Burglary or Related Crime

State v. Donald Adams, 220 N.C. App. 319 (May 1, 2012) (COA11-930). In the defendant's trial for breaking and entering into his ex-wife's Raleigh residence and for burning her personal property, the trial court did not abuse its discretion by admitting 404(b) evidence of an argument the defendant had with the victim and of a prior break-in at the victim's Atlanta apartment for which the defendant was not investigated, charged, or convicted. The victim testified that in June 2008, while at her apartment in Raleigh, the defendant became angry and threw furniture and books, shoved a television, and broke a lamp. A few months later, the victim's Atlanta apartment was burglarized and ransacked. Her couch was shredded, a lamp was broken, the floor was covered in an oily substance, her personal belongings were strewn about, and her laptop and car title were stolen. Police could not locate any fingerprints or DNA evidence tying the defendant to the crime; no eyewitnesses placed the defendant at the scene. In January 2009, the crime at issue occurred when the victim's apartment in Raleigh was burglarized and ransacked. Her clothes and other personal belongings were strewn about and covered in liquid, her furniture was cut, her electronics destroyed, the floor was covered in liquid, her pictures were slashed, and a fire was lit in the fireplace, in which pictures of the defendant and the victim, books, shoes, picture frames, and photo albums had been burned. The only stolen item was a set of jewelry given to her by the defendant. As with the earlier break-in, the police could not locate any forensic evidence or eyewitnesses tying the defendant to the crime. The court found it clear from the record that the evidence established "a significant connection between defendant and the three incidents." The court went on to find that the prior bad acts were properly admitted to show common plan or scheme, identity, and motive.

State v. Matthews, 218 N.C. App. 277 (Jan. 17, 2012). Evidence of a break-in by the defendant, occurring after the break-in in question, was properly admitted under Rule 404(b). DNA evidence sufficiently linked the defendant to the break-in and the evidence was probative of intent, identity, modus operandi, and common scheme or plan.

State v. Woodard, 365 N.C. App. 334 (Apr. 5, 2011). In a case involving charges arising out of a drug store break-in in which controlled substances were stolen, the trial court did not abuse its discretion by admitting 404(b) testimony from an accomplice that a few days before the break-in at issue, the same perpetrators broke into a different pharmacy but did not obtain any narcotics. The incidents were sufficiently similar, occurred only a few days apart, and involved the same accomplices.

State v. Blymyer, 205 N.C. App. 240 (July 6, 2010). In a murder and armed robbery case, the trial court did not commit plain error by admitting 404(b) evidence that the defendant broke into and stole from two houses near the time of the victim's death. The evidence was relevant to illustrate the defendant's motive for stealing from the victim—to support an addiction to prescription pain killers.

Defendant's Theft, Robbery or Related Conduct

State v. Parker, __ N.C. App. __, 756 S.E.2d 122 (April 15, 2014). In a case where the defendant was charged with embezzling from a school, trial court did not err by admitting evidence that the defendant misappropriated funds from a church to show absence of mistake, opportunity, motive, intent, and/or common plan or scheme. The record supported the trial court's conclusion of similarity and temporal proximity.

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). In a residential robbery case, the trial court did not err by admitting 404(b) evidence of the defendant's robbery at a Holiday Inn two days after the incident in question. As to similarity, the court noted that both incidents were armed robberies. Also, the perpetrators in both wore black hoodies and dark fabric covering part of their faces, immediately demanded money upon entering the buildings, used a black semi-automatic handgun by "pushing" it to the heads of the victims, restrained the victims in a similar manner, and moved the victims from place to place, searching for money.

State v. Gordon, __ N.C. App. __, 745 S.E.2d 361 (July 16, 2013). In a robbery case involving a purse snatching, a purse-snatching by the defendant 6 weeks prior was properly admitted under Rule 404(b). The court found that the incidents were sufficiently in that they both occurred in Wal-Mart parking lots and involved a purse-snatching from a female victim who was alone. Also, the requirement of temporal proximity was satisfied.

State v. Rollins, 220 N.C. App. 443 (May 15, 2012). In a second-degree murder case stemming from a vehicle accident during a high speed chase following a shoplifting incident, details of the shoplifting incident were properly admitted under Rule 404(b). Evidence is admissible under Rule 404(b) when it is part of the chain of circumstances leading to the event at issue or when necessary to provide a complete picture for the jury. Here, the shoplifting incident explained the manner of the defendant's flight.

State v. Pierce, 216 N.C. App. 377 (Oct. 18, 2011). (1) In a case in which the defendant faced homicide charges in connection with the death of an officer in a vehicular accident while that officer responded to a call regarding the defendant's flight from another officer's lawful stop of the defendant's vehicle, the trial court did not err by admitting 404(b) evidence that the defendant had been involved in a robbery. In the robbery the defendant and an accomplice fled from the police and the accomplice was shot and killed by police officers. This was admitted to show implied malice in that it showed the defendant's knowledge that flight from the police was dangerous and could result in death. (2) The trial court did not err by admitting evidence that the defendant and two other occupants of his vehicle stole several pounds of marijuana just before the defendant fled from the officer. The evidence showed the defendant's motive to flee and his "intent or implied malice."

State v. Mohamed, 205 N.C. App. 470 (July 20, 2010). In an armed robbery case, evidence of the defendant's involvement in another robbery was properly admitted under Rule 404(b). In both instances, the victims were robbed of their credit or debit cards by one or more handgun-wielding individuals with African accents, which were then used by the defendant to purchase gas at the same gas station within a very short period of time. The evidence was admissible to prove a common plan or scheme and identity. The court further held that the trial court did not abuse its discretion by failing to exclude the evidence under Rule 403.

Defendant's Motor Vehicle Violations and Related Conduct

State v. Grooms, __ N.C. App. __, 748 S.E.2d 162 (Oct. 1, 2013). In a second-degree murder case arising after the defendant drove while impaired and hit and killed two bicyclists, the trial court did not err by admitting Rule 404(b) evidence. Specifically, Thelma Shumaker, a woman defendant dated, testified regarding an incident where the defendant drove while impaired on the same road two months before the collision in question. Shumaker also testified that the defendant habitually drank alcohol, drank alcohol while driving 20 times, and drove while impaired one or two additional times. The trial court found that Shumaker's testimony regarding the specific incident was admissible to show malice. With regard to Shumaker's other testimony, the court held that even if the evidence was inadmissible, the defendant could not establish the requisite prejudice, given the other evidence.

State v. Rollins, 220 N.C. App. 443 (May 15, 2012). (1) The trial court did not err by admitting evidence that the defendant received two citations for driving without a license, including one only three days before the crash at issue. The fact that the defendant drove after having been repeatedly informed that driving without a license was unlawful was relevant to malice. The court rejected the defendant's argument that admission of the "bare fact" of the citations violated the *Wilkerson* rule (bare fact of a conviction may not be admitted under Rule 404(b)). The court noted that *Wilkerson* recognized that conviction for a traffic-related offense may "show the malice necessary to support a second-degree murder conviction," because it was "the *underlying evidence* that showed the necessary malice, not the fact that a trial court convicted the defendant." Thus, the court concluded, *Wilkerson* does not apply. (3) The trial court did not err by admitting an officer's testimony of the defendant's conduct after the crash. The evidence suggested that the defendant was continuing to try to escape regardless of the collision and in callous disregard for the condition of his passengers and as such supports a finding of malice.

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). The defendant was convicted of second-degree murder involving impaired driving. No plain error occurred when the trial judge admitted, under Rule 404(b), the defendant's prior traffic-related convictions that were more than sixteen years old. The court rejected the implication that it previously had adopted a bright line rule that it was plain error to admit traffic-related convictions that occurred more than sixteen years before the date of a second-degree vehicular murder. Of the defendant's six previous DWI convictions, four occurred in the sixteen years before the events at issue, including one within six months of the event at issue. Those convictions "constitute part of a clear and consistent pattern of criminality highly probative of his mental state." Although temporal proximity is relevant to the assessments of probative value under 404(b), remoteness generally affects the weight of the evidence, not its

admissibility, especially when the prior conduct tends to show state of mind as opposed to common scheme or plan.

Defendant's Fraudulent Conduct

State v. Barker, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this obtaining property by false pretenses case, the trial court did not err by admitting Rule 404(b) evidence. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. At trial, three other witnesses testified to similar incidents. This evidence was "properly admitted under Rule 404(b) because it demonstrated that defendant specifically targeted his victims pursuant to his plan and intent to deceive, and with knowledge and absence of mistake as to his actions."

State v. Conley, 220 N.C. App. 50 (Apr. 17, 2012). In a case involving convictions for uttering a forged instrument and attempting to obtain property by false pretenses in connection with a fraudulent check, the trial court did not err by admitting evidence of a second fraudulent check. The second check was virtually identical to the first one, except that it was drawn on a different bank. The fact that the defendant possessed the second check undermined the defendant's explanation for how he came into possession of the first check and proved intent to commit the charged crimes. Also, the evidence passed the Rule 403 balancing test.

State v. Britt, 217 N.C. App. 309 (Dec. 6, 2011). In a case in which the defendant was charged with murdering his wife, the trial court did not abuse its discretion by admitting 404(b) evidence pertaining to the defendant's submission of false information in a loan application. Evidence of the defendant's financial hardship was relevant to show a financial motive for the killing.

State v. Twitty, 212 N.C. App. 100 (May 17, 2011). In a case in which the defendant was charged with obtaining property by false pretenses by lying to church members about his situation, the trial court did not abuse its discretion by admitting 404(b) evidence of the defendant's similar conduct with regard to other churches, occurring after the incident in question. The evidence was properly admitting to show common scheme or plan and was admissible even though it occurred after the incident in question.

Defendant's Argument/Contact With/Assault on Victim

State v. Golden, __ N.C. App. __, 735 S.E.2d 425 (Dec. 4, 2012). In a case in which the defendant was convicted of perpetrating a hoax on law enforcement officers by use of a false bomb, the trial court did not err by admitting evidence of the defendant's prior acts against his estranged wife. The defendant's wife had a domestic violence protective order against him. When she saw the defendant at her house, she called 911. After arresting the defendant, officers found weapons on his person and the device and other weapons in his vehicle. At trial his wife testified to her prior interactions with the defendant, including those where he threatened her. The evidence of the prior incidents showed the defendant's intent to perpetrate a hoax by use of a false bomb in that they showed his ongoing objective of scaring his wife with suggestions that he would physically harm her and others around her. Also, the prior acts were part of the chain of

events leading up to the crime and thus completed the story of the crime for the jury. The court rejected the defendant's argument that the prior acts were not sufficiently similar to the act charged on grounds that similarity was not pertinent to the 404(b) purpose for which the evidence was admitted. The court also concluded that the trial court did not abuse its discretion by admitting the evidence under Rule 403.

State v. Barnett, __ N.C. App. __, 734 S.E.2d 130 (Nov. 20, 2012). In a second-degree rape case, the trial court properly admitted 404(b) evidence of the defendant's prior sexual conduct with the victim to show common scheme. The conduct leading to the charges occurred in 1985 when the victim was sixteen years old. After ingesting alcohol and other substances, the victim awoke to find the defendant, her uncle, having sex with her. At trial the victim testified that in 1977, the defendant touched her breasts several times; in 1978, he touched her breasts, put her hand on his penis, and made her rub his penis up and down; and in 1980 he twice masturbated in front of her. The court found the prior acts sufficient similar to the rape at issue, noting that they show "a progression from inappropriate touching in 1977 to sexual intercourse in 1985." Also, the court noted, all of the incidents occurred where the defendant was living at the time. The incidents were not too remote. Although there was a five year gap between the last act and the rape, the defendant did not have access to the victim for three years. The court also found that the evidence was admissible under Rule 403.

State v. Donald Adams, 220 N.C. App. 319 (May 1, 2012) (COA11-930). In the defendant's trial for breaking and entering into his ex-wife's Raleigh residence and for burning her personal property, the trial court did not abuse its discretion by admitting 404(b) evidence of an argument the defendant had with the victim and of a prior break-in at the victim's Atlanta apartment for which the defendant was not investigated, charged, or convicted. The victim testified that in June 2008, while at her apartment in Raleigh, the defendant became angry and threw furniture and books, shoved a television, and broke a lamp. A few months later, the victim's Atlanta apartment was burglarized and ransacked. Her couch was shredded, a lamp was broken, the floor was covered in an oily substance, her personal belongings were strewn about, and her laptop and car title were stolen. Police could not locate any fingerprints or DNA evidence tying the defendant to the crime; no eyewitnesses placed the defendant at the scene. In January 2009, the crime at issue occurred when the victim's apartment in Raleigh was burglarized and ransacked. Her clothes and other personal belongings were strewn about and covered in liquid, her furniture was cut, her electronics destroyed, the floor was covered in liquid, her pictures were slashed, and a fire was lit in the fireplace, in which pictures of the defendant and the victim, books, shoes, picture frames, and photo albums had been burned. The only stolen item was a set of jewelry given to her by the defendant. As with the earlier break-in, the police could not locate any forensic evidence or eyewitnesses tying the defendant to the crime. The court found it clear from the record that the evidence established "a significant connection between defendant and the three incidents." The court went on to find that the prior bad acts were properly admitted to show common plan or scheme, identity, and motive.

State v. Foust, 220 N.C. App. 63 (Apr. 17, 2012). In a rape case, the trial court did not err by admitting evidence that the defendant assaulted a male visiting the victim's home and called the victim a whore and slut upon arriving at her house and finding a male visitor. Rejecting the defendant's argument that these incidents bore no similarity to the rape at issue, the court noted

that the victim was present for both incidents and that her state of mind was relevant to why she did not immediately report the rape.

State v. Flaugher, 214 N.C. App. 370 (Aug. 16, 2011). In a maiming case in which the defendant was accused of attacking the victim with a pickaxe and almost severing his finger, no plain error occurred when the trial judge admitted 404(b) evidence that the defendant had previously attacked the victim with a fork and stabbed his finger. The 404(b) evidence was admitted to show absence of accident or mistake. Although the defendant argued that she never intended to purposefully strike the victim's finger with the pickaxe, the defendant knew from the fork incident that she could end up stabbing the victim's hand or fingers if she swung at him with a weapon and he attempted to defend himself. The evidence was thus relevant to whether the defendant intended to disable the victim or whether she accidentally struck his finger and did not intend to maim it. The court also rejected the defendant's argument that the 404(b) evidence was inadmissible because the State had previously dismissed charges arising from the fork incident, distinguishing cases in which the defendants had been tried and acquitted of the 404(b) conduct.

State v. Madures, 197 N.C. App. 682 (July 7, 2009). In a trial for assault on a law enforcement officer and resisting and obstructing, the trial court properly admitted evidence relating to the defendant's earlier domestic disturbance arrest. The same officer involved in the present offenses handled the earlier arrest, and at the time had told the defendant's mother to call him if there were additional problems. It was the defendant's mother's call that brought the officers to the residence on the date in question. Thus, the fact of the earlier arrest helped to provide a complete picture of the events for the jury. The court also held that the trial court did not abuse its discretion in admitting the defendant's statement to the police after his arrest while he was being transported to the jail. The court found that the defendant's argumentative statements showed both his intent to assault or resist officers as well as absence of mistake.

State v. Graham, 200 N.C. App. 204 (Oct. 6, 2009). The trial court properly admitted evidence of the defendant's prior assault on a murder victim when the evidence showed that the defendant wanted to prevent the victim from testifying against him in the assault trial; the prior bad act showed motive, malice, hatred, ill-will and intent. There was no abuse of discretion in the 403 balancing with respect to this highly probative evidence.

Victim's Violent Act or History

State v. Jacobs, 363 N.C. 815 (Mar. 12, 2010). In a murder and attempted armed robbery trial, the trial court erred when it excluded the defendant's proposed testimony that he knew of certain violent acts by the victim and that the victim had spent time in prison. This evidence was relevant to the defendant's claim of self-defense to the murder charge and to his contention that he did not form the requisite intent for attempted armed robbery because "there is a greater disincentive to rob someone who has been to prison or committed violent acts." The evidence was admissible under Rule 404(b) because it related to the defendant's state of mind. The court also held that certified copies of the victim's convictions were admissible under Rule 404(b) because they served the proper purpose of corroborating the defendant's testimony that the victim was a violent person who had been incarcerated. *State v. Wilkerson*, 148 N.C. App. 310, *rev'd per curiam*, 356 N.C. 418 (2002) (bare fact of the defendant's conviction, even if offered

for a proper Rule 404(b) purpose, must be excluded under Rule 403), did not require exclusion of the certified copies of the victim's convictions. Unlike evidence of the defendant's conviction, evidence of certified copies of the victim's convictions does not encourage the jury to acquit or convict on an improper basis.

Defendant's Acts Occurring After Offense at Issue

State v. Mobley, 200 N.C. App. 570 (Nov. 3, 2009). The trial court did not abuse its discretion by admitting, to show identification, intent, and modus operandi, a bad act that occurred 2 ½ years after the crime at issue. Bad acts that occur subsequent to the offense being tried are admissible under Rule 404(b). When the evidence is admitted to show intent and modus operandi, remoteness becomes less important.

State v. Hargrave, 198 N.C. App. 579 (Aug, 4, 2009). Evidence of that the defendant drove with a revoked license *after* his arrest for several crimes, including driving while license revoked, which lead to the prosecution at issue, was admissible under Rule 404(b) to show that he knowingly drove with a revoked license.

Evidence Inadmissible

State v. Hembree, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). In this capital murder case, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to the murder of another victim, Saldana. The court began by concluding that the trial court properly admitted evidence of the Saldana murder under Rule 404(b) to show common plan or design. However, the trial court abused its discretion under Rule 403 by admitting "so much" 404(b) evidence given the differences between the two deaths and the lack of connection between them, the uncertainty regarding the cause of the victim's death, and the nature and extent of the 404(b) evidence (among other things, of the 8 days used by the State to present its case, 7 were spent on the 404(b) evidence; also, the jury viewed over a dozen photographs of Saldana's burned remains). The court stated: "Our review has uncovered no North Carolina case in which it is clear that the State relied so extensively, both in its case-in-chief and in rebuttal, on Rule 404(b) evidence about a victim for whose murder the accused was not currently being tried."

State v. Davis, 222 N.C. App. 562 (Aug. 21, 2012). In a child sexual assault case in which the defendant was charged with assaulting his son, the trial court erred by admitting under Rule 404(b) evidence of the defendant's writings in a composition book about forcible, non-consensual anal sex with an adult female acquaintance. The defendant contended that the composition book was fiction; the State argued that the described events were real. The trial court admitted the composition book on the grounds that it showed "a pattern." On appeal the court assumed the trial court meant that the book showed a common scheme or plan; the court noted that the trial court must have assumed that the entry described an actual event. The court found that the events described in the book were not sufficiently similar to the case at bar, finding the only overlapping fact to be anal intercourse. The court also noted that the actual force described in the book was "not analogous" to the constructive force that applies with sexual conduct between a parent and child. It added that aside from anal intercourse, "the acts bore no

resemblance to each other, involving different genders, radically different ages, different relationships between the parties, and different types of force." It concluded:

> [T]he charged crime involves defendant's very young son, while the 404(b) evidence involved a grown woman friend. There was no evidence that the locations of the crimes were similar. Further, there was no similarity in how the crime came to occur other than that it involved anal intercourse. Even though the State argues that both crimes involved force, the State has not shown that defendant's writings about physically forcible, non-consensual anal sex with an adult woman friend give rise to any inference that defendant would be desirous of or obtain sexual gratification from anal intercourse with his four-year-old or six-year-old son. The 404(b) evidence simply does not "share 'some unusual facts' that go to a purpose other than propensity . . . ."

State v. Flood, 221 N.C. App. 247 (June 19, 2012). In a case involving a drug-related murder that occurred in 2007, the trial court committed reversible error by admitting evidence that the defendant was involved in a 1994 homicide in which he broke into an apartment, found his girlfriend in bed with the victim, and shot the victim. The facts of the 1994 shooting were not admissible to show intent or knowledge. The State argued that the 404(b) evidence showed that the defendant knew that the weapon was lethal and intent to kill. Because the victim in this case was killed by a gunshot to the back of his head, the person who committed that act clearly knew it was lethal and intended to kill. The court found that whatever slight relevance the 1994 shooting might have on these issues was outweighed by undue prejudice. Regarding the 404(b) purpose of identity, the court found that the acts were not sufficiently similar. The court discounted similarities noted by the trial court, such as the fact that both crime occurred with a gun.

State v. Laurean, 220 N.C. App. 342 (May 1, 2012). In a murder case, the trial court did not err by excluding defense evidence of the victims' military disciplinary infractions. Both the defendant and the victim were in the military. After several military infractions, the victim was referred to the defendant for counseling. The victim later alleged that the defendant raped her. She was subsequently killed. At trial, the defendant sought to question military personnel about the victim's disciplinary infractions which led to the request that he counsel her. The defendant argued that this evidence established the victim's motive for making a false rape allegation against him. The trial court excluded this evidence. The court of appeals concluded that the question of whether the victim's accusation of rape was grounded in fact or falsehood was not before the jury. Moreover, her specific instances of conduct unrelated to the defendant shed no light upon the crimes charged. Therefore, it concluded, the specific instances of conduct resulting in minor disciplinary infractions were not relevant and were properly excluded.

State v. Glenn, 220 N.C. App. 23 (Apr. 17, 2012). In a kidnapping, assault and indecent exposure case, the trial court erred by admitting testimony from a witness about a sexual encounter with the defendant to show identity, modus operandi, intent, plan, scheme, system, or design. The encounter occurred nine years earlier. The witness testified that the partially clothed defendant approached her on foot while she was walking. He exposed his penis to her and grabbed at her breasts and buttocks. Although he followed her up a driveway, he did not try to restrain her. In the case at hand, however, the victim got in a man's vehicle and discovered that he was partially

clothed. The man called her a bitch and grabbed her hair and shirt as she attempted to exit the vehicle, but there was no evidence of a sexual touching. The court concluded: "Given the differences in the two instances, as well as the remoteness in time of the incident . . . admission of the evidence was error.

State v. Gray, 210 N.C. App. 493 (Apr. 5, 2011). In a case in which the defendant was charged with committing a sexual offense and indecent liberties against a five-year-old female victim, the trial court committed prejudicial error by admitting evidence that the defendant had anal intercourse with a four-year-old male 18 years earlier. The evidence was admitted to show identity, intent, and common scheme or plan. Noting confusion in the N.C. cases, the court concluded that temporal proximity continues to be relevant to the issue of admissibility of 404(b) evidence; the court rejected the notion that temporal proximity goes only to weight of the evidence. Turning to admission of the evidence for purposes of identity, the court found the 18-year gap between the incidents significant. It rejected the State's argument that the time period should be tolled during the defendant's incarceration on grounds that the State failed to offer competent evidence as to the length of his incarceration. Although the incidents both involved very young children and occurred at a caretaker's house where the defendant was a frequent visitor, the nature of the alleged assaults was very different. In light of these differences and "the great length of time" between them, the State failed to show sufficient unusual facts present in both or particularly similar acts which would indicate that the same person committed both crimes. The court went on to reach similar conclusions as to admissibility for the purposes of intent and prior scheme or plan.

State v. Davis, 208 N.C. App. 26 (Nov. 16, 2010). The trial court committed prejudicial error by admitting, under rule 404(b), the defendant's prior impaired driving convictions to show malice for purposes of a second-degree murder charge. Three of the defendant's four prior impaired driving convictions occurred eighteen or nineteen years prior to the accident at issue and one occurred two years prior. Given the sixteen-year gap between the older convictions and the more recent one, the court held that there was not a clear and consistent pattern of criminality and that the older convictions were too remote to be admissible under rule 404(b).

State v. Ward, 199 N.C. App. 1 (Aug. 18, 2009). The trial court erred in admitting 404(b) evidence obtained as a result of an earlier arrest when the earlier charges were dismissed for insufficient evidence and the probative value of the evidence depended on the defendant's having committed those offenses. The court distinguished cases where several items are seized from a defendant at one time but the defendant is tried separately for possession of the various items; in this context, evidence may be admissible even if there has been an earlier acquittal, if the evidence forms an integral and natural part of an account of the present crime.

State v. Webb, 197 N.C. App. 619 (June 16, 2009). In a child sexual abuse case, 404(b) evidence that the defendant abused two witnesses 21 and 31 years ago was improperly admitted. In light the fact that the prior incidents were decades old, more was required in terms of similarity than that the victims were young girls in the defendant's care, the incidents happened in the defendant's home, and the defendant told the victims not to report his behavior.

Miscellaneous 404(b) Cases

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). The court rejected the defendant's 404(b) challenge to evidence elicited by the State that a witness corresponded by mail with the defendant when he was in prison. The fact of "recent incarceration, in and of itself" does not constitute evidence of other crimes, wrongs, or acts within the meaning of the rule.

State v. Barrett, __ N.C. App. __, 746 S.E.2d 413 (Aug. 6, 2013). In a child sexual assault case, even if an officer's testimony that the police department had a record of defendant's date of birth "[f]rom prior arrests" could be considered 404(b) evidence, it was admissible to show a fact other than the defendant's character: the defendant's age, an element of the charged offense. Furthermore, there was no reasonable possibility that any error with respect to this testimony could have affected the verdict.

Rule 609 Impeachment with Conviction of Crime

State v. Gayles, __ N.C. App. __, 756 S.E.2d 46 (April 1, 2014). (1) Under Rule 609, a party is not required to establish a prior conviction before cross-examining a witness about the offense. (2) Although cross-examination under Rule 609 is generally limited to the name of the crime, the time and place of the conviction, and the punishment imposed, broader cross-examination may be allowed when the defendant opens the door. Here that occurred when the defendant tried to minimize his criminal record. (3) The trial court did not err by allowing the State to impeach the defendant with prior convictions when the defendant had stipulated that he was a convicted felon for purposes of a felon in possession of a firearm charge. The court declined to apply *Old Chief v. United States*, 519 U.S. 172 (1997), to this case where the defendant testified at trial and was subject to impeachment under Rule 609.

State v. Ellerbee, 218 N.C. App. 596 (Feb. 7, 2012). The trial court erred by allowing the State to impeach a defense witness with a prior conviction that occurred outside of the ten-year "look-back" for Rule 609 when the trial court made no findings as to admissibility. However, no prejudice resulted.

State v. Lynch, 217 N.C. App. 455 (Dec. 20, 2011). Over a dissent, the court held that the trial court committed prejudicial error by denying defense counsel's request to allow into evidence an exhibit showing the victim's prior convictions for twelve felonies and two misdemeanors, offered under Rule 609. The court noted that Rule 609 is mandatory, leaving no room for discretion by the trial judge.

Fifth Amendment (Self-Incrimination) Issues

Kansas v. Cheever, 571 U.S. __, 134 S. Ct . 596 (Dec. 11, 2013). The Fifth Amendment does not prohibit the government from introducing evidence from a court-ordered mental evaluation of a criminal defendant to rebut that defendant's presentation of expert testimony in support of a defense of voluntary intoxication. It explained:

> [We hold] that where a defense expert who has examined the defendant testifies that the defendant lacked the requisite mental state to commit an offense, the prosecution may present psychiatric evidence in rebuttal. Any other rule would undermine the adversarial process, allowing a defendant to provide the jury, through an expert operating as proxy, with a one-sided and potentially inaccurate view of his mental state at the time of the alleged crime.

Slip Op. at 5-6 (citation omitted). The Court went on to note that "admission of this rebuttal testimony harmonizes with the principle that when a defendant chooses to testify in a criminal case, the Fifth Amendment does not allow him to refuse to answer related questions on cross-examination." *Id.* at 6.

Salinas v. Texas, 570 U.S. __, 133 S. Ct. 2174 (June 17, 2013). Use at trial of the defendant's silence during a non-custodial interview did not violate the Fifth Amendment. Without being placed in custody or receiving *Miranda* warnings, the defendant voluntarily answered an officer's questions about a murder. But when asked whether his shotgun would match shells recovered at the murder scene, the defendant declined to answer. Instead, he looked at the floor, shuffled his feet, bit his bottom lip, clenched his hands in his lap, and began "to tighten up." After a few moments, the officer asked additional questions, which the defendant answered. The defendant was charged with murder and at trial prosecutors argued that his reaction to the officer's question suggested that he was guilty. The defendant was convicted and on appeal asserted that this argument violated the Fifth Amendment. The Court took the case to resolve a lower court split over whether the prosecution may use a defendant's assertion of the privilege against self-incrimination during a non-custodial police interview as part of its case in chief. In a 5-to-4 decision, the Court held that the defendant's Fifth Amendment claim failed. Justice Alito, joined by the Chief Justice and Justice Kennedy found it unnecessary to reach the primary issue, concluding instead that the defendant's claim failed because he did not expressly invoke the privilege in response to the officer's question and no exception applied to excuse his failure to invoke the privilege. Justice Thomas filed an opinion concurring in the judgment, to which Justice Scalia joined. In Thomas's view the defendant's claim would fail even if he had invoked the privilege because the prosecutor's comments regarding his pre-custodial silence did not compel him to give self-incriminating testimony.

State v. Moore, 366 N.C. 100 (June 14, 2012). Affirming an unpublished court of appeals' decision, the court held that no plain error occurred when a State's witness testified that the defendant exercised his right to remain silent. On direct examination an officer testified that after he read the defendant his *Miranda* rights, the defendant "refused to talk about the case." Because this testimony referred to the defendant's exercise of his right to silence, its admission was error. The court rejected the State's argument that no error occurred because the comments were neither made by the prosecutor nor the result of a question by the prosecutor designed to elicit a comment on the defendant's exercise of his right to silence. It stated: "An improper adverse inference of guilt from a defendant's exercise of his right to remain silent cannot be made, regardless of who comments on it." The court went on to conclude that the error did not rise to the level of plain error. Finally, the court rejected the defendant's argument that other testimony by the officer referred to the defendant's pre-arrest silence.

State v. Young, __ N.C. App. __, 756 S.E.2d 768 (April 1, 2014), *rev'd on other grounds,* ___ N.C. ___ (Aug. 21, 2015). The trial court did not err by instructing the jury that "[e]xcept as it relates to the defendant's truthfulness, you may not consider the defendant's refusal to answer police questions as evidence of guilt in this case" but that "this Fifth Amendment protection applies only to police questioning. It does not apply to questions asked by civilians, including friends and family of the defendant and friends and family of the victim." The court rejected the defendant's argument that the trial court committed plain error by instructing the jury that it could consider his failure to speak with friends and family as substantive evidence of guilt, noting that the Fifth Amendment's protection against self-incrimination does not extend to questions asked by civilians.

State v. Goins, __ N.C. App. __, 754 S.E.2d 195 (Feb. 18, 2014). By commenting in closing statements that the defendant failed to produce witnesses or evidence to contradict the State's evidence, the prosecutor did not impermissibly comment on the defendant's right to remain silent.

State v. Barbour, __ N.C. App. __, 748 S.E.2d 59 (Sept. 17, 2013). The State did not impermissibly present evidence of the defendant's post-*Miranda* silence. After being advised of his *Miranda* rights, the defendant did not remain silent but rather made statements to the police. Thus, no error occurred when an officer indicated that after his arrest the defendant never asked to speak with the officer or anyone else in the officer's office.

State v. Richardson, __ N.C. App. __, 741 S.E.2d 434 (April 2, 2013). The trial court committed plain error by allowing the State to cross-examine the defendant about his failure to make a post-arrest statement to officers and to comment in closing argument on the defendant's decision to refrain from giving such a statement. The following factors, none of which is determinative, must be considered in ascertaining whether a prosecutorial comment concerning a defendant's post-arrest silence constitutes plain error: whether the prosecutor directly elicited the improper testimony or explicitly made an improper comment; whether there was substantial evidence of the defendant's guilt; whether the defendant's credibility was successfully attacked in other ways; and the extent to which the prosecutor emphasized or capitalized on the improper testimony. After concluding that the State improperly cross-examined the defendant about his post-arrest silence and commented on that silence in closing argument, the court applied the factors noted above and concluded that the trial court's failure to preclude these comments constituted plain error.

State v. Harrison, 218 N.C. App. 546 (Feb. 7, 2012). The trial court committed error by allowing the State to use the defendant's pre- and post-arrest silence as substantive evidence of guilt. When explaining the circumstances of the defendant's initial interview, an officer testifying for the State stated: "He provided me – he denied any involvement, wished to give me no statement, written or verbal." Also, when the State asked the officer whether the defendant had made any statements after arrest, the officer responded, "After he was mirandized [sic], he waived his rights and provided no further verbal or written statements." The court noted that a defendant's pre- arrest silence and post-arrest, pre-Miranda warnings silence may not be used as substantive evidence of guilt, but may be used to impeach the defendant by suggesting that his or her prior silence is inconsistent with present statements at trial. A defendant's post-arrest, post-Miranda

warnings silence, however, may not be used for any purpose. Here, the defendant testified after the officer, so the State could not use the officer's statement for impeachment. Also, the officer's testimony was admitted as substantive evidence during the State's case in chief. However, the errors did not rise to the level of plain error.

State v. Adu, 195 N.C. App. 269 (Feb. 3, 2009). The trial court erred in allowing the state to question the defendant about his failure to make a statement to law enforcement and to reference the defendant's silence in closing argument.

State v. Mendoza, 206 N.C. App. 391 (Aug. 17, 2010). The trial court erred by allowing the State to introduce evidence, during its case in chief, of the defendant's pre-arrest and post-arrest, pre-*Miranda* warnings silence. The only permissible purpose for such evidence is impeachment; since the defendant had not yet testified when the State presented the evidence, the testimony could not have been used for that purpose. Also, the State's use of the defendant's post-arrest, post-*Miranda* warnings silence was forbidden for any purpose. However, the court concluded that there was no plain error given the substantial evidence pointing to guilt.

State v. Smith, 206 N.C. App. 404 (Aug. 17, 2010). The trial court did not improperly allow use of the defendant's post-arrest silence when it allowed the State to impeach him with his failure to provide information about an alleged meeting with a drug dealer. In this murder case, the defendant claimed that the child victim drowned in a bathtub while the defendant met with the dealer. The defendant's pre-trial statements to the police never mentioned the meeting. The court held that because the defendant waived his rights and made pre-trial statements to the police, the case did not involve the use of post-arrest silence for impeachment. Rather, it involved only the evidentiary issue of impeachment with a prior inconsistent statement.

Forfeiture Exception

State v. James, 215 N.C. App. 588 (Sept. 20, 2011). Under the circumstances, no error occurred when the trial court allowed an officer to testify that a substance was crack cocaine based on visual examination and on the results of a narcotics field test kit (NIK). After officers observed the substance, the defendant ate it, in an attempt to conceal evidence. As to the visual identification, the court noted that "[u]nder normal circumstances" the testimony would be inadmissible under *State v. Ward*, 364 N.C. 133 (2010) (testimony identifying a controlled substance must be based on a scientifically valid chemical analysis and not mere visual inspection). It also noted that testimony regarding the NIK typically would be inadmissible because the State did not sufficiently establish the reliability of that test. However, the court concluded that "[u]nder the unique circumstances of this case . . . Defendant forfeited his right to challenge the admission of this otherwise inadmissible testimony." It reasoned that "[j]ust as a defendant can lose the benefit of a constitutional right established for his or her benefit, we hold a defendant can lose the benefit of a statutory or common law legal principle established for his or her benefit in the event that he or she engages in conduct of a sufficiently egregious nature to justify a forfeiture determination." It concluded: "[H]aving prevented the State from conducting additional chemical analysis by eating the crack cocaine, Defendant has little grounds to complain about the trial court's decision to admit the police officers' testimony identifying the substance as crack cocaine based on visual inspection and the NIK test results."

Hearsay

Non-Hearsay

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The defendant's own statements were admissible under the hearsay rule. The statements were recorded by a police officer while transporting the defendant from Georgia to North Carolina. The court noted that "[a] defendant's statement that is not purported to be a written confession is admissible under the exception to the hearsay rule for statements by a party-opponent and does not require the defendant's acknowledgement or adoption." Slip Op. at 8.

State v. Phillips, 365 N.C. 103 (June 16, 2011). Noting that it has not had occasion to consider whether statements by law enforcement officers acting as agents of the government and concerning a matter within the scope of their agency or employment constitute admissions of a party opponent under Rule 801(d) for the purpose of a criminal proceeding, the court declined to address the issue because even if error occurred, it did not constitute plain error.

State v. Castaneda, 215 N.C. App. 144 (Aug. 16, 2011). The trial court did not err by denying the defendant's request to redact certain statements from a transcript of the defendant's interview with the police. In the statements at issue, an officer said that witnesses saw the defendant pick up a knife and stab the victim. The statements were not hearsay because they were not admitted for the truth of the matter asserted but rather to provide context for the defendants' answers and to explain the detectives' interviewing techniques. The court also noted that the trial court gave an appropriate limiting instruction.

State v. Stanley, 213 N.C. App. 545 (July 19, 2011). When statements were offered to explain an officer's subsequent action, they were not offered for the truth of the matter asserted and thus were not hearsay.

State v. Banks, 210 N.C. App. 30 (Mar. 1, 2011). An officer's testimony as to a witness' response when asked if she knew what had happened to the murder weapon was not hearsay. The statement was not offered for the truth of the matter asserted but rather to explain what actions the officer took next (contacting his supervisor and locating the gun). Although other hearsay evidence was erroneously admitted, no prejudice resulted.

State v. Elkins, 210 N.C. App. 110 (Mar. 1, 2011). Statements offered to explain a witness's subsequent actions were not offered for the truth of the matter asserted and not hearsay.

State v. Johnson, 209 N.C. App. 682 (Mar. 1, 2011). A witness's written statement, admitted to corroborate his trial testimony, was not hearsay. The statement was generally consistent with the witness's trial testimony. Any points of difference were slight, only affecting credibility, or were permissible because they added new or additional information that strengthened and added credibility to the witness's testimony.

State v. Treadway, 208 N.C. App. 286 (Dec. 7, 2010). (1) In a child sexual assault case, the trial court did not commit plain error by allowing a witness to testify about her step-granddaughter's

statements. The evidence was properly admitted for the non-hearsay purpose of explaining the witness's subsequent conduct of relaying the information to the victim's parents so that medical treatment could be obtained. Also, the victim's statements corroborated her trial testimony. (2) The trial court did not commit plain error by allowing an expert in clinical social work to relate the victim's statements to her when the statements corroborated the victim's trial testimony.

Hearsay Exceptions

Rule 803(1) – Present Sense Impression

State v. Capers, 208 N.C. App. 605 (Dec. 21, 2010). A victim's statement to his mother, made in the emergency room approximately 50 minutes after a shooting and identifying the defendant as the shooter, was a present sense impression under Rule 803(1). The time period between the shooting and the statement was sufficiently brief. The court noted that the focus of events during the gap in time was on saving the victim's life, thereby reducing the likelihood of deliberate or conscious misrepresentation.

Rule 803(2) – Excited Utterance

State v. Young, __ N.C. App. __, 756 S.E.2d 768 (April 1, 2014), *rev'd on other grounds*, ___ N.C. ___ (Aug. 21, 2015). In this murder case where the defendant was charged with killing his wife, statements by the couple's child to daycare workers made six days after her mother was killed were admissible as excited utterances. The child's daycare teacher testified that the child asked her for "the mommy doll." When the teacher gave the child a bucket of dolls, the child picked two dolls, one female with long hair and one with short hair, and hit them together. The teacher testified that she saw the child strike a "mommy doll" against another doll and a dollhouse chair while saying, "[M]ommy has boo-boos all over" and "[M]ommy's getting a spanking for biting. . . . [M]ommy has boo-boos all over, mommy has red stuff all over."

State v. Carter, 216 N.C. App. 453 (Nov. 1, 2011), *rev. on other grounds*, 366 N.C. 496 (Apr. 12, 2013). (1) In a child sexual assault case, the trial court did not err by declining to admit defense-proffered evidence offered under the hearsay exception for excited utterances. The evidence was the victim's statement to a social worker made during "play therapy" sessions. Because the record contained no description of the victim's behavior or mental state, the court could not discern whether she was excited, startled, or under the stress of excitement when the statement was made.

Rule 803(3) -- Then-Existing Mental, Emotional or Physical condition

State v. Mills, __ N.C. App. __, 741 S.E.2d 427 (Mar. 5, 2013). The trial court did not err by admitting a murder victim's hearsay statement to her sister-in-law under the Rule 803(3) then existing mental, emotional or physical condition hearsay exception. The murder victim told her sister-in-law that the defendant was harassing her and had threatened her.

State v. Hernandez, 202 N.C. App. 359 (Feb. 2, 2010). A murder victim's statements to her mother were properly admitted under the Rule 803(3) exception for then-existing mental, emotional or physical condition. The victim told her mother that she wanted to leave the

defendant because he was wanted in another jurisdiction for attempting to harm the mother of his child; the victim also told her mother that she previously had tried to leave the defendant but that he had stalked and physically attacked her. The statements indicate difficulties in the relationship prior to the murder and are admissible to show the victim's state of mind.

Rule 803(4) – Statements for Medical Diagnosis and Treatment

State v. Lowery, 219 N.C. App. 151 (Feb. 21, 2012). The trial court did not err by excluding the defendant's statement to a doctor, offered under Rule 803(4) (hearsay exception for medical diagnosis and treatment). The defendant told the doctor that he only confessed to the murder because an officer told him he would receive the death penalty if he did not do so. Relying on appellate counsel's admission that the defendant saw the doctor with the hope that any mental illness he may have had could be diagnosed and used as a defense at trial, the court concluded, "[e]ven though defendant may have wanted continued treatment if he did, in fact, have a mental illness, his primary objective was to present the diagnosis as a defense." The court also noted that the defendant did not make any argument as to how his statement was relevant to medical diagnosis or treatment.

State v. Carter, 216 N.C. App. 453 (Nov. 1, 2011), *rev. on other grounds* 366 N.C. 496 (Apr. 12, 2013). (1) In a child sexual assault case, the trial court did not err by declining to admit defense-proffered evidence offered under the hearsay exception for statements made purposes of medical diagnosis and treatment. The evidence was the victim's statement to a social worker made during "play therapy" sessions. Nothing indicated that the victim understood that the sessions were for the purpose of providing medical diagnosis or treatment. They began more than two weeks after an initial examination and were conducted at a battered women's shelter in a "very colorful" room filled with "board games, art supplies, Play-Doh, dolls, blocks, cars, [and] all [other types] of things for . . . children to engage in" rather than in a medical environment. Although the social worker emphasized that the victim should tell the truth, there was no evidence that she told her that the sessions served a medical purpose or that the victim understood that her statements might be used for such a purpose. (2) The trial court did not err by declining to admit the same statement as an excited utterance. Because the record contained no description of the victim's behavior or mental state, the court could not discern whether she was excited, startled, or under the stress of excitement when the statement was made.

Rule 803(5) -- Recorded Recollection

State v. Wilson, 197 N.C. App. 154 (May 19, 2009). An audio recording can be admitted under the Rule 803(5) exception for recorded recollection. However, the statement at issue was not admissible under this exception because the witness did not recall making the statement and when asked whether she fabricated it, the witness testified that because of her mental state she was "liable to say anything."

Rule 803(6) – Records of Regularly Conducted Activity

State v. Jackson, __ N.C. App. __, 748 S.E.2d 50 (Sept. 17, 2013). The trial court properly admitted data obtained from an electronic surveillance device worn by the defendant and placing

him at the scene. The specific evidence included an exhibit showing an event log compiled from data retrieved from the defendant's device and a video file plotting the defendant's tracking data. The court began by holding that the tracking data was a data compilation and that the video file was merely an extraction of that data produced for trial. Thus, it concluded, the video file was properly admitted as a business record if the tracking data was recorded in the regular course of business near the time of the incident and a proper foundation was laid. The defendant did not dispute that the device's data was recorded in the regular course of business near the time of the incident. Rather, he asserted that the State failed to establish a proper foundation to verify the authenticity and trustworthiness of the data. The court disagreed noting that the officer-witness established his familiarity with the GPS tracking system by testifying about his experience and training in electronic monitoring, concerning how the device transmits data to a secured server where the data was stored and routinely accessed in the normal course of business, and how, in this case, he accessed the tracking data for the defendant's device and produced evidence introduced at trial.

Joines v. Moffitt, __ N.C. App. __, 739 S.E.2d 177 (Mar. 19, 2013). In this civil case the court held that an officer's accident report, prepared near the time of the accident, using information from individuals who had personal knowledge of the accident was admissible under the Rule 803(6) hearsay exception.

State v. Sneed, 210 N.C. App. 622 (Apr. 5, 2011). In a case in which the defendant was charged with, among other things, armed robbery and possession of a stolen handgun, no plain error occurred when the trial court admitted, under Rule 803(6) (records of regularly conducted activity) testimony that the National Crime Information Center ("NCIC") database indicated a gun with the same serial number as the one possessed by the defendant had been reported stolen in South Miami, Florida. The court rejected the defendant's argument that the State failed to lay the necessary foundation for admission of the evidence. The defendant had argued that the State was required to present testimony from a custodian of records for NCIC that the information was regularly kept in the course of NCIC's business and that NCIC routinely makes such records in the course of conducting its business. The proper foundation was laid through the testimony of a local police officer who used the database in his regular course of business.

Rule 803(8) -- Public Records

State v. McLean, 205 N.C. App. 247 (July 6, 2010). Information in a police department database linking the defendant's name to her photograph fell within the Rule 803(8) public records hearsay exception. After an undercover officer engaged in a drug buy from the defendant, he selected the defendant's photograph from an array presented to him by a fellow officer. The fellow officer then cross-referenced the photograph in the database and determined that the person identified was the defendant. This evidence was admitted at trial. The court noted that although the Rule 803(8) exception excludes matters observed by officers and other law enforcement personnel regarding a crime scene or apprehension of the accused, it allows for admission of public records of purely ministerial observations, such as fingerprinting and photographing a suspect, and cataloguing a judgment and sentence. The court concluded that the photographs in the police department's database were taken and compiled as a routine procedure following an arrest and were not indicative of anything more than that the person photographed

has been arrested. It concluded: "photographing an arrested suspect is a routine and unambiguous record that Rule 803(8) was designed to cover. Absent evidence to the contrary, there is no reason to suspect the reliability of these records, as they are not subject to the same potential subjectivity that may imbue the observations of a police officer in the course of an investigation."

Rule 803(17) – Market Quotations, Tabulations, Etc.

State v. Dallas, 205 N.C. App. 216 (July 6, 2010). In a larceny of motor vehicle case, the court held that the Kelley Blue Book and the NADA pricing guide fall within the Rule 803(17) hearsay exception for "[m]arket quotations, tabulations, lists, directories, or other published compilations, generally used and relied upon by the public or by persons in particular occupations." Those items were use to establish the value of the motor vehicles stolen.

Rule 804(b)(1) – Former Testimony

State v. Rollins, __ N.C. App. __, 738 S.E.2d 440 (Mar. 19, 2013). The trial court properly admitted an unavailable witness's testimony at a proceeding in connection with the defendant's *Alford* plea under the Rule 804(b)(1) hearsay exception for former testimony. The court rejected the defendant's argument that the testimony was inadmissible because he had no motive to cross-examine the witness during the plea hearing.

Rule 804(b)(3) – Statement Against Interest

State v. Speight, 213 N.C. App. 38 (June 21, 2011). In the defendant's trial for sex offense, burglary, and other crimes, the trial court did not err by admitting the defendant's statement, made to an officer upon the defendant's arrest: "Man, I'm a B and E guy." Given the charges, the statement was a statement against penal interest pursuant to Rule 804(b)(3).

State v. Choudhry, 206 N.C. App. 418 (Aug. 17, 2010). The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

Residual Exception

State v. Sargeant, 365 N.C. 58 (Mar. 11, 2011). Modifying and affirming *State v. Sargeant*, 206 N.C. App. 1 (Aug. 3, 2010), the court held that the trial court committed prejudicial error by excluding defense evidence of hearsay statements made by a participant in the murder, offered under the Rule 804(b)(5) residual exception. The court noted that the only factor in dispute under the six-factor residual exception test was circumstantial guarantees of trustworthiness. To evaluate that factor, a court must assess, among other things, (1) the declarant's personal knowledge of the event; (2) the declarant's motivation to speak the truth; (3) whether the declarant recanted; and (4) the reason for the declarant's unavailability. Because the record established that the declarant had personal knowledge and never recanted, the court focused it analysis on factors (2) and (4). The court found that the trial court's conclusions that these considerations had not been satisfied were made on the basis of inaccurate and incomplete findings of fact used to reach unsupported conclusions of law.

State v. Choudhry, 206 N.C. App. 418 (Aug. 17, 2010). The trial court did not abuse its discretion by sustaining the State's objection to a defense proffer of a co-defendant's hearsay statement indicating that he and the defendant acted in self-defense. The statement was not admissible under Rule 804(b)(3) (statement against interest exception). To be admissible under that rule, (1) the statement must be against the declarant's interest, and (2) corroborating circumstances must indicate its trustworthiness. As to the second prong, there must be an independent, non-hearsay indication of trustworthiness. There was no issue about whether the statement satisfied the first prong. However, as to the second, there was no corroborating evidence. Furthermore, the co-defendant had a motive to lie: he was he friends with the defendant, married to the defendant's sister, and had an incentive to exculpate himself. Nor was the statement admissible under the Rule 804(b)(5) catchall exception. Applying the traditional six-part residual exception analysis, the court concluded that, for the reasons noted above, the statement lacked circumstantial guarantees of trustworthiness.

Impeachment of the Verdict

Cummings v. Ortega, 365 N.C. 262 (Oct. 7, 2011). In a civil medical malpractice case, the court held that under Rule 606(b) juror affidavits were inadmissible to support a new trial motion. Two days after the jury returned a verdict in favor of the defendant, juror Rachel Simmons contacted the plaintiff's attorneys to report misconduct by juror Charles Githens. Simmons executed an affidavit stating that before the case was submitted to the jury, Githens told the other jurors that "his mind was made up" and he would not change his views. Githens said the other jurors could either "agree with him or they would sit there through the rest of the year." Simmons stated that Githens's conduct "interfered with [her] thought process about the evidence during the plaintiff's case." An affidavit from another juror corroborated this account. Based on these affidavits, the plaintiff successfully moved for a new trial. On appeal, the court noted that Rule 606(b) reflects the common law rule that juror affidavits are inadmissible to impeach the verdict except as they pertain to external influences that may have affected the jury's decision. External influences include information that has not been introduced in evidence. Internal influences by contrast include information coming from the jurors themselves, such as a juror not assenting to the verdict, a juror misunderstanding the court's instructions, a juror being unduly influenced by the statements of fellow jurors, or a juror being mistaken in his or her calculations or judgments. The court found that the affidavits in question pertained to internal influences. The court also rejected

the plaintiff's argument that Rule 606(b) was inapplicable because the misconduct occurred before her case was submitted formally to the jury.

Objections and Motions to Strike

State v. McCain, 212 N.C. App. 228 (May 17, 2011) (No. COA10-647). The trial court did not abuse its discretion by denying the defendant's untimely motion to strike.

State v. Carter, 210 N.C. App. 156 (Mar. 1, 2011). When the defendant failed to object to a question until after the witness responded, the objection was waived by the defendant's failure to move to strike the answer.

State v. Boyd, 209 N.C. App. 418 (Feb. 1, 2011). By objecting only on the basis that the subject matter of questioning had been "covered" the previous day, the defense failed to preserve other grounds for exclusion of the evidence and plain error review applied.

Opinions

Expert Opinions

Applicability of Amendments to R. 702

State v. Walston, __ N.C. App. __, 747 S.E.2d 720 (Aug. 20, 2013), *rev'd on other grounds*, __ N.C. __, 766 S.E.2d 312 (Jan. 23, 2014). For purposes of applying the effective date of the amendment to Rule 702 (the amended rule applies to actions "arising on or after" 1 October 2011), in a case where a superseding indictment is used, the relevant date is the date the superseding indictment is filed, not the filing date of the original indictment.

State v. Gamez, __ N.C. App. __, 745 S.E.2d 876 (July 16, 2013). In criminal cases, the amendment to N.C.Evid. R. 702, which is "effective October 1, 2011, and applies to actions commenced on or after that date" applies to cases where the indictment is filed on or after that date. The court noted that it had suggested in a footnote in a prior unpublished opinion that the trigger date for applying the amended Rule is the start of the trial but held that the proper date is the date the indictment is filed. Here, the defendant was initially indicted on 17 May 2010, before the 1 October 2011 effective date. Although a second bill of indictment was filed on 12 December 2011 and subsequently joined for trial, the court held that the criminal proceeding commenced with the filing of the first indictment and that therefore amended Rule 702 did not apply.

Ballistics

State v. Britt, 217 N.C. App. 309 (Dec. 6, 2011). The trial court did not abuse its discretion by reversing its ruling on the defendant's motion in limine and allowing the State's expert witnesses' firearm identification testimony. The trial court initially had ruled that it would limit any testimony by the experts to statements that the bullets were "consistent," rather than that they had been fired from the same weapon. However, after defense counsel stated in his opening statement that defense experts would testify as to their "opinion that you cannot make a match, that there [are] simply not enough points of comparison on the two bullets," the trial court reversed its earlier ruling and permitted the State's experts to testify to their opinions that both

bullets were fired from the same gun. (1) Citing case law, the court held that forensic toolmark identification is sufficiently reliable. (2) The court rejected the defendant's argument that the State's experts were not qualified to testify based on a lack of evidence verifying one of the expert's training and a shared lack of credentials. The State presented evidence of both experts' qualifications and experience. Although the State did not present verification of one of the expert's training and neither expert was a member of a professional organization, both experts explained how firearm toolmark identification works and how they conducted their investigations such that they were better qualified than the jury to form an opinion in the instant case.

Sexual Assault Cases

State v. Towe, 366 N.C. 56 (June 14, 2012). The court modified and affirmed *State v. Towe*, 210 N.C. App. 430 (Mar. 15, 2011). The court of appeals held that the trial court committed plain error by allowing the State's medical expert to testify that the child victim was sexually abused when no physical findings supported this conclusion. On direct examination, the expert stated that 70-75% of sexually abused children show no clear physical signs of abuse. When asked whether she would put the victim in that group, the expert responded, "Yes, correct." The court of appeals concluded that this amounted to impermissible testimony that the victim was sexually abused. The supreme court agreed that it was improper for the expert to testify that the victim fell into the category of children who had been sexually abused when she showed no physical symptoms of such abuse. The supreme court modified the opinion below with respect to its application of the plain error standard, but like the lower court agreed that plain error occurred in this case.

State v. Purcell, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this child sexual assault case, no error occurred when the State's expert medical witness testified that the victim's delay in reporting anal penetration was a characteristic consistent with the general behavior of children who have been sexually abused in that manner. The court rejected the defendant's argument that the expert impermissibly opined on the victim's credibility.

State v. Chavez, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). In this child sexual abuse case, no error occurred when the medical doctor who examined the victim explained the victim's normal examination, stating that 95% of children examined for sexual abuse have normal exams and that "it's more of a surprise when we do find something." The doctor further testified that a normal exam with little to no signs of penetrating injury could be explained by the "stretchy" nature of the hymen tissue and its ability to heal quickly. For example, she explained, deep tears to the hymen can often heal within three to four months, while superficial tears can heal within a few days to a few weeks. Nor was it error for the doctor to testify that she was made aware of the victim's "cutting behavior" through the victim's medical history and that cutting behavior was significant to the doctor because "cutting, unfortunately, is a very common behavior seen in children who have been abused and frequently sexually abused." The doctor never testified that the victim in fact had been abused.

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). In this child sexual abuse case, the State's treating medical experts did not vouch for the victim's credibility. The court

noted that defendant's argument appears to be based primarily on the fact that the experts testified about the problems reported by the victim without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." The court stated: "Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be 'vouching' for that person's credibility unless each disclosure by the witness includes a qualifier such as 'alleged.' We decline to impose such a requirement."

State v. Hicks, ___ N.C. App. ___, 768 S.E.2d 373 (Feb. 17, 2015). (1) In this child sexual abuse case, testimony from a psychologist, Ms. Bellis, who treated the victim did not constitute expert testimony that impermissibly vouched for the victim's credibility. Bellis testified, in part, that the victim "came in because she had been molested by her older cousin." The court noted that in the cases offered by defendant, "the experts clearly and unambiguously either testified as to their opinion regarding the victim's credibility or identified the defendant as the perpetrator of the sexual abuse." It continued:

> Here, in contrast, Ms. Bellis was never specifically asked to give her opinion as to the truth of [the victim's] allegations of molestation or whether she believed that [the victim] was credible. When reading Ms. Bellis' testimony as a whole, it is evident that when Ms. Bellis stated that "[t]hey specifically came in because [the victim] had been molested by her older cousin[,]" Ms. Bellis was simply stating the reason why [the victim] initially sought treatment from Ms. Bellis. Indeed, Ms. Bellis' affirmative response to the State's follow-up question whether there was "an allegation of molestation" clarifies that Ms. Bellis' statement referred to [the victim]'s allegations, and not Ms. Bellis' personal opinion as to their veracity. Because Ms. Bellis' testimony, when viewed in context, does not express an opinion as to [the victim]'s credibility or defendant's guilt, we hold that the trial court did not err in admitting it.

(2) The court rejected defendant's argument that the trial court committed plain error by admitting Bellis' testimony that she diagnosed the victim with PTSD. The court concluded that the State's introduction of evidence of PTSD on re-direct was not admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination. The court further noted that although defendant could have requested a limiting instruction, he did not do so.

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). In this sexual assault case, no plain error occurred when a pediatric nurse practitioner testified to the opinion that her medical findings were consistent with the victim's allegation of sexual abuse. The nurse performed a physical examination of the victim. She testified that in girls who are going through puberty, it is very rare to discover findings of sexual penetration. She testified that "the research, and, . . . this is thousands of studies, indicates that it's five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse." With respect to the victim, the expert testified that her genital findings were normal and that such findings "would be still consistent with the possibility of sexual abuse." The prosecutor then asked: "Were your medical findings consistent with her disclosure in the interview?" She answered that they were. The defendant argued that the expert's opinion that her medical findings were consistent with the victim's allegations impermissibly vouched for the victim's credibility. Citing prior case law, the

court noted that the expert "did not testify as to whether [the victim's] account of what happened to her was true," that she was believable or that she had in fact been sexually abused. "Rather, she merely testified that the lack of physical findings was consistent with, and did not contradict, [the victim's] account."

State v. Walton, __ N.C. App. __, 765 S.E.2d 54 (Oct. 21, 2014). No error occurred when the State's experts in a sexual assault case testified that the victim's physical injuries were consistent with the sexual assault she described.

State v. King, __ N.C. App. __, 760 S.E.2d 377 (July 15, 2014). In this child sex abuse case, the trial court did not err by allowing the State's expert in pediatric medicine and the evaluation and treatment of sexual abuse to testify about common characteristics she observed in sexually abused children and a possible basis for those characteristics. The court rejected the defendant's argument that the expert's testimony constituted opinion testimony on the victim's credibility.

State v. May, __ N.C. App. __, 749 S.E.2d 483 (Nov. 5, 2013), *reversed on other grounds*, __ N.C. ___, ___ S.E.2d ___ (June 11, 2015). In a child sexual abuse case, the trial court did not err by admitting testimony by the State's medical experts. The court rejected the defendant's argument that an expert pediatrician improperly testified that the victim had been sexually abused, concluding that the expert gave no such testimony. Rather, she properly testified regarding whether the victim exhibited symptoms or characteristics consistent with sexually abused children. The court reached the same conclusion regarding the testimony of a nurse expert.

State v. Perry, __ N.C. App. __, 750 S.E.2d 521 (Aug. 20, 2013). In a child homicide case, the trial court did not commit plain error by allowing the State's medical experts to testify that their review of the medical records and other available information indicated that the victim's injuries were consistent with previously observed cases involving intentionally inflicted injuries and were inconsistent with previously observed cases involving accidentally inflicted injuries. The defendant asserted that these opinions rested "on previously accepted medical science that is now in doubt" and that, because "[c]urrent medical science has cast significant doubt" on previously accepted theories regarding the possible causes of brain injuries in children, there is currently "no medical certainty around these topics." The court rejected this argument, noting that there was no information in the record about the state of "current medical science" or the degree to which "significant doubt" has arisen with respect to the manner in which brain injuries in young children occur.

State v. Frady, __ N.C. App. __, 747 S.E.2d 164 (Aug. 6, 2013). In this child sex case, the trial court committed reversible error by allowing the State's medical expert to testify to the opinion that the victim's disclosure was consistent with sexual abuse where there was no physical evidence consistent with abuse. In order for an expert medical witness to give an opinion that a child has, in fact, been sexually abused, the State must establish a proper foundation, i.e. physical evidence consistent with sexual abuse. Without physical evidence, expert testimony that sexual abuse has occurred is an impermissible opinion regarding credibility. Although the expert in this

case did not diagnose the victim as having been sexually abused, she "essentially expressed her opinion that [the victim] is credible."

State v. Gamez, __ N.C. App. __, 745 S.E.2d 876 (July 16, 2013). In a child sex case decided under pre-amended R. 702, the trial court did not abuse its discretion by admitting expert opinion that the victim suffered from post-traumatic stress disorder when a licensed clinical social worker was tendered as an expert in social work and routinely made mental health diagnoses of sexual assault victims. The court went on to note that when an expert testifies the victim is suffering from PTSD, the testimony must be limited to corroboration and may not be admitted as substantive evidence.

State v. Ragland, __ N.C. App. __, 739 S.E.2d 616 (April 16, 2013). In a child sex case, the trial court did not err by allowing the State's properly qualified medical expert to testify that the victim's profile was consistent with that of a sexually abused child. The court rejected the defendant's argument that the State failed to lay a proper foundation for the testimony, concluding that because the witness was properly qualified to testify as an expert regarding the characteristics of sexually abused children, a proper foundation was laid.

State v. Dew, __ N.C. App. __, 738 S.E.2d 215 (Mar. 5, 2013). (1) In a child sex case, the trial court did not err by qualifying as an expert a family therapist who provided counseling to both victims. The court first concluded that the witness possessed the necessary qualifications. Among other things, she had a master's degree in Christian counseling and completed additional professional training relating to the trauma experienced by children who have been sexually abused; she engaged in private practice as a therapist and was a licensed family therapist and professional counselor; and over half of her clients had been subjected to some sort of trauma, with a significant number having suffered sexual abuse. Second, the court rejected the defendant's challenge to the expert's testimony on reliability grounds, concluding that he failed to demonstrate that her methods were unreliable. The court noted that our courts have consistently allowed the admission of similar expert testimony, relying upon personal observations and professional experience rather than upon quantitative analysis. (2) The expert did not impermissibly vouch for the credibility of the victims when she testified that "research says is 60% of cases like this do not even get reported." According to the defendant, the expert improperly vouched for the credibility of the children by describing child sexual abuse cases with which she was familiar as "cases like this." Distinguishing prior cases, the court disagreed. It noted that the expert never directly stated that the victims were believable; instead she described the actions and reactions of sexual abuse victims in general. (3) A detective did not impermissibly vouch for the victim's credibility when she testified that the child actually remembered specific events. The challenged testimony was nothing more than a permissible discussion of the manner in which the child communicated with the detective.

State v. Ryan, __ N.C. App. __, 734 S.E.2d 598 (Nov. 6, 2012). Improper testimony by an expert pediatrician in a child sexual abuse case required a new trial. After the alleged abuse, the child was seen by Dr. Gutman, a pediatrician, who reviewed her history and performed a physical exam. Gutman observed a deep notch in the child's hymen, which was highly suggestive of vaginal penetration. Gutman found the child's anus to be normal but testified that physical findings of anal abuse are uncommon. Gutman also tested the child for sexually transmitted

diseases. The tests were negative, except that the child was diagnosed with bacterial vaginosis. Gutman testified that the presence of bacterial vaginosis can be indicative of a vaginal injury, although it is the most common genital infection in women and can have many causes. The child's mother had indicated the child had symptoms of vaginosis as early as 2006, which predated the alleged abuse. Gutman testified to her opinion that the child had been sexually abused, that she had no indication the child's story was fictitious or that the child had been coached, and that defendant was the perpetrator. (1) Gutman was properly allowed to testify that the child had been sexually abused given the physical evidence of the unusual hymenal notch and bacterial vaginosis. The court noted that Gutman did not state which acts of alleged sexual abuse had occurred. It continued, noting that if Gutman had testified that the child had been the victim of both vaginal and anal sexual abuse, that would have been error given the lack of physical evidence of anal penetration. (2) Gutman's testimony that she was not concerned that the child was "giving a fictitious story" was essentially an opinion that the child was not lying about the sexual abuse and thus was improper. The court rejected the State's argument that the defendant opened the door to this testimony. (3) Citing *State v. Baymon*, 336 N.C. 748 (1994), the court held that Gutman's testimony that the child had not been coached was admissible. (4) It was error to allow Gutman to testify that "there was no evidence that there was a different perpetrator" other than defendant where Gutman based her conclusion on her interview with the child and it did not relate to a diagnosis derived from Gutman's examination of the child.

State v. Black, __ N.C. App. __, 735 S.E.2d 195 (Oct. 16, 2012). Although the trial court erred by allowing the State's expert to testify that the child victim had been sexually abused, the error did not rise to the level of plain error. Responding to a question about the child's treatment, the expert, a licensed clinical social worker, said: "For a child, that means . . . being able to, um, come to terms with all the issues that are consistent with someone that has been sexually abused." She also testified several times to her conclusion that the sexual abuse experienced by the victim started at a young age, perhaps age seven, and continued until she was removed from the home. When asked why the victim lashed out at a family member, the expert said that the behavior was "part of a history of a child that goes through sexual abuse." With respect to her concerns about the adequacy of a family member's care, the expert testified: "She had every opportunity to get the education and the information to become an informed parent about a child that is sexually abused." And, when asked if it was reasonable for a family member to have doubt about the victim's story given that she had recanted, the expert responded: "With me, there was no uncertainty." The testimony was indistinguishable from that found to be error in *State v. Towe*, 366 N.C. 56 (June 14, 2012) (expert's testimony was improper when she stated that the victim fell into the category of children who had been sexually abused but showed no physical symptoms of such abuse). Here, it was error for the expert to "effectively assert[]" that the victim was a sexually abused child absent physical evidence of abuse.

State v. Carter, 216 N.C. App. 453 (Nov. 1, 2011), *rev. on other grounds*, 366 N.C. 496 (Apr. 12, 2013). In a child sexual offense case, the trial court did not err by excluding defense evidence consisting of testimony by a social worker that during therapy sessions the victim was "overly dramatic," "manipulative," and exhibited "attention seeking behavior." The testimony did not relate to an expert opinion which the witness was qualified to deliver and was inadmissible commentary on the victim's credibility.

State v. Khouri, 214 N.C. App. 389 (Aug. 16, 2011). In a child sexual abuse case, no plain error occurred when the trial court allowed the State's expert to testify that the victim exhibited some classic signs of a sexually abused child. The expert did not testify that the victim was in fact sexually abused.

State v. Treadway, 208 N.C. App. 286 (Dec. 7, 2010). The trial court erred when it allowed the State's expert in clinical social work to testify that she had diagnosed the victim with sexual abuse when there was no physical evidence consistent with abuse. However, the error did not constitute plain error given other evidence in the case.

State v. Jennings, 209 N.C. App. 329 (Jan. 18, 2011). The trial court did not err by allowing the State's expert in family medicine to testify that if there had been a tear in the victim's hymen, it probably would have healed by the time the expert saw the victim. The testimony explained that the lack of physical findings indicative of sexual abuse did not negate the victim's allegations of abuse and was not an impermissible opinion as to the victim's credibility. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt.

State v. Livengood, 206 N.C. App. 746 (Sept. 7, 2010). In a child sexual abuse case, the trial court did not abuse its discretion by overruling a defense objection to a response by the State's expert. On direct examination, the expert testified that the child's physical examination revealed no signs of trauma to the hymen. On cross-examination, she opined, without objection, that her physical findings could be consistent with rape or with no rape. On recross-examination, defense counsel asked: "And the medical aspects of this case physically are that there are no showings of any rape; correct?" The witness responded: "There's no physical findings which do not rule out her disclosure, sir." The trial judge overruled a defense objection to this response. The court rejected the defendant's argument that the expert's answer impermissibly commented on the victim's credibility, concluding that the expert's response was consistent with her prior testimony that her physical findings were consistent with rape or no rape.

State v. Register, 206 N.C. App. 629 (Sept. 7, 2010). The trial court erred by denying the defendant's motion to strike a response by the State's expert witness in a child sexual abuse case. During cross-examination, defense counsel asked whether the victim told the expert that she had been penetrated. The expert responded: "She described the rubbing; and, I would say that, as far as vaginal penetration, since the oral penetration — well, I'm not discussing that. I mean, I felt that that was very graphic and believable." The testimony was not responsive to the question and was opinion testimony on the victim's credibility. The court rejected the State's argument that the statement was offered as a basis of the expert's opinion. However, the court found that the error was harmless.

State v. Streater, 197 N.C. App. 632 (July 7, 2009). The state's expert pediatrician was improperly allowed to testify that his findings were consistent with a history of anal penetration received from the child victim where no physical evidence supported the diagnosis. The expert was properly allowed to testify that victim's history of vaginal penetration was consistent with his findings, which included physical evidence supporting a diagnosis of sexual intercourse. The expert's testimony that his findings were consistent with the victim's allegations that the defendant perpetrated the abuse was improper where there was no foundation for the testimony

that the defendant was the one who committed the acts.

State v. Webb, 197 N.C. App. 619 (June 16, 2009). In child sexual abuse case, it was error to allow the state's expert, a child psychologist, to testify that he believed that the victim had been exposed to sexual abuse. The expert's statement pertained to the victim's credibility; it apparently was unsupported by clinical evidence.

State v. Horton, 200 N.C. App. 74 (Sept. 15, 2009). Prejudicial error occurred warranting a new trial when the trial court overruled an objection to testimony of a witness who was qualified as an expert in the treatment of sexually abused children. After recounting a detailed description of an alleged sexual assault provided to her by the victim, the State asked the witness: "As far as treatment for victims . . . why would that detail be significant?" The witness responded: "[W]hen children provide those types of specific details it enhances their credibility." The witness's statement was an impermissible opinion regarding credibility. Additionally, it was error to allow the witness to testify that the child "had more likely than not been sexually abused," where there was no physical evidence of abuse; such a statement exceeded permissible opinion testimony that a child has characteristics consistent with abused children.

State v. Ray, 197 N.C. App. 662 (July 7, 2009), *rev'd on other grounds*, 364 N.C. 272 (Aug. 27, 2010). The trial court did not err in admitting the State's expert witness's testimony that the results of his examination of the victim were consistent with a child who had been sexually abused; the expert did not testify that abuse had in fact occurred and did not comment on the victim's credibility.

State v. Paddock, 204 N.C. App. 280 (June 1, 2010). In a case in which the defendant was found guilty of felonious child abuse inflicting serious bodily injury and first-degree murder, the trial court did not err by admitting testimony of the State's expert in the field of developmental and forensic pediatrics. Based on a review of photographs, reports, and other materials, the expert testified that she found the histories of the older children very consistent as eyewitnesses to what the younger children described. She also testified about ritualistic and sadistic abuse and torture, stating that torture occurs when a person "takes total control and totally dominates a person's behavior and most the [sic] basic of behaviors are taken control of. Those basic behaviors are eating, eliminating and sleeping." As an example, she described binding a child at night, placing duct tape over the mouth, and then placing furniture on the child for the purpose of immobilization. The expert stated that she was not testifying to a legal definition of torture but was defining the term based on her medical expertise. She testified that one sibling suffered from sadistic abuse and torture; another from sadistic abuse, ritualistic abuse, and torture; and a third from sadistic abuse and torture. The jury was instructed to consider this testimony for the limited purpose for which it was admitted under Rule 404(b). Additionally, the trial court instructed the jury that torture was a "course of conduct by one who intentionally inflicts grievous pain and suffering upon another for the purpose of punishment, persuasion or sadistic pleasure." The expert's testimony was not inadmissible opinion testimony on the credibility of the children and admission of the expert's testimony regarding the use of the word torture was not an abuse of discretion.

Computer Experts

State v. Cooper, __ N.C. App. __, 747 S.E.2d 398 (Sept. 3, 2013). In this murder case, the trial court committed reversible error by ruling that the defendant's expert was not qualified to give expert testimony that incriminating computer files had been planted on the defendant's computer. Temporary internet files recovered from the defendant's computer showed that someone conducted a Google Map search on the laptop while it was at the defendant's place of work the day before the victim was murdered. The Google Map search was initiated by someone who entered the zip code associated with the defendant's house, and then moved the map and zoomed in on the exact spot where the victim's body later was found. Applying the old version of Evidence Rule 702 and the *Howerton* test, the court found that the trial court erred by concluding that the defendant's expert was not qualified to offer the relevant expert testimony. It went on to conclude that this error deprived the defendant of his constitutional right to present a defense.

Drug Cases
Chemical Analysis/Visual Identification

State v. Ward, 364 N.C. 133 (June 17, 2010). In a drug case, the trial court abused its discretion by allowing the State's expert in chemical analyses of drugs and forensic chemistry to identify the pills at issue as controlled substances when the expert's method of making that identification consisted of a visual inspection and comparison with information in Micromedex literature, a publication used by doctors in hospitals and pharmacies to identify prescription medicines. The court concluded that the expert's proffered method of proof was not sufficiently reliable under the first prong of the *Howerton/Goode* analysis. It concluded: "Unless the State establishes before the trial court that another method of identification is sufficient to establish the identity of the controlled substance beyond a reasonable doubt, some form of scientifically valid chemical analysis is required." The court limited its holding to Rule 702 and stated that it "does not affect visual identification techniques employed by law enforcement for other purposes, such as conducting criminal investigations." Finally, the court indicated that "common sense limits this holding regarding the scope of the chemical analysis that must be performed." It noted that in the case at issue, the State submitted sixteen batches of over four hundred tablets to the laboratory, and that "a chemical analysis of each individual tablet is not necessary." In this regard, the court reasoned that the "SBI maintains standard operating procedures for chemically analyzing batches of evidence, and the propriety of those procedures is not at issue here. A chemical analysis is required in this context, but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration."

State v. Nabors, 356 N.C. 306 (Dec. 9, 2011). The court reversed a decision by the court of appeals in *State v. Nabors*, 207 N.C. App. 463 (Oct. 19, 2010) (the trial court erred by denying the defendant's motion to dismiss drug charges when the evidence that the substance at issue was crack cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on visual observation; the court held that *State v. Ward*, 364 N.C. 133 (2010), calls into question "the continuing viability" of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer can give a lay opinion that substance was crack cocaine), and requires that in

order to prove that a substance is a controlled substance, the State must present expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection). The supreme court declined to address whether the trial court erred in admitting lay testimony that the substance at issue was crack cocaine, instead concluding that the testimony by the defendant's witness identifying the substance as cocaine was sufficient to withstand the motion to dismiss.

State v. Hanif, __ N.C. App. __, 743 S.E.2d 690 (July 2, 2013). In a counterfeit controlled substance case, the trial court committed plain error by admitting evidence identifying a substance as tramadol hydrochloride based solely upon an expert's visual inspection. The State's witness Brian King, a forensic chemist with the State Crime Lab, testified that after a visual inspection, he identified the pills as tramadol hydrochloride. Specifically he compared the tablets' markings to a Micromedex online database. King performed no chemical analysis of the pills. Finding that *State v. Ward*, 364 N.C. 133 (2010), controlled, the court held that in the absence of a scientific, chemical analysis of the substance, King's visual inspection was insufficient to identify the composition of the pills.

State v. Johnson, __ N.C. App. __, 737 S.E.2d 442 (Feb. 5, 2013). In a misdemeanor possession of marijuana case, the State was not required to test the substance alleged to be marijuana where the arresting officer testified without objection that based on his training the substance was marijuana. The officer's testimony was substantial evidence that the substance was marijuana and therefore the trial court did not err by denying the defendant's motion to dismiss.

State v. Mitchell, __ N.C. App. __, 735 S.E.2d 438 (Dec. 4, 2012). In a drug case, an officer properly was allowed to identify the substance at issue as marijuana based on his "visual and olfactory assessment"; a chemical analysis of the marijuana was not required.

State v. Davis, __ N.C. App. __, 733 S.E.2d 191 (Nov. 6, 2012). In a trafficking in opium case, the State's forensic expert properly testified that the substance at issue was an opium derivative where the expert relied on a chemical analysis, not a visual identification.

State v. Jones, 216 N.C. App. 519 (Nov. 1, 2011). (1) The trial court improperly allowed an officer to testify that a substance was cocaine based on a visual examination. (2) However, that same officer was properly allowed to testify that a substance was marijuana based on visual identification. (3) In a footnote, the court indicated that the defendant's statement that he bought what he believed to be cocaine was insufficient to identify the substance at issue.

State v. Woodard, 365 N.C. App. 334 (Apr. 5, 2011). In a case arising from a pharmacy break-in, the court rejected the defendant's argument that the trial court erred by failing to dismiss trafficking in opium charges because the State did not present a chemical analysis of the pills. Citing *State v. Ward*, 364 N.C. 133 (2010), and *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), the court determined that State is not required to conduct a chemical analysis on a controlled substance in order to sustain a conviction under G.S. 90-95(h)(4), provided it has established the identity of the controlled substance beyond a reasonable doubt by another method of identification. In the case at hand, the State's evidence did that. The drug store's pharmacist manager testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were

stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every item in inventory throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with a sticker identifying the item, the date it was purchased and a partial of the pharmacy's account number. These stickers, which were on every pill bottle delivered to the pharmacy, aided the pharmacist in determining that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen 2,691 pill tablets was approximately 1,472 grams. Based on his 35 years of experience dispensing the same drugs that were stolen and his unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, the pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* and *Llamas–Hernandez*.

State v. Garnett, 209 N.C. App. 537 (Feb. 15, 2011). An expert in forensic chemistry properly made an in-court visual identification of marijuana. Citing *State v. Fletcher*, 92 N.C. App. 50, 57 (1988), but not mentioning *State v. Ward*, 364 N.C. 133 (June 17, 2010), the court noted that it had previously held that a police officer experienced in the identification of marijuana may testify to a visual identification.

State v. Brunson, 204 N.C. App. 357 (June 1, 2010). Holding that the trial court committed plain error by admitting the testimony of the State's expert chemist witness that the substance at issue was hydrocodone, an opium derivative. The State's expert used a Micromedics database of pharmaceutical preparations to identify the pills at issue according to their markings, color, and shape but did no chemical analysis on the pills. Note that although this decision was issued before the North Carolina Supreme Court decided *Ward* (discussed above), it is consistent with that case.

Testing Only a Portion of the Substance

State v. James, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (2) In this opium trafficking case where the State's witness was accepted by the trial court as an expert witness without objection from defendant and the defendant did not cross-examine the expert regarding the sufficiency of the sample size and did not make the sufficiency of the sample size a basis for his motion to dismiss, the issue of whether the two chemically analyzed pills established a sufficient basis to show that there were 28 grams or more of opium was not properly before this Court. (2) Assuming arguendo that the issue had been properly preserved, it would fail. The court noted: "[a] chemical analysis is required . . . , but its scope may be dictated by whatever sample is sufficient to make a reliable determination of the chemical composition of the batch of evidence under consideration." (quotation omitted). It noted further that "[e]very pill need not be chemically analyzed, however" and in *State v. Meyers*, 61 N.C. App. 554, 556 (1983), the court held that a chemical analysis of 20 tablets selected at random, "coupled with a visual inspection of the remaining pills for consistency, was sufficient to support a conviction for trafficking in 10,000 or more tablets of methaqualone." Here, 1 pill, physically consistent with the other pills,

was chosen at random from each exhibit and tested positive for oxycodone. The expert testified that she visually inspected the remaining, untested pills and concluded that with regard to color, shape, and imprint, they were "consistent with" those pills that tested positive for oxycodone. The total weight of the pills was 31.79 grams, exceeding the 28 gram requirement for trafficking. As a result, the State presented sufficient evidence to conclude that the defendant possessed and transported 28 grams or more of a Schedule II controlled substance.

State v. Dobbs, 208 N.C. App. 272 (Dec. 7, 2010). The trial court did not err by denying the defendant's motion to dismiss a charge of trafficking by sale or delivery in more than four grams and less than fourteen grams of Dihydrocodeinone when the State's expert sufficiently identified the substance at issue as a controlled substance. Special Agent Aharon testified as an expert in chemical analysis. She compared the eight tablets at issue with information contained in a pharmaceutical database and found that each was similar in coloration and had an identical pharmaceutical imprint; the pharmaceutical database indicated that the tablets consisted of hydrocodone and acetaminophen. Agent Aharon performed a confirmatory test on one of the tablets, using a gas chromatograph mass spectrometer. This test revealed that the tablet was an opiate derivative. The tablets weighed a total of 8.5 grams. Relying on *State v. Ward*, 364 N.C. 133 (2010), the defendant argued that because the State cannot rely upon a visual inspection to identify a substance as a controlled substance, the State was required to test a sufficient number of pills to reach the minimum weight threshold for a trafficking offense. The court concluded that even if the issue had been properly preserved, the defendant's argument was without merit, citing *State v. Myers*, 61 N.C. App. 554, 556 (1983) (a chemical analysis test of a portion of pills, coupled with a visual inspection of the rest for consistency, supported a conviction for trafficking in 10,000 or more tablets of methaqualone).

Combining Substances for Testing

State v. Huerta, 221 N.C. App. 436 (July 3, 2012). In a case in which the defendant was convicted of trafficking in more than 400 grams of cocaine, the trial court did not err by allowing the State's expert to testify that the substance was cocaine where the expert combined three separate bags into one bag before testing the substance. After receiving the three bags, the expert performed a preliminary chemical test on the material in each bag. The test showed that the material in each bag responded to the reagent in exactly the same manner. She then consolidated the contents of the three bags into a single mixture, performed a definitive test, and determined that the mixture contained cocaine. The defendant argued that because the expert combined the substance in each bag before performing the definitive test, she had no basis for opining that each bag contained cocaine, that all of the cocaine could have been contained in the smallest of the bags, and thus that he could have only been convicted of trafficking in cocaine based upon the weight of cocaine in the smallest of the three bags. Relying on *State v. Worthington*, 84 N.C. App. 150 (1987), and other cases, the court held that the jury should decide whether the defendant possessed the requisite amount of cocaine and that speculation concerning the weight of the substance in each bag did not render inadmissible the expert's testimony that the combined mixture had a specific total weight.

NarTest Cases

State v. Carter, __ N.C. App. __, 765 S.E.2d 56 (Nov. 18, 2014). Relying on *State v. Meadows*, 201 N.C. App. 707 (2010) (trial court abused its discretion by allowing an officer to testify that substances were cocaine based on NarTest field test), the court held that the trial abused its discretion by admitting an officer's testimony that narcotics indicator field test kits indicated the presence of cocaine in the residence in question.

State v. Jones, 216 N.C. App. 519 (Nov. 1, 2011). (1) In a drug case, the court followed *State v. Meadows*, 201 N.C. App. 707 (2010), and held that the trial court erred by allowing an offer to testify as an expert concerning the use and reliability of a NarTest machine. (2) The trial court erred by admitting testimony by an expert in forensic chemistry regarding the reliability of a NarTest machine. Although the witness's professional background and comparison testing provided some indicia of reliability, other factors required the court to conclude that the expert's proffered method of proof was not sufficiently reliable. Among other things, the court noted that no case has recognized the NarTest as an accepted method of analysis or identification of controlled substances and that the expert had not conducted any independent research on the machine outside of his duties as a NarTest employee.

State v. Meadows, 201 N.C. App. 707 (Jan. 5, 2010). A new trial was required in a drug case where the trial court erred by admitting expert testimony as to the identity of the controlled substance when that testimony was based on the results of a NarTest machine. Applying *Howerton v. Arai Helmet, Ltd.*, 358 N.C. 440 (2004), the court held that the State failed to demonstrate the reliability of the NarTest machine.

Lab Licensing/Accrediting Issues

State v. Jones, 216 N.C. App. 519 (Nov. 1, 2011). Because a lab that tested a controlled substance was neither licensed nor accredited, expert testimony regarding testing done at that lab on the substances at issue was inadmissible.

Miscellaneous Cases

State v. McDonald, 216 N.C. App. 161 (Oct. 4, 2011). (1) In a drug case, no plain error occurred when the trial court allowed the State's expert forensic chemist to testify as to the results of his chemical analysis of the substance in question. Through the expert's testimony as to his professional background and use of established forensic techniques, the State met its burden of establishing "indices of reliability," as contemplated in *Howerton.* The court noted that although the laboratory was not accredited the defendant provided no legal authority establishing that accreditation is required when the forensic chemist who conducted the analysis at issue testifies at trial (the lab was licensed). (2) The court rejected the defendant's argument that the expert's lab report was inadmissible under G.S. 8-58.20(b) because the lab was not accredited. That statutory provision is relevant only when the State seeks to have the report admitted without the testimony of the preparer.

Forensic Scientists and Related Experts

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, that the trial court did not err by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" It concluded:

> The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck, stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony.

State v. Martin, 222 N.C. App. 213 (Aug. 7, 2012). The trial court did not abuse its discretion by refusing to allow a defense witness to testify as an expert. The defense proffered a forensic scientist and criminal profiler for qualification as an expert. Because the witness's testimony was offered to discredit the victim's account of the defendant's actions and to comment on the manner in which the criminal investigation was conducted, it appears to invade the province of the jury. Although disallowing this testimony, the trial court made clear that the defendant would still be allowed to argue the inconsistencies in the State's evidence.

Impaired Driving

State v. Norman 213 N.C. App. 114 (July 5, 2011). (1) The trial court did not abuse its discretion by qualifying the State's witness as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. The witness was the head of the Forensic Test for Alcohol branch of the N.C. Department of Health and Human Services, oversaw the training of law enforcement officers on the operation of alcohol breath test instruments and of drug recognition experts. His specialty is in "scientific issues related to breath testing and blood testing for drugs and alcohol." He has a B.A. and master's in biology and is certified as a chemical analyst. He attended courses on the effects of alcohol on the human body and various methods for determining alcohol concentrations and the effects of drugs on human psychomotor performance. He has published several works and has previously been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. Despite his lack of a formal degree or certification in physiology and pharmacology, his extensive practical experience qualifies him to testify as an expert. (2) The trial court did not abuse its discretion by admitting the State's expert's testimony regarding the relative amount of cocaine in the defendant's system at the time of the collision and the effects of cocaine on an individual's ability to drive. The defendant argued that the testimony was based upon unreliable methods. Based on cocaine's half-life and a report showing unmetabolized cocaine in the defendant's system, the expert determined that the defendant had recently used cocaine and that the concentration of cocaine in his system would have been higher at the time of the crash. On cross-examination, he testified

that there was no way to determine the quantity of cocaine in the defendant's system. He further testified as to the effects of cocaine on driving ability, noting a correlation between "high-risk driving, speeding, [and] sometimes fleeing . . . when cocaine is present." He based this testimony on a study which "looked at crashes and behaviors and found [an] association or correlation between the presence of cocaine and high-risk driving." He testified that it was possible for cocaine to be detected in a person's system even after the person was no longer impaired by the drug. The expert's testimony that the level of cocaine in the defendant's system would have been higher at the time of the collision and his testimony as to the general effects of cocaine on a person's ability to drive was supported by reliable methods. Notably, the defendant's expert corroborated this testimony both as to the half-life of cocaine and the existence of studies showing a correlation between the effects of cocaine and "high-risk" driving.

State v. Norton, 213 N.C. App. 75 (June 21, 2011). The trial judge did not commit plain error by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. The defendant had argued that this testimony was outside of the witness's area of expertise. The court concluded that "[a]s a trained expert in forensic toxicology with degrees in biology and chemistry, the witness in this case was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury."

State v. Green, 209 N.C. App. 669 (Mar. 1, 2011). (1) In an impaired driving case, the trial court did not abuse its discretion by allowing the State's witness to testify as an expert in pharmacology and physiology. Based on his knowledge, skill, experience, training, and education, the witness was better informed than the jury about the subject of alcohol as it relates to human physiology and pharmacology. (2) The court rejected the defendant's argument that the trial court erred by allowing the expert to give opinion testimony regarding the defendant's post-driving consumption of alcohol on grounds that such testimony was an opinion about the truthfulness of the defendant's statement that he consumed wine after returning home. The court concluded that because the expert's testimony was not opinion testimony concerning credibility, the trial court did not err by allowing the expert to testify as to how the defendant's calculated blood alcohol content would have been altered by the defendant's stated post-driving consumption; the expert's statements assisted the jury in determining whether the defendant's blood alcohol content at the time of the accident was in excess of the legal limit. (3) The trial court did not abuse its discretion by admitting the expert's opinion testimony regarding retrograde extrapolation in a case where the defendant asserted that he consumed alcohol after driving. The defendant's assertions of post-driving alcohol consumption went to the weight of the expert's testimony, not its admissibility.

State v. Davis, 208 N.C. App. 26 (Nov. 16, 2010). The trial court committed reversible error by allowing the State's expert to use "odor analysis" as a baseline for his opinion as to the defendant's blood-alcohol level (BAC) at the time of the accident, formed using retrograde extrapolation. When the defendant reported to the police department more than ten hours after the accident, she was met by an officer. Although the officer did not perform any tests on the defendant, he detected an odor of alcohol on her breath. The expert based his retrograde extrapolation analysis on the officer's report of smelling alcohol on the defendant's breath. He testified that based on "look[ing] at some papers, some texts, where the concentration of alcohol that is detectable by the human nose has been measured[,]" the lowest BAC that is detectable by

odor alone is 0.02. He used this baseline for his retrograde extrapolation and opined that at the time of the accident, the defendant had a BAC of 0.18. The court noted that because odor analysis is a novel scientific theory, an unestablished technique, or a compelling new perspective on otherwise settled theories or techniques, it must be accompanied by sufficient indices of reliability. Although the expert testified that "there are published values for the concentrations of alcohol that humans . . . can detect with their nose," he did not specify which texts provided this information, nor were those texts presented at trial. Furthermore, there was no evidence that the expert performed any independent verification of an odor analysis or that he had ever submitted his methodology for peer review. Thus, the court concluded, the method of proof lacked the required indices of reliability. The court also noted that while G.S. 20-139.1 sets out a thorough set of procedures governing chemical analyses of breath, blood, and urine, the odor analysis lacked any of the rigorous standards applied under that provision. It concluded that the expert's retrograde extrapolation was not supported by a reliable method of proof, that the odor analysis was so unreliable that the trial court's decision was manifestly unsupported by reason, and that the trial court abused its discretion in admitting this testimony.

State v. Armstrong, 203 N.C. App. 399 (Apr. 20, 2010). In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although the state proffered the testimony as lay opinion, it was actually expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

Medical Examiners & Cause of Death

State v. Borders, __ N.C. App. __, 762 S.E.2d. 490 (Sept. 2, 2014). In this rape and murder case in which the old "*Howerton*" version of Rule 702 applied, the court rejected the defendant's argument that opinion testimony by the State's medical examiner experts as to cause of death was unreliable and should not have been admitted. The court concluded:

> [T]he forensic pathologists examined the body and eliminated other causes of death while drawing upon their experience, education, knowledge, skill, and training. Both doctors knew from the criminal investigation into her death that [the victim's] home was broken into, that she had been badly bruised, that she had abrasions on her arm and vagina, that her panties were torn, and that DNA obtained from a vaginal swab containing sperm matched Defendant's DNA samples. The doctors' physical examination did not show a cause of death, but both doctors drew upon their experience performing such autopsies in stating that suffocation victims often do not show physical signs of asphyxiation. The doctors also eliminated all other causes of death before arriving at asphyxiation, which Defendant contends is not a scientifically established technique. However, the reliability criterion at issue here is nothing more than a preliminary inquiry into the adequacy of the expert's testimony. Accordingly, the doctors' testimony met the first prong of *Howerton* so that "any lingering questions or controversy

> concerning the quality of the expert's conclusions go to the weight of the testimony rather than its admissibility." (citations omitted)

The court then concluded that the witnesses were properly qualified as experts in forensic pathology.

Prosecutor's Fallacy—DNA Experts

State v. Ragland, __ N.C. App. __, 739 S.E.2d 616 (April 16, 2013). The trial court erred by admitting expert testimony regarding DNA evidence that amounted to a "prosecutor's fallacy." That fallacy, the court explained, involves the use of DNA evidence to show "random match probability." Random match probability evidence, it continued, is the probability that another person in the general population would share the same DNA profile as the person whose DNA profile matched the evidence. Citing, *McDaniel v. Brown*, 558 U.S. 120 (2010), the court explained that "[t]he prosecutor's fallacy is the assumption that the random match probability is the same as the probability that the defendant was not the source of the DNA sample." It continued, quoting from *McDaniel:*

> In other words, if a juror is told the probability a member of the general population would share the same DNA is 1 in 10,000 (random match probability), and he takes that to mean there is only a 1 in 10,000 chance that someone other than the defendant is the source of the DNA found at the crime scene (source probability), then he has succumbed to the prosecutor's fallacy.

Here, error occurred when the State's expert improperly relied on the prosecutor's fallacy. However, the error did not rise to the level of plain error.

Repressed Memory

State v. King, 366 N.C.68 (June 14, 2012). Affirming *State v. King*, 214 N.C. App. 114 (Aug. 2, 2011) (trial court did not abuse its discretion by excluding the State's expert testimony regarding repressed memory under Rule 403), the court disavowed that part of the opinion below that relied on *Barrett v. Hyldburg*, 127 N.C. App. 95 (1997), to conclude that all testimony based on recovered memory must be excluded unless it is accompanied by expert testimony. The court agreed with the holding in *Barrett* that a witness may not express the opinion that he or she personally has experienced repressed memory. It reasoned that psychiatric theories of repressed and recovered memories may not be presented without accompanying expert testimony to prevent juror confusion and to assist juror comprehension. However, *Barrett* "went too far" when it added that even if the adult witness in that case were to avoid use of the term "repressed memory" and simply testified that she suddenly in remembered traumatic incidents from her childhood, such testimony must be accompanied by expert testimony. The court continued: "unless qualified as an expert or supported by admissible expert testimony, the witness may testify only to the effect that, for some time period, he or she did not recall, had no memory of, or had forgotten the incident, and may not testify that the memories were repressed or recovered."

Use of Force Experts

State v. McGrady, __ N.C. App. __, 753 S.E.2d 361 (Jan. 21, 2014), *review allowed*, 367 N.C. 505 (June 11, 2014). In murder case involving a claim of self-defense, the court applied amended

NC Evidence Rule 702 and held that the trial court did not abuse its discretion by excluding defense expert testimony regarding the doctrine of "use of force." The trial court concluded, among other things, that the expert's testimony was not based on sufficient facts or data or the product of reliable principles and methods. The court also rejected the defendant's argument that the trial court's ruling deprived him of a right to present a defense, noting that right is not absolute and defendants do not have a right to present evidence that the trial court, in its discretion, deems inadmissible under the evidence rules.

Generally

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). The trial court properly sustained the State's objection to the defendant's attempt to introduce opinion testimony regarding his IQ from a special education teacher who met the defendant when he was eleven years old. Because the witness had not been tendered as an expert, her speculation as to IQ ranges was inadmissible.

State v. Trogdon, 216 N.C. App. 15 (Sept. 20, 2011). No plain error occurred when the trial court admitted expert medical testimony identifying the victim's death as a homicide. Medical experts described the nature of the victim's injuries and how those injuries had resulted in his death. Their testimony did not use the word "homicide" as a legal term of art but rather to explain that the victim's death did not occur by accident. Neither witness provided evidence that amounted to a legal conclusion based on the facts; instead, they testified as to the factual mechanism that resulted in the victim's death.

State v. Jennings, 209 N.C. App. 329 (Jan. 18, 2011). (1) The trial court did not err by allowing the State's expert in family medicine to testify that if there had been a tear in the victim's hymen, it probably would have healed by the time the expert saw the victim. The testimony explained that the lack of physical findings indicative of sexual abuse did not negate the victim's allegations of abuse and was not an impermissible opinion as to the victim's credibility. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt. (2) The trial court did not err by allowing the State's expert in forensic computer examination to testify that individuals normally try to hide proof of their criminal activity, do not normally save incriminating computer conversations, the defendant would have had time to dispose of incriminating material, and that someone who sets up a site for improper purposes typically would not include their real statistics. Law enforcement officers may testify as experts about the practices criminals use in concealing their identity or criminal activity. The testimony properly explained why, despite the victim's testimony that she and defendant routinely communicated through instant messaging and a web page and that defendant took digital photographs of her during sex, no evidence of these communications or photographs were recovered from defendant's computer equipment, camera, or storage devices. Even if error occurred, it was not prejudicial in light of overwhelming evidence of guilt.

State v. Crandell, 208 N.C. App. 227 (Dec. 7, 2010). In a murder case involving a shooting, the trial court did not commit plain error by allowing a Special Agent with the State Bureau of Investigation to testify as an expert in the field of bullet identification, when his testimony was based on sufficiently reliable methods of proof in the area of bullet identification, he was qualified as an expert in that area, and the testimony was relevant. The trial court was not

required to make a formal finding as to a witness' qualification to testify as an expert because such a finding is implicit in the court's admission of the testimony in question.

State v. Smart, 195 N.C. App. 752 (Mar. 17, 2009). Rule 702(a1) obviates the state's need to prove that the horizontal gaze nystagmus testing method is sufficiently reliable.

State v. Hargrave, 198 N.C. App. 579 (Aug. 4, 2009). A laboratory technician who testified that substances found by law enforcement officers contained cocaine was properly qualified as an expert even though she did not possess an advanced degree.

Lay Opinions

Foundation

State v. Ziglar, 209 N.C. App. 461 (Feb. 1, 2011). In a felony death by vehicle case, the trial court did not abuse its discretion by sustaining the State's objection when defense counsel asked the defendant whether he would have been able to stop the vehicle if it had working brakes. Because a lay opinion must be rationally based on the witness's perception, for the defendant's opinion to be admissible, some foundational evidence was required to show that he had, at some point, perceived his ability, while highly intoxicated, to slow down the vehicle as it went through the curve at an excessive speed. However, there was no evidence that the defendant ever had perceived his ability to stop the car under the hypothetical circumstances.

Drug Cases

Powder Cocaine

State v. Llamas-Hernandez, 363 N.C. 8 (Feb. 6, 2009). The court, per curiam and without an opinion, reversed the ruling of the North Carolina Court of Appeals and held, for the reasons stated in the dissenting opinion below, that the trial judge erred in allowing a detective to offer a lay opinion that 55 grams of a white powder was cocaine. The officer's identification of the powder as cocaine was based solely on the detective's visual observations. There was no testimony why the officer believed that the white powder was cocaine other than his extensive experience in handling drug cases. There was no testimony about any distinguishing characteristics of the white powder, such as its taste or texture.

Crack Cocaine

State v. Nabors, 365 N.C. 306 (Dec. 9, 2011). The court reversed a decision by the court of appeals in *State v. Nabors*, 207 N.C. App. 463 (Oct. 19, 2010) (the trial court erred by denying the defendant's motion to dismiss drug charges when the evidence that the substance at issue was crack cocaine consisted of lay opinion testimony from the charging police officer and an undercover informant based on visual observation; the court held that *State v. Ward*, 364 N.C. 133 (2010) calls into question "the continuing viability" of *State v. Freeman*, 185 N.C. App. 408 (2007) (officer can give a lay opinion that substance was crack cocaine), and requires that in order to prove that a substance is a controlled substance, the State must present expert witness testimony based on a scientifically valid chemical analysis and not mere visual inspection). The supreme court declined to address whether the trial court erred in admitting lay testimony that

the substance at issue was crack cocaine, instead concluding that the testimony by the defendant's witness identifying the substance as cocaine was sufficient to withstand the motion to dismiss.

State v. Davis, 202 N.C. App. 490 (Feb. 16, 2010). Not mentioning *Meadows* and stating that notwithstanding *Llamas-Hernandez*, *State v. Freeman*, 185 N.C. App. 408 (2007), stands for the proposition that an officer may offer a lay opinion that a substance is crack cocaine.

State v. Meadows, 201 N.C. App. 707 (Jan. 5, 2010). Citing *Ward*, discussed above under expert opinions, the court held that the trial judge erred by allowing a police officer to testify that he "collected what [he] believe[d] to be crack cocaine." Controlled substances defined in terms of their chemical composition only can be identified by the use of a chemical analysis rather than through the use of lay testimony based on visual inspection.

Marijuana

State v. Cox, 222 N.C. App. 192 (Aug. 7, 2012), *reversed on other grounds* 367 N.C. 147 (Nov. 8, 2013). The trial court did not err by allowing the two officers to identify the green vegetable matter as marijuana based on their observation, training, and experience.

Other Controlled Substances

State v. Woodard, 365 N.C. App. 334 (Apr. 5, 2011). In a case arising from a pharmacy break-in, the court rejected the defendant's argument that the trial court erred by failing to dismiss trafficking in opium charges because the State did not present a chemical analysis of the pills. Citing *State v. Ward*, 364 N.C. 133 (2010), and *State v. Llamas-Hernandez*, 363 N.C. 8 (2009), the court determined that State is not required to conduct a chemical analysis on a controlled substance in order to sustain a conviction under G.S. 90-95(h)(4), provided it has established the identity of the controlled substance beyond a reasonable doubt by another method of identification. In the case at hand, the State's evidence did that. The drug store's pharmacist manager testified that 2,691 tablets of hydrocodone acetaminophen, an opium derivative, were stolen from the pharmacy. He testified that he kept "a perpetual inventory" of all drug items. Using that inventory, he could account for the type and quantity of every item in inventory throughout the day, every day. Accordingly, he was able to identify which pill bottles were stolen from the pharmacy by examining his inventory against the remaining bottles, because each bottle was labeled with a sticker identifying the item, the date it was purchased and a partial of the pharmacy's account number. These stickers, which were on every pill bottle delivered to the pharmacy, aided the pharmacist in determining that 2,691 tablets of hydrocodone acetaminophen were stolen. He further testified, based on his experience and knowledge as a pharmacist, that the weight of the stolen 2,691 pill tablets was approximately 1,472 grams. Based on his 35 years of experience dispensing the same drugs that were stolen and his unchallenged and uncontroverted testimony regarding his detailed pharmacy inventory tracking process, the pharmacist's identification of the stolen drugs as more than 28 grams of opium derivative hydrocodone acetaminophen was sufficient evidence to establish the identity and weight of the stolen drugs and was not analogous to the visual identifications found to be insufficient in *Ward* and *Llamas–Hernandez*.

Opinion that Drugs Are Packaged for Sale, Etc.

State v. Hargrave, 198 N.C. App. 579 (Aug. 4, 2009). The trial judge did not err by allowing officers to give lay opinion testimony that the cocaine at issue was packaged as if for sale and that the total amount of money and the number of twenty-dollar bills found on the defendant were indicative of drug sales. The officers' testimony was based on their personal knowledge of drug practices, through training and experience.

In Re D.L.D, 203 N.C. App. 434 (Apr. 20, 2010). The trial court did not err by admitting lay opinion testimony from an officer regarding whether, based on his experience in narcotics, he knew if it was common for a person selling drugs to have possession of both money and drugs. Officer also gave an opinion about whether a drug dealer would have a low amount of inventory and a high amount of money or vice versa. The testimony was based on the officer's personal experience and was helpful to the determination of whether the juvenile was selling drugs.

DWI Cases

State v. Norman 213 N.C. App. 114 (July 5, 2011). The trial court did not err by allowing a lay witness to testify that the defendant was impaired. The witness formed the opinion that the defendant was impaired because of the strong smell of alcohol on him and because the defendant was unable to maintain balance and was incoherent, acting inebriated, and disoriented. The witness's opinion was based on personal observation immediately after the collision.

State v. Armstrong, 203 N.C. App. 399 (Apr. 20, 2010). In a DWI/homicide case, the trial court erred by allowing a state's witness to testify about ingredients and effect of Narcan. Although the state proffered the testimony as lay opinion, it actually was expert testimony. When the state called the witness, it elicited extensive testimony regarding his training and experience and the witness testified that Narcan contains no alcohol and has no effect on blood-alcohol content. Because the witness offered expert testimony and because the state did not notify the defendant during discovery that it intended to offer this expert witness, the trial court erred by allowing him to testify as such. However, the error was not prejudicial.

Ballistics

State v. Crandell, 208 N.C. App. 227 (Dec. 7, 2010). In a murder case involving a shooting, the trial court did not abuse its discretion by allowing a detective to give lay opinion testimony concerning the calibers of bullets recovered at the crime scene. The detective testified that as a result of officer training, he was able to recognize the calibers of weapons and ammunition. The detective's testimony was based upon on his own personal experience and observations relating to various calibers of weapons, and was admissible under Rule 701.

Accident Reconstruction

State v. Maready, 205 N.C. App. 1 (July 6, 2010). It was error to allow officers, who were not proffered as experts in accident reconstruction and who did not witness the car accident in

question, to testify to their opinions that the defendant was at fault based on their examination of the accident scene. The court stated: "Accident reconstruction opinion testimony may only be admitted by experts, who have proven to the trial court's satisfaction that they have a superior ability to form conclusions based upon the evidence gathered from the scene of the accident than does the jury." However, the court went on to find that the error did not rise to the level of plain error.

Surveillance Video or Photographs

State v. Collins, 216 N.C. App. 249 (Oct. 4, 2011). The trial court did not commit plain error by admitting an officer's lay opinion testimony identifying the defendant as the person depicted in a videotape. The defendant argued that the officer was in no better position than the jury to identify the defendant in the videotape. However, the officer had contact with the defendant prior to the incident in question; because he was familiar with the defendant, the officer was in a better position than the jury to identify defendant in the videotape.

State v. Howard, 215 N.C. App. 318 (Sept. 6, 2011). The trial court did not commit plain error by allowing a detective to identify the defendant as the person shown in a still photograph from a store's surveillance tapes. The detective observed the defendant in custody on the morning that the photo was taken, affording him the opportunity to see the defendant when his appearance most closely matched that in the video. The detective also located the defendant's clothes. As such, the detective had more familiarity with the defendant's appearance at the time the photo was taken than the jury could have.

State v. Belk, 201 N.C. App. 412 (Dec. 8, 2009). The trial court committed reversible error by allowing a police officer to give a lay opinion identifying the defendant as the person depicted in a surveillance video. The officer only saw the defendant a few times, all of which involved minimal contact. Although the officer may have been familiar with the defendant's "distinctive" profile, there was no basis for the trial court to conclude that the officer was more likely than the jury correctly to identify the defendant as the person in the video. There was is no evidence that the defendant altered his appearance between the time of the incident and the trial or that the individual depicted in the footage was wearing a disguise and the video was of high quality.

State v. Buie, 194 N.C. App. 725 (Jan. 6, 2009). The trial judge erred in allowing a detective to offer lay opinion testimony regarding whether what was depicted in crime scene surveillance videos was consistent with the victim's testimony. For example, the detective was impermissibly allowed to testify that the videotapes showed a car door being opened, a car door being closed, and a vehicle driving away. The court found that the officer's testimony was neither a shorthand statement of facts nor based on firsthand knowledge.

State v. Ligon, 206 N.C. App. 458 (Aug. 17, 2010). In a sexual exploitation of a minor and indecent liberties case, the trial court did not err by allowing lay opinion testimony regarding photographs of a five-year-old child that formed the basis for the charges. None of the witnesses perceived the behavior depicted; instead they formed opinions based on their perceptions of the photographs. In one set of statements to which the defendant failed to object at trial, the witnesses stated that the photographs were "disturbing," "graphic," "of a sexual nature involving

children," "objectionable," "concerning" to the witness, and that the defendant pulled away the minor's pant leg to get a "shot into the vaginal area." As to these statements, any error did not rise to the level of plain error. However the defendant did object to a statement in the Police Incident report stating that the photo "has the juvenile's female private's [sic] showing." At to this statement, the court held that the trial court did not abuse its discretion by admitting this testimony as a shorthand statement of fact.

Value of Stolen Item

State v. Snead, ___ N.C. App. ___, 768 S.E.2d 344 (Feb. 17, 2015), *temporary stay allowed*, __ N.C. __, 768 S.E.2d 568 (Mar. 9, 2015). In this store larceny case, the trial court committed prejudicial error by admitting into evidence testimony by Mr. Steckler, the store's loss prevention manager, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise where his opinion was based on store surveillance video and not first-hand knowledge.

State v. Rahaman, 202 N.C. App. 36 (Jan. 19, 2010). The trial court did not abuse its discretion by allowing an officer to give a lay opinion as to the value of a stolen Toyota truck in a felony possession trial. The officer had worked as a car salesman, was very familiar with Toyotas, and routinely valued vehicles as a police officer. He also spent approximately three hours taking inventory of the truck.

Blood

State v. Mills, 221 N.C. App. 409 (June 19, 2012). The trial court did not err by permitting detectives to offer lay opinions that a substance found on a lawn chair used to beat the victim was blood. One detective testified that there was blood in the driveway and that a lawn chair close by had blood on it. He based this conclusion on his 7 years of experience as an officer, during which he saw blood on objects other than a person several times and found that blood has a distinct smell and appearance. A second detective opined that there was blood on the lawn chair based on the "hundreds and maybe thousands" of times that he had seen blood in his life, both in the capacity as an officer and otherwise.

Shoeprint

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). In a burglary and felony larceny case, an officer properly offered lay opinion testimony regarding a shoeprint found near the scene. The court found that the shoeprint evidence satisfied the *Palmer* "triple inference" test:

> [E]vidence of shoeprints has no legitimate or logical tendency to identify an accused as the perpetrator of a crime unless the attendant circumstances support this triple inference: (1) that the shoeprints were found at or near the place of the crime; (2) that the shoeprints were made at the time of the crime; and (3) that the shoeprints correspond to shoes worn by the accused at the time of the crime.

Shorthand Statement of Facts

State v. Phillips, 365 N.C. 103 (June 16, 2011) In this capital case, the trial court did not commit plain error by admitting lay opinion testimony by an eyewitness. When the eyewitness was asked about the defendant's demeanor, she stated: "He was fine. I mean it was -- he had -- he knew what he was doing. He had it planned out. It was a -- he -- he knew before he ever got there what was going to happen." The defendant argued that the eyewitness had no personal knowledge of any plans the defendant might have had. The court noted that a lay witness may provide testimony based upon inference or opinion if the testimony is rationally based on the witness's perception and helpful to a clear understanding of his or her testimony or the determination of a fact in issue. It further noted that this rule permits a witness to express "instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts." Immediately before the testimony at issue, the witness testified that the defendant had said that "[h]e was in debt with somebody who he needed money for and that's why they came to [the] house," that the debt was "with a drug dealer and they were going to kill him, if he did not come up with their money," and that "his brother had been shot and he was dying and he had to get their money." In context, the witness's statements that the defendant "had it planned out" and "knew before he ever got there what was going to happen" were helpful to an understanding of her testimony and were rationally based on her perceptions upon seeing the defendant commit the multiple murders at issue.

State v. Pace, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). In this child sexual assault case the trial court did not abuse its discretion by allowing the victim's mother to testify about changes she observed in her daughter that she believed were a direct result of the assault. The court rejected the defendant's argument that this testimony was improper lay opinion testimony, finding that the testimony was proper as a shorthand statement of fact.

Miscellaneous Cases

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). An officer's testimony that a substance found on a vehicle looked like residue from a car wash explained the officer's observations about spots on the vehicle and was not a lay opinion. The officer properly testified to a lay opinion that (1) the victims were not shot in the vehicle, when that opinion was rationally based on the officer's observations regarding a lack of pooling blood in or around the vehicle, a lack of shell casings in or around the car, very little blood spatter in the vehicle, and no holes or projectiles found inside or outside the vehicle; (2) one of the victim was "winched in" the vehicle using rope found in the vehicle, when that opinion was based upon his perception of blood patterns, the location of the vehicle, and the positioning of and tension on the rope on the seat and the victim's hands; and (3) the victims were dragged through the grass at the defendant's residence, when that opinion was based on his observations at the defendant's residence and his experience in luminol testing.

State v. Bishop, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). In this cyberbullying case based on electronic messages, the trial court did not abuse its discretion by allowing the investigating detective to testify that while investigating the case, he took screen shots of

anything that appeared to be evidence of cyberbullying. The defendant argued that the detective's testimony was inadmissible opinion testimony regarding the defendant's guilt. The detective testified about what he found on Facebook and about the course of his investigation. When asked how he searched for electronic comments concerning the victim, he explained that examined the suspects' online pages and "[w]henever I found anything that appeared to have been to me cyber-bullying I took a screen shot of it." He added that "[i]f it appeared evidentiary, I took a screen shot of it." This testimony was not proffered as an opinion of the defendant's guilt; it was rationally based on the detective's perception and was helpful in presenting to the jury a clear understanding of his investigative process and thus admissible under Rule 701.

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). In this felony child abuse case, the trial court did not commit plain error by admitting testimony from an investigating detective that the existence of the victim's hairs in a hole in the wall of the home where the incident occurred was inconsistent with defendant's account of the incident, that he punched the wall when he had difficulty communicating with a 911 operator. The detective's testimony did not invade the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, the court reasoned, the detective was explaining the investigative process that led officers to return to the home and collect the hair sample (later determined to match the victim). Contrary to defendant's arguments, testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. The detective's testimony served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. It concluded: "these statements were rationally based on [the officer's] experience as a detective and were helpful to the jury in understanding the investigative process in this case."

State v. Jackson, __ N.C. App. __, 748 S.E.2d 50 (Sept. 17, 2013). An officer properly gave lay witness testimony. In a case where data from the defendant's electronic monitoring device was used to place him at the crime scene, the officer-witness testified regarding the operation of the device and tracking data retrieved from the secured server. When questioned about specific tracking points in the sequence of mapped points, he identified the date, time, accuracy reading, and relative location of the tracking points.

State v. Storm, __ N.C. App. __, 743 S.E.2d 713 (July 2, 2013). In a murder case, the trial court did not err by excluding testimony of Susan Strain, a licensed social worker. Strain worked with the defendant's step-father for several years and testified that she occasionally saw the defendant in the lobby of the facility where she worked. The State objected to Strain's proffered testimony that on one occasion the defendant "appeared noticeably depressed with flat affect." The trial court allowed Strain to testify to her observation of the defendant, but did not permit her to make a diagnosis of depression based upon her brief observations of the defendant some time ago. The defendant tendered Strain as a lay witness and made no attempt to qualify her as an expert; her opinion thus was limited to the defendant's emotional state and she could not testify concerning a specific psychiatric diagnosis. The statement that the defendant "appeared noticeably depressed with flat affect" is more comparable to a specific psychiatric diagnosis than to a lay opinion of an emotional state. Furthermore Strain lacked personal knowledge because she only saw the

defendant on occasion in the lobby, her observations occurred seven years before to the murder, she did not spend any appreciable amount of time with him, and the defendant did not present any evidence to indicate Strain had personal knowledge of his mental state at that time.

State v. James, __ N.C. App. __, 735 S.E.2d 627 (Dec. 4, 2012). In an assault with a deadly weapon on a law enforcement officer case, the trial court did not err by allowing the officer to give lay opinion regarding the weight of a kitchen chair (the alleged deadly weapon) that the defendant threw at him. The officer's observation of the chair and of the defendant use of it was sufficient to support his opinion as to its weight. Also, this testimony was helpful to the jury.

State v. Howard, 215 N.C. App. 318 (Sept. 6, 2011). No plain error occurred when the trial court allowed a detective to give lay opinion testimony that items were purchased with a stolen credit card and it looked like someone had tried to hide them; subtotals on a store receipt indicated that the credit card was stolen; blood was present on clothing and in a car; and a broken wood panel piece matched a break at the entry site. Some testimony was proper on grounds that an officer may give lay opinion testimony based on investigative training. Other testimony was nothing more than an instantaneous conclusion reached by the detective. Finally, the Supreme Court of North Carolina has upheld lay opinion testimony identifying blood or bloodstains.

State v. Elkins, 210 N.C. App. 110 (Mar. 1, 2011). Although Rule 704 allows admission of lay opinion evidence on ultimate issues, the lay opinion offered was inadmissible under Rule 701 because it was not helpful to the jury. In this case, a detective was asked: After you received this information from the hospital, what were your next steps? Were you building a case at this point? He answered: "I felt like I was building a solid case. [The defendant] was, indeed, the offender in this case." However, the error did not constitute plain error.

On Credibility

See also cases cited under Opinions, Expert Opinions, Child Victim Cases

State v. Taylor, ___ N.C. App. ___, 767 S.E.2d 585 (Dec. 16, 2014), *temporary stay allowed*, __ N.C. __, 767 S.E.2d 53 (Jan. 2, 2015). Over a dissent, the court held that the trial court committed plain error by permitting a Detective to testify that she moved forward with her investigation of obtaining property by false pretenses and breaking or entering offenses because she believed that the victim, Ms. Medina, "seemed to be telling me the truth." The challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and the defendant.

State v. Castaneda, 215 N.C. App. 144 (Aug. 16, 2011). The trial court did not err by denying the defendant's motion to redact an officer's statements in a transcript of an interview of the defendant in which the officer accused the defendant of telling a "lie" and giving an account of the events that was "bullshit" and like "the shit you see in the movies." The defendant argued that these statements were inadmissible opinion evidence about the defendant's credibility. The court noted that issue of the admissibility of an interrogator's statements during an interview that the suspect is being untruthful has not been decided by North Carolina's appellate courts. It concluded that because the officer's statements were part of an interrogation technique designed

to show the defendant that the detectives were aware of the holes and discrepancies in his story and were not made for the purpose of expressing an opinion as to the defendant's credibility or veracity at trial, the trial court properly admitted the evidence. The court went on to note that investigators' comments reflecting on the suspect's truthfulness are not, however, always admissible. It explained that an interrogator's comments that he or she believes the suspect is lying are admissible only to the extent that they provide context to a relevant answer by the suspect. Here, the officer's statements that he believed the defendant to be lying were admissible because they provided context for the defendant's inculpatory responses. For similar reasons the court rejected the defendant's argument that admission of these statements violated Rule 403.

State v. Martinez, 212 N.C. App. 661 (June 21, 2011). In a child sex case, the trial court erred by admitting a DSS social worker's testimony that she "substantiated" the victim's claim of sexual abuse by the defendant. This testimony was an impermissible expression of opinion as to the victim's credibility.

State v. Ligon, 206 N.C. App. 458 (Aug. 17, 2010). In a sexual exploitation of a minor and indecent liberties case, the court rejected the defendant's argument that a testifying detective's statement that the defendant's explanation of the events was not consistent with photographic evidence constituted an improper opinion as to credibility of a witness. The court concluded that no improper vouching occurred.

State v. Dye, 207 N.C. App. 473 (Oct. 19, 2010). In a child sexual assault case, the court held that even assuming that the State's medical expert's testimony regarding "secondary gain" improperly vouched for the victim's credibility, the error did not rise to the level of plain error.

On Legal Issues

State v. Rollins, 220 N.C. App. 443 (May 15, 2012). No plain error occurred in a second-degree murder case stemming from a vehicle accident after a police chase when officers testified that the defendant committed the offense of felony speeding to elude arrest and other crimes. The officer's testimony was a shorthand statement of facts necessary to explain why the police chase ensued. Specifically, the officers testified that they were not allowed to give chase unless they observed felonious conduct. Following *State v. Anthony*, 354 N.C. 372, 408 (2001), the court held that the officers were not interpreting the law for the jury, but rather were testifying regarding their observations in order to explain why they pursued the defendant in a high-speed chase.

State v. Cole, 209 N.C. App. 84 (Jan. 4, 2011). No plain error occurred when a detective testified that after his evaluation of the scene, he determined that the case involved a robbery and resulting homicide. The court rejected the defendant's argument that the trial court improperly allowed the detective to give a legal opinion, concluding that the detective merely was testifying about police procedure.

Privileges

Mosteller v. Stiltner, 221 N.C. App. 486 (July 3, 2012). Because the social worker-patient

privilege belongs to the patient alone, a social worker did not have standing to appeal an order compelling her comply with a subpoena where the patient never asserted the privilege. In this civil action the court found that the record and the patient's failure to participate in the appeal showed that the patient had raised no objection to the social worker's testimony or document production.

State v. Watkins, 195 N.C. App. 215 (Feb. 3, 2009). Conversation between the defendant and his lawyer was not privileged because the defendant told his lawyer the information with the intention that it be conveyed to the prosecutor. At a hearing on the defendant's motion to withdraw his guilty plea, the defendant's former attorney, who had represented the defendant during plea negotiations, testified over the defendant's objection. Former counsel testified about a meeting in which the defendant provided former counsel with information to be relayed to the prosecutor to show what testimony the defendant could offer against his co-defendants.

State v. Rollins, 363 N.C. 232 (May 1, 2009). Marital communications privilege does not protect conversations between a husband and wife that occur in the public visiting areas of state correctional facilities. No reasonable expectation of privacy exists in those places.

State v. Terry, 207 N.C. App. 311 (Oct. 5, 2010). The marital privilege did not apply when the parties did not have a reasonable expectation of privacy of their conversation, which occurred after they were arrested and in an interview room at the sheriff's department. Warning signs indicated that the premises were under audio and visual surveillance and there were cameras and recording devices throughout the department.

Refreshed Recollection

State v. Harrison, 218 N.C. App. 546 (Feb. 7, 2012). The trial court properly allowed the State's witness to use a prior statement to refresh her recollection. The prior statement was made to an officer and recounted an interaction between her and the defendant. The witness had an independent recollection of her conversation with the defendant and of making her statement to the officer. She affirmed that her recollection had been refreshed, testified from memory, and her testimony included details not in the statement. Her testimony showed that she was not using her prior statement as a crutch for something beyond her recall. In its decision the court reviewed and distinguished the law regarding the past recollection recorded and present recollection refreshed.

State v. Black, 197 N.C. App. 731 (July 7, 2009). The trial court did not abuse its discretion in admitting a witness's refreshed recollection. The witness's testimony was not merely a recitation of the refreshing memorandum. The witness testified to some of the relevant events before being shown a transcript of his police interview. After being shown the transcript, the witness was equivocal about whether he made the statements recorded in it. However, after hearing an audio tape of the interview out of the presence of the jury, the witness said that his memory was refreshed. He then testified in detail regarding the night in question, apparently without reference to the interview transcript. Where, as here, there is doubt about whether about whether the witness was testifying from his or her own recollection, the testimony is admissible, in the trial court's discretion.

Re-Opening Evidence

State v. McClaude, __ N.C. App. __, 765 S.E.2d 104 (Nov. 18, 2014). In this drug and drug conspiracy case, the trial court did not abuse its discretion by denying the defendant's request for additional time to locate an alleged co-conspirator and his motion to reopen the evidence so that witness could testify when he was located after the jury reached a verdict. The trial court acted within its authority given that the witness had not been subpoenaed (and thus was not required to be present) and his attorney indicated that he would not testify.

Vouching for the Credibility of a Victim

State v. Giddens, 199 N.C. App. 115 (Aug. 18, 2009), *aff'd*, 363 N.C. 826 (Mar. 12, 2010). Holding, over a dissent, that plain error occurred in a child sex case when the trial court admitted the testimony of a child protective services investigator. The investigator testified that the Department of Social Services (DSS) had "substantiated" the defendant as the perpetrator and that the evidence she gathered caused DSS personnel to believe that the abuse alleged by the victims occurred. Case law holds that a witness may not vouch for the credibility of a victim.

State v. Sprouse, 217 N.C. App. 230 (Dec. 6, 2011). In a child sexual assault case, the trial court erred by allowing a DSS social worker to testify that there had been a substantiation of sex abuse of the victim by the defendant. Citing its opinion in *State v. Giddens*, 199 N.C. App. 115 (2009), *aff'd*, 363 N.C. 826 (2010), the court agreed that this constituted an impermissible opinion vouching for the victim's credibility. However, the court found that unlike *Giddens*, the error did not rise to the level of plain error.

Admissibility of Chemical Test Results in an Impaired Driving Case

State v. Simmons, 205 N.C. App. 509 (July 20, 2010). The trial court did not err by denying the defendant's motion to suppress the results of the chemical analysis performed on the defendant's breath with the Intoxilyzer 5000 on grounds that preventative maintenance was not performed on the machine at least every 4 months as required by the Department of Health and Human Services. Preventive maintenance was performed on July 14, 2006 and December 5, 2006. The court concluded that although the defendant's argument might have had merit if the chemical analysis had occurred after November 14, 2006 (4 months after the July maintenance) and before December 5, 2006, it failed because the analysis at issue was done only 23 days after the December maintenance.

Miscellaneous Cases

State v. Matthews, 218 N.C. App. 277 (Jan. 17, 2012). The trial court did not err by denying the defendant's motion to exclude DNA evidence. The alleged crime occurred at a convenience store. An officer collected blood samples from the scene, including blood from cigarette cartons. The defendant argued that the cigarette cartons from which samples were taken should have been preserved. The court noted that the defendant did not argue any bad faith on the part of law enforcement officers, nor did he identify any irregularities in the collection or analysis of the

samples that would call into question the results of the analysis. Therefore, the court concluded, the defendant failed to demonstrate any exculpatory value attached to the cigarette cartons from which the blood samples were collected.

State v. McDowell, 215 N.C. App. 184 (Sept. 6, 2011). In a murder case, the trial court did not err by allowing law enforcement officers to testify that they had observed a small hair on the wall at the murder scene and that the hair appeared to have tissue attached. The hair was not collected as evidence. The court concluded that the State is not required to collect evidence as a pre-condition to offering testimony about a particular subject.

State v. Dallas, 205 N.C. App. 216 (July 6, 2010). In a larceny of motor vehicle case, the court rejected the defendant's argument that testimony by the vehicle owners regarding the value of the stolen vehicles invaded the province of the jury as fact-finder, stating: "the owner of property is competent to testify as to the value of his own property even though his knowledge on the subject would not qualify him as a witness were he not the owner."

State v. Capers, 208 N.C. App. 605 (Dec. 21, 2010). The trial court properly admitted testimony that the defendant was handcuffed and shackled when he was arrested. The court declined to extend *State v. Tolley*, 290 N.C. 349, 365 (1976) ("a defendant in a criminal case is entitled to appear at trial free from all bonds or shackles except in extraordinary instances"), concluding that *Tolley* applies when the jury sees the defendant shackled at trial, not to prohibit the jury from hearing evidence that a defendant was previously handcuffed and shackled. The defendant had asserted that the relevant testimony violated his due process rights.

Arrest, Search, and Investigation

Abandoned Property

State v. Williford, ___ N.C. App. ___, 767 S.E.2d 139 (Jan. 6, 2015). The trial court did not err by denying the defendant's motion to suppress DNA evidence obtained from his discarded cigarette butt. When the defendant refused to supply a DNA sample in connection with a rape and murder investigation, officers sought to obtain his DNA by other means. After the defendant discarded a cigarette butt in a parking lot, officers retrieved the butt. The parking lot was located directly in front of the defendant's four-unit apartment building, was uncovered, and included 5-7 unassigned parking spaces used by the residents. The area between the road and the parking lot was heavily wooded, but no gate restricted access to the lot and no signs suggested either that access to the parking lot was restricted or that the lot was private. After DNA on the cigarette butt matched DNA found on the victim, the defendant was charged with the crimes. At trial the defendant unsuccessfully moved to suppress the DNA evidence. On appeal, the court rejected the defendant's argument that the seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment:

> [W]e conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept."

Next, the court rejected the defendant's argument that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a third party. The court reasoned that the cigarette butt was abandoned property. Finally, the court rejected the defendant's argument that even if officers lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing it for his DNA because he had a legitimate expectation of privacy in his DNA. The court reasoned that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment.

State v. Borders, __ N.C. App. __, 762 S.E.2d. 490 (Sept. 2, 2014). In this rape and murder case, no Fourth Amendment violation occurred when an officer seized a cigarette butt containing the defendant's DNA. The defendant, a suspect in a murder case, refused four requests by the police to provide a DNA sample. Acting with the primary purpose of obtaining a sample of the defendant's DNA to compare to DNA from the victim's rape kit, officers went to his residence to execute an unrelated arrest warrant. After the defendant was handcuffed and taken outside to the driveway, an officer asked him if he wanted to smoke a cigarette. The defendant said yes and after he took several drags from the cigarette the officer asked if he could take the cigarette to throw it away for the defendant. The defendant said yes but instead of throwing away the cigarette, the officer extinguished it and placed it in an evidence bag. The DNA on the cigarette butt came back as a match to the rape kit DNA. The court acknowledged that if the defendant had discarded the cigarette himself within the curtilage of the premises, the officers could not have seized it. However, the defendant voluntarily accepted the officer's offer to throw away the

cigarette butt. The court continued, rejecting the defendant's argument that he had a reasonable expectation of privacy in the cigarette butt. When the defendant, while under arrest and handcuffed, placed the cigarette butt in the officer's gloved hand—instead of on the ground or in some other object within the curtilage--the defendant relinquished possession of the butt and any reasonable expectation of privacy in it. Finally, although indicating that it was "troubled" by the officers' trickery, the court concluded that the officers' actions did not require suppression of the DNA evidence. The court reasoned that because "the police did not commit an illegal act in effectuating the valid arrest warrant and because the subjective motives of police do not affect the validity of serving the underlying arrest warrant," suppression was not required.

State v. Joe, 222 N.C. App. 206 (Aug. 7, 2012). (1) On remand from the N.C. Supreme Court for consideration of an issue not addressed in the original decision, the court held that the trial court did not err by granting the defendant's motion to suppress cocaine found following the defendant's arrest. The State argued that suppression was erroneous because the officer had reasonable suspicion to conduct an investigatory stop. The court found that an arrest, not an investigatory stop, had occurred. Additionally, because its previous ruling in *State v. Joe*, 213 N.C. App. 148 (July 5, 2011), that no probable cause supported the arrest controlled, any evidence found during a search incident to the arrest must be suppressed. (2) The defendant did not voluntarily abandon controlled substances. Noting that the defendant was illegally arrested without probable cause, the court concluded that property abandoned as a result of illegal police activity cannot be held to have been voluntarily abandoned.

State v. Eaton, 210 N.C. App. 142 (Mar. 1, 2011). Because the defendant had not been seized when he discarded a plastic baggie beside a public road, the baggie was abandoned property in which the defendant no longer retained a reasonable expectation of privacy. As such, no Fourth Amendment violation occurred when an officer obtained the baggie.

Arrests and Investigatory Stops
Stops
Whether a Seizure Occurred
Seizure Occurred

State v. Leak, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In a case in which there was a dissenting opinion, the court held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. Until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the officer's conduct of taking the defendant's license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing the recent U.S. Supreme Court case *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

State v. Icard, 363 N.C. 303 (June 18, 2009). Under the totality circumstances, the defendant was seized by officers and the resulting search of her purse was illegal. The officers mounted a show of authority when (1) an officer, who was armed and in uniform, initiated the encounter, telling the defendant, an occupant of a parked truck, that the area was known for drug crimes and prostitution; (2) the officer called for backup assistance; (3) the officer initially illuminated the truck with blue lights; (4) a second officer illuminated the defendant's side of the truck with take-down lights; (5) the first officer opened the defendant's door, giving her no choice but to respond to him; and (6) the officer instructed the defendant to exit the truck and bring her purse. A reasonable person in defendant's place would not have believed that she was free to leave or otherwise terminate the encounter and thus the trial court erred when it concluded that the defendant's interaction with the officers was consensual.

State v. Knudsen, __ N.C. App. __, 747 S.E.2d 641 (Aug. 20, 2013). The trial court did not err by determining that the defendant was seized while walking on a sidewalk. Although the officers used no physical force to restrain the defendant, both were in uniform and had weapons. One officer blocked the sidewalk with his vehicle and another used his bicycle to block the defendant's pedestrian travel on the sidewalk.

State v. Harwood, 221 N.C. App. 451 (July 3, 2012). The defendant was seized when officers parked directly behind his stopped vehicle, drew their firearms, and ordered the defendant and his passenger to exit the vehicle. After the defendant got out of his vehicle, an officer put the defendant on the ground and handcuffed him.

No Seizure Occurred

State v. Veal, __ N.C. App. __, 760 S.E.2d. 43 (July 1, 2014). No seizure occurred when an officer initially approached the defendant in response to a tip about an impaired driver. The officer used no physical force, approached the defendant's vehicle on foot and engaged in conversation with him. The officer did not activate his blue lights and there was no evidence that he removed his gun from his holster or used a threatening tone. Thus, the court concluded, the event was a voluntary encounter.

State v. Price, __ N.C. App. __, 757 S.E.2d 309 (April 1, 2014). The court ruled that the trial court erred by granting the defendant's motion to suppress. A wildlife officer approached the defendant, dressed in full camouflage and carrying a hunting rifle, and asked to see his hunting license. After the defendant showed his license, the officer asked how he got to the location; he replied that his wife transported him there. The officer then asked him whether he was a convicted felon. The defendant admitted that he was. The officer seized the weapon and the defendant was later charged with being a felon in possession of a firearm. The court ruled that the defendant was neither seized under the Fourth Amendment nor in custody under Miranda when the officer asked about his criminal history, and therefore the trial court erred by granting the motion to suppress. The court further noted that the officer had authority to seize the defendant's rifle without a warrant under the plain view doctrine.

State v. Eaton, 210 N.C. App. 142 (Mar. 1, 2011). Citing *California v. Hodari D*, 499 U.S. 621 (1991), the court held that the defendant was not seized when he dropped a plastic baggie

containing controlled substances. An officer was patrolling at night in an area where illegal drugs were often sold, used, and maintained. When the officer observed five people standing in the middle of an intersection, he turned on his blue lights, and the five people dispersed in different directions. When the officer asked them to come back, all but the defendant complied. When the officer repeated his request to the defendant, the defendant stopped, turned, and discarded the baggie before complying with the officer's show of authority by submitting to the officer's request.

State v. Morton, 198 N.C. App. 206 (July 21, 2009), *rev'd on other grounds*, 363 N.C. 737 (Dec. 11, 2009). No seizure occurred when officers approached the defendant and asked to speak with him regarding a shooting. The defendant submitted to questioning without physical force or show of authority by the police; the officers did not raise their weapons or activate their blue lights.

State v. Williams, 201 N.C. App. 566 (December 22, 2009). An encounter between the defendant and an officer did not constitute a seizure. The officer parked his patrol car on the opposite side of the street from the defendant's parked car; thus, the officer did not physically block the defendant's vehicle from leaving. The officer did not activate his siren or blue lights, and there was no evidence that he removed his gun from its holster, or used any language or displayed a demeanor suggesting that the defendant was not free to leave. A reasonable person would have felt free to disregard the officer and go about his or her business; as such the encounter was entirely consensual.

State v. Mewborn, 200 N.C. App. 731 (Nov. 3, 2009). No stop occurred when the defendant began to run away as the officers exited their vehicle. The defendant did not stop or submit to the officers' authority at this time.

Use of Force, Including Handcuffs

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). Even if the defendant had properly preserved the issue, the officer did not use excessive force by taking the defendant to the ground during a valid traffic stop.

State v. Rouson, __ N.C. App. __, 741 S.E.2d 470 (April 16, 2013). The trial court's findings of fact support its rejection of the defendant's argument that the show of force by law enforcement during a traffic stop amounted to an arrest.

State v. Carrouthers, 213 N.C. App. 384 (July 19, 2011). An officer's act of handcuffing the defendant during a *Terry* stop was reasonable and did not transform the stop into an arrest. The officer observed what he believed to be a hand-to-hand drug transaction between the defendant and another individual; the defendant was sitting in the back seat of a car, with two other people up front. Upon frisking the defendant, the officer felt an item consistent with narcotics, corroborating his suspicion of drug activity. The officer then handcuffed the defendant and recovered crack cocaine from his pocket. The circumstances presented a possible threat of physical violence given the connection between drugs and violence and the fact that the officer was outnumbered by the people in the car.

State v. Carrouthers, 200 N.C. App. 415 (Oct. 20, 2009). The trial court applied the wrong legal standard when granting the defendant's motion to suppress. The trial court held that an arrest occurred when the defendant was handcuffed by an officer, and the arrest was not supported by probable cause. The trial court should have determined whether special circumstances existed that would have justified the officer's use of handcuffs as the least intrusive means reasonable necessary to carry out the purpose of the investigative stop. The court remanded for the required determination.

Pretextual Stops

State v. Lopez, 219 N.C. App. 139 (Feb. 21, 2012). An officer lawfully stopped a vehicle after observing the defendant drive approximately 10 mph above the speed limit. The court rejected the defendant's argument that the traffic stop was a pretext to search for drugs as irrelevant in light of the fact that the defendant was lawfully stopped for speeding.

State v. Ford, 208 N.C. App. 699 (Dec. 21, 2010). Citing *Whren v. United States*, 517 U.S. 806, 813 (1996), the court rejected the defendant's argument that a stop for an alleged violation of G.S. 20-129(d) (motor vehicle's rear plate must be lit so that it can be read from a distance of 50 feet) was pretextual. Under *Whren*, the reasonableness of a traffic stop does not depend on the actual motivations of the individual officers involved.

Non-Vehicle Stops
Reasonable Suspicion
No Reasonable Suspicion Existed

State v. Knudsen, __ N.C. App. __, 747 S.E.2d 641 (Aug. 20, 2013). The trial court did not err by concluding that the seizure was unsupported by reasonable suspicion. The officers observed the defendant walking down the sidewalk with a clear plastic cup in his hands filled with a clear liquid. The defendant entered his vehicle, remained in it for a period of time, and then exited his vehicle and began walking down the sidewalk, where he was stopped. The officers stopped and questioned the defendant because he was walking on the sidewalk with the cup and the officers wanted to know what was in the cup.

State v. White, 214 N.C. App. 471 (Aug. 16, 2011). The trial court erred denying the defendant's motion to suppress. Officers responded to a complaint of loud music in a location they regarded as a high crime area. The officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music. Rather, the defendant was merely standing outside at night, with two or three other men. These facts do not provide reasonable suspicion to justify an investigatory stop of the defendant. That being the case, the officer's encounter with the defendant was entirely consensual, which the defendant was free to and did ignore by running away. Once the officer caught up with the defendant and handcuffed him for resisting arrest, a seizure occurred. However, because the defendant's flight from the consensual encounter did not constitute resisting, the arrest was improper.

State v. Huey, 204 N.C. App. 513 (June 15, 2010). An officer lacked reasonable suspicion for a stop. The State stipulated that the officer knew, at the time of the stop, that the robbery suspects

the officer was looking for were approximately 18 years old. The defendant was 51 years old at the time of the stop. Even if the officer could not initially tell the defendant's age, once the officer was face-to-face with the defendant, he should have been able to tell that the defendant was much older than 18. In any event, as soon as the defendant handed the officer his identification card with his birth date, the officer knew that the defendant did not match the description of the suspects and the interaction should have ended.

Reasonable Suspicion Existed

State v. Jackson, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). Reversing the decision below, *State v. Jackson*, __ N.C. App. __, 758 S.E.2d 39 (2014), the court held that an officer had reasonable suspicion for the stop. The stop occurred at approximately 9:00 pm in the vicinity of Kim's Mart. The officer knew that the immediate area had been the location of hundreds of drug investigations. Additionally, the officer personally had made drug arrests in the area and was aware that hand to hand drug transactions occurred there. On the evening in question the officer saw the defendant and another man standing outside of Kim's Mart. Upon spotting the officer in his patrol car, the two stopped talking and dispersed in opposite directions. In the officer's experience, this is typical behavior for individuals engaged in a drug transaction. The officer tried to follow the men, but lost them. When he returned to Kim's Mart they were standing 20 feet from their original location. When the officer pulled in, the men again separated and started walking in opposite directions. The defendant was stopped and as a result contraband was found. The court found these facts sufficient to create reasonable suspicion to justify the investigatory stop. The court noted that its conclusion was based on more than the defendant's presence in a high crime and high drug area.

State v. Benton, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). In this companion case to *Jackson* (above), the court vacated and remanded to the court of appeals in light *Jackson.* The opinion below in this case was unpublished.

State v. Hargett, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In the course of rejecting the defendant's ineffective assistance claim related to preserving a denial of a motion to suppress, the court held that no prejudice occurred because the trial court properly denied the motion. The officer received a report from an identified tipster that a window at a residence appeared to have been tampered with and the owner of the residence was incarcerated. After the officer confirmed that a window screen had been pushed aside and the window was open, he repeatedly knocked on the door. Initially there was no response. Finally, an individual inside asked, "Who's there?" The officer responded, "It's the police." The individual indicated, "Okay," came to the door and opened it. When the officer asked the person's identity, the individual gave a very long, slow response, finally gave his name but either would not or could not provide any ID. When asked who owned the house, he gave no answer. Although the individual was asked repeatedly to keep his hands visible, he continued to put them in his pockets. These facts were sufficient to create reasonable suspicion that the defendant might have broken into the home and also justified the frisk. During the lawful frisk, the officer discovered and identified baggies of marijuana in the defendant's sock by plain feel.

State v. Veal, __ N.C. App. __, 760 S.E.2d. 43 (July 1, 2014). After a consensual encounter with the defendant, reasonable suspicion supported the officer's later detention of the driver. During the voluntary encounter the officer noticed the odor of alcohol coming from the defendant and observed an unopened container of beer in his truck. These observations provide a sufficient basis for reasonable suspicion to support the subsequent stop. [Author's note: The court's opinion contains discussion of whether the original tip was anonymous or not and cites recent NC case law; it does not however mention the US Supreme Court's most recent anonymous tip case, Navarette v. California, 572 U.S. __ (April 22, 2014). In any event, this discussion does not seem to be integral the holding noted above and thus is not addressed here.]

State v. Sutton, __ N.C. App. __, 754 S.E.2d 464 (Mar. 4, 2014). An officer had reasonable suspicion to stop and frisk the defendant when the defendant was in a high crime area and made movements which the officer found suspicious. The defendant was in a public housing area patrolled by a Special Response Unit of U.S. Marshals and the DEA concentrating on violent crimes and gun crimes. The officer in question had 10 years of experience and was assigned to the Special Response Unit. Many persons were banned from the public housing area—in fact the banned list was nine pages long. On a prior occasion the officer heard shots fired near the area. The officer saw the defendant walking normally while swinging his arms. When the defendant turned and "used his right hand to grab his waistband to clinch an item" after looking directly at the officer, the officer believed the defendant was trying to hide something on his person. The officer then stopped the defendant to identify him, frisked him and found a gun in the defendant's waistband.

In Re V.C.R., __ N.C. App. __, 742 S.E.2d 566 (May 7, 2013). (1) An officer had reasonable suspicion that a juvenile was violating G.S. 14-313(c) (unlawful for person under 18 to accept receipt of cigarettes) and thus the officer's initial stop of the juvenile was proper. (2) The officer's actions of approaching the juvenile a second time in response to her loud yelling of an obscenity, telling her companions to leave, and questioning the juvenile constituted a seizure as a reasonable person would not feel free to leave. (3) Referencing the offense of disorderly conduct, the court found this seizure "permissible, given [the juvenile's] loud and profane language."

State v. Hemphill, 219 N.C. App. 50 (Feb. 21, 2012). An officer had a reasonable, articulable suspicion that criminal activity was afoot when he detained the defendant. After 10 pm the officer learned of a report of suspicious activity at Auto America. When the officer arrived at the scene he saw the defendant, who generally matched the description of one of the individuals reported, peering from behind a parked van. When the defendant spotted the officer, he ran, ignoring the officer's instructions to stop. After a 1/8 mile chase, the officer found the defendant trying to hide behind a dumpster. The defendant's flight and the other facts were sufficient to raise a reasonable suspicion that criminal activity was afoot.

State v. Brown, 213 N.C. App. 617 (July 19, 2011). Officers had reasonable suspicion to stop the defendant. When officers on a gang patrol noticed activity at a house, they parked their car to observe. The area was known for criminal activity. The defendant exited a house and approached the officers' car. One of the officers had previously made drug arrests in front of the house in question. As the defendant approached, one officer feared for his safety and got out of the car to have a better defensive position. When the defendant realized the individuals were police officers

his "demeanor changed" and he appeared very nervous--he started to sweat, began stuttering, and would not speak loudly. Additionally, it was late and there was little light for the officers to see the defendant's actions.

State v. Mewborn, 200 N.C. App. 731 (Nov. 3, 2009). Because the defendant was not stopped until after he ran away from the officers, his flight could be considered in determining that there was reasonable suspicion to stop.

State v. Williams, 195 N.C. App. 554 (Mar. 3, 2009). An officer had reasonable suspicion to stop and frisk the defendant. The officer saw the defendant, who substantially matched a "be on the lookout" report following a robbery, a few blocks from the crime scene, only minutes after the crime occurred and travelling in the same direction as the robber. The defendant froze when confronted by the officer and initially refused to remove his hands from his pockets.

Tips

Anonymous Tips

See also the cases summarized under Vehicle Stops; Reasonable Suspicion; Tips, below

State v. Harwood, 221 N.C. App. 451 (July 3, 2012). No reasonable and articulable suspicion supported seizure of the defendant made as a result of an anonymous tip. When evaluating an anonymous tip in this context, the court must determine whether the tip taken as a whole possessed sufficient indicia of reliability. If not, the court must assess whether the anonymous tip could be made sufficiently reliable by independent corroboration. The tip at issue reported that the defendant would be selling marijuana at a certain location on a certain day and would be driving a white vehicle. The court held that given the limited details contained in the tip and the failure of the officers to corroborate its allegations of illegal activity, the tip lacked sufficient indicia of reliability.

In re A.J.M-B, 212 N.C. App. 586 (June 21, 2011). The trial court erred by denying the juvenile's motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two juveniles "pop their heads out of the wood line" and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

State v. Garcia, 197 N.C. App. 522 (June 16, 2009). Anonymous informant's tips combined with officers' corroboration provided reasonable suspicion for a stop. The anonymous tips provided specific information of possessing and selling marijuana, including the specific location of such activity (a shed at the defendant's residence). The tips were buttressed by officers' knowledge of the defendant's history of police contacts for narcotics and firearms offenses, verification that the defendant lived at the residence, and subsequent surveillance of the residence. During surveillance an officer observed individuals come and go and observed the defendant remove a large bag from the shed and place it in a vehicle. Other officers then followed the defendant in

the vehicle to a location known for drug activity.

State v. Johnson, 204 N.C. App. 259 (June 1, 2010). An anonymous tip lacked a sufficient indicia of reliability to justify the warrantless stop. The anonymous tip reported that a black male wearing a white t-shirt and blue shorts was selling illegal narcotics and guns at the corner of Pitts and Birch Streets in the Happy Hill Garden housing community. The caller said the sales were occurring out of a blue Mitsubishi, license plate WT 3456. The caller refused to provide a name, the police had no means of tracking him or her down, and the officers did not know how the caller obtained the information. Prior to the officers' arrival in the Happy Hill neighborhood, the tipster called back and stated that the suspect had just left the area, but would return shortly. Due to construction, the neighborhood had only two entrances. Officers stationed themselves at each entrance and observed a blue Mitsubishi enter the neighborhood. The car had a license plate WTH 3453 and was driven by a black male wearing a white t-shirt. After the officers learned that the registered owner's driver's license was suspended, they stopped the vehicle. The court concluded that while the tip included identifying details of a person and car allegedly engaged in illegal activity, it offered few details of the alleged crime, no information regarding the informant's basis of knowledge, and scant information to predict the future behavior of the alleged perpetrator. Given the limited details provided, and the officers' failure to corroborate the tip's allegations of illegal activity, the tip lacked sufficient indicia of reliability to justify the warrantless stop. The court noted that although the officers lawfully stopped the vehicle after discovering that the registered owner's driver's license was suspended, because nothing in the tip involved a revoked driver's license, the scope of the stop should have been limited to a determination of whether the license was suspended.

Confidential Informant Tips

State v. Reid, __ N.C. App. __, 735 S.E.2d 389 (Dec. 4, 2012). In a drug case, the trial court did not commit plain error by concluding that an officer had reasonable suspicion to conduct a warrantless stop. The officer received information from two informants who had previously provided him with reliable information leading to several arrests; the informants provided information about the defendant's criminal activity, location, and appearance. The officer corroborated some of this information and on the day in question an informant saw the defendant with the contraband. Also, when the officer approached the defendant, the defendant exuded a strong odor of marijuana

Vehicle Stops
Reasonable Suspicion
Generally

Arizona v. Johnson, 555 U.S. 323 (Jan. 26, 2009). Summarizing existing law, the Court noted that a "stop and frisk" is constitutionally permissible if: (1) the stop is lawful; and (2) the officer reasonably suspects that the person stopped is armed and dangerous. It noted that that in an on-the-street encounter, the first requirement—a lawful stop—is met when the officer reasonably suspects that the person is committing or has committed a criminal offense. The Court held that in a traffic stop setting, the first requirement—a lawful stop—is met whenever it is lawful for the police to detain an automobile and its occupants pending inquiry into a vehicular violation. The

police do not need to have cause to believe that any occupant of the vehicle is involved in criminal activity. Also, an officer may ask about matters unrelated to the stop provided that those questions do not measurably extend the duration of the stop. The Court further held that to justify a frisk of the driver or a passenger during a lawful stop, the police must believe that the person is armed and dangerous.

State v. Salinas 366 N.C. 119 (June 14, 2012). The court modified and affirmed *State v. Salinas*, 214 N.C. App. 408 (Aug. 16, 2011) (trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional). The supreme court agreed that the trial judge applied the wrong standard when evaluating the legality of the stop. The court further held that because the trial court did not resolve the issues of fact that arose during the suppression hearing, but rather simply restated the officers' testimony, its order did not contain sufficient findings of fact to which the court could apply the reasonable suspicion standard. It thus remanded for the trial court to reconsider the evidence pursuant to the reasonable suspicion standard.

Mistake of Law

Heien v. North Carolina, 574 U.S. ___, 135 S. Ct. 530 (Dec. 15, 2014). Affirming *State v. Heien*, 366 N.C. 271 (Dec. 14, 2012), the Court held that because an officer's mistake of law was reasonable, it could support a vehicle stop. In *Heien,* an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required. The case presented the question whether such a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment. The Court answered the question in the affirmative. It explained:

> [W]e have repeatedly affirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." We have recognized that searches and seizures based on mistakes of fact can be reasonable. The warrantless search of a home, for instance, is reasonable if undertaken with the consent of a resident, and remains lawful when officers obtain the consent of someone who reasonably appears to be but is not in fact a resident. By the same token, if officers with probable cause to arrest a suspect mistakenly arrest an individual matching the suspect's description, neither the seizure nor an accompanying search of the arrestee would be unlawful. The limit is that "the mistakes must be those of reasonable men."
>
> But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by

> way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Slip op. at 5-6 (citations omitted). The Court went on to find that the officer's mistake of law was objectively reasonable, given the state statutes at issue:

> Although the North Carolina statute at issue refers to "*a* stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N. C. Gen. Stat. Ann. §20–129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," §20–129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Slip op. at 12-13.

State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (June 18, 2013). An officer lacked reasonable suspicion to stop the defendant's vehicle. A "be on the lookout" call was issued after a citizen caller reported that there was a cup of beer in a gold Toyota sedan with license number VST-8773 parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. Although the complainant wished to remain anonymous, the communications center obtained the caller's name as Kim Creech. An officer responded and observed a vehicle fitting the caller's description. The officer followed the driver as he pulled out of the lot and onto Wake Forest Road and then pulled him over. The officer did not observe any traffic violations. After a test indicated impairment, the defendant was charged with DWI. Noting that the officer's sole reason for the stop was Creech's tip, the court found that the tip was not reliable in its assertion of illegality because possessing an open container of alcohol in a parking lot is not illegal. It concluded: "Accordingly, Ms. Creech's tip contained no actual allegation of criminal activity." It further found that the officer's mistaken belief that the tip included an actual allegation of illegal activity was not objectively reasonable. Finally, the court concluded that even if the officer's mistaken belief was reasonable, it still would find the tip insufficiently reliable. Considering anonymous tip cases, the court held that although Creech's tip provided the license plate number and location of the car, "she did not identify or describe defendant, did not provide any way for [the] Officer . . . to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions."

Weaving

State v. Otto, 366 N.C. 134 (June 14, 2012). Reversing *State v. Otto*, 217 N.C. App. 79 (Nov. 15, 2011), the court held that there was reasonable suspicion for the stop. Around 11 pm, an officer observed a vehicle drive past. The officer turned behind the vehicle and immediately noticed that it was weaving within its own lane. The vehicle never left its lane, but was "constantly weaving from the center line to the fog line." The vehicle appeared to be traveling at the posted speed limit. After watching the vehicle weave in its own lane for about ¾ of a mile, the officer stopped the vehicle. The defendant was issued a citation for impaired driving and was convicted. The court of appeals determined that the traffic stop was unreasonable because it was supported solely by the defendant's weaving within her own lane. The supreme court disagreed, concluding

that under the totality of the circumstances, there was reasonable suspicion for the traffic stop. The court noted that unlike other cases in which weaving within a lane was held insufficient to support reasonable suspicion, the weaving here was "constant and continual" over ¾ of a mile. Additionally, the defendant was stopped around 11:00 pm on a Friday night.

State v. Kochuk, 366 N.C. 549 (June 13, 2013). The court, per curiam and without an opinion, reversed the decision of the North Carolina Court of Appeals, State v. Kochuk, ___ N.C. App. ___, 741 S.E.2d 327 (2012), for the reasons stated in the dissenting opinion. An officer was on duty and traveling eastbound on Interstate 40, where there were three travel lanes. The officer was one to two car lengths behind the defendant's vehicle in the middle lane. The defendant momentarily crossed the right dotted line once while in the middle lane. He then made a legal lane change to the right lane and later drove on the fog line twice. The officer stopped the vehicle, and the defendant was later charged with DWI. The dissenting opinion stated that this case is controlled by *State v. Otto*, 366 N.C. 134 (2012) (reasonable suspicion existed to support vehicle stop; unlike other cases in which weaving within a lane was held insufficient to support reasonable suspicion, weaving here was "constant and continual" over three-quarters of a mile; additionally, the defendant was stopped around 11:00 p.m. on a Friday night). The defendant was weaving within his own lane, and the vehicle stop occurred at 1:10 a.m. These two facts coupled together, under *Otto*'s totality of the circumstances analysis, constituted reasonable suspicion for the DWI stop.

State v. Wainwright, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). In this DWI case, the officer had reasonable suspicion to stop the defendant's vehicle. The officer observed the defendant's vehicle swerve right, cross the line marking the outside of his lane of travel and almost strike the curb. The court found that this evidence, along with "the pedestrian traffic along the sidewalks and in the roadway, the unusual hour defendant was driving, and his proximity to bars and nightclubs, supports the trial court's conclusion that [the] Officer . . . had reasonable suspicion to believe defendant was driving while impaired."

State v. Derbyshire, __ N.C. App. __, 745 S.E.2d 886 (Aug. 6, 2013). In this DWI case, the court held that the officer lacked reasonable suspicion to stop the defendant's vehicle. At 10:05 pm on a Wednesday night an officer noticed that the defendant's high beams were on. The officer also observed the defendant weave once within his lane of travel. When pressed about whether he weaved out of his lane, the officer indicated that "just . . . the right side of his tires" crossed over into the right-hand lane of traffic going in the same direction. The State presented no evidence that the stop occurred in an area of high alcohol consumption or that the officer considered such a fact as a part of her decision to stop the defendant. The court characterized the case as follows: "[W]e find that the totality of the circumstances . . . present one instance of weaving, in which the right side of Defendant's tires crossed into the right-hand lane, as well as two conceivable "plus" factors — the fact that Defendant was driving at 10:05 on a Wednesday evening and the fact that [the officer] believed Defendant's bright lights were on before she initiated the stop." The court first noted that the weaving in this case was not constant and continuous. It went on to conclude that driving at 10:05 pm on a Wednesday evening and that the officer believed that the defendant's bright lights were on "are not sufficiently uncommon to constitute valid 'plus' factors" to justify the stop under a "weaving plus" analysis.

State v. Fields, 219 N.C. App. 385 (Mar. 6, 2012). An officer had reasonable suspicion to stop the defendant's vehicle where the defendant's weaving in his own lane was sufficiently frequent and erratic to prompt evasive maneuvers from other drivers. Distinguishing cases holding that weaving within a lane, standing alone, is insufficient to support a stop, the court noted that here "the trial court did not find only that defendant was weaving in his lane, but rather that defendant's driving was 'like a ball bouncing in a small room'" and that "[t]he driving was so erratic that the officer observed other drivers -- in heavy traffic -- taking evasive maneuvers to avoid defendant's car." The court determined that none of the other cases involved the level of erratic driving and potential danger to other drivers that was involved in this case.

State v. Simmons, 205 N.C. App. 509 (July 20, 2010). Distinguishing *State v. Fields*, the court held that reasonable suspicion existed to support the stop. The defendant was not only weaving within his lane, but also was weaving across and outside the lanes of travel, and at one point ran off the road.

State v. Hudson, 206 N.C. App. 482 (Aug. 17, 2010). An officer had reasonable suspicion to stop the defendant's vehicle after the officer observed the vehicle twice cross the center line of I-95 and pull back over the fog line.

State v. Peele, 196 N.C. App. 668 (May 5, 2009). Neither an anonymous tip nor an officer's observation of the vehicle weaning once in its lane provided reasonable suspicion to stop the vehicle in this DWI case. At approximately 7:50 p.m., an officer responded to a dispatch concerning "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. The officer immediately arrived at the intersection and saw a burgundy Chevrolet pickup truck. After following the truck for about 1/10 of a mile and seeing the truck weave once in its lane once, the officer stopped the truck. Although the anonymous tip accurately described the vehicle and its location, it provided no way for officer to test its credibility. Neither the tip nor the officer's observation, alone or together established reasonable suspicion to stop.

State v. Fields, 195 N.C. App. 740 (Mar. 17, 2009). No reasonable suspicion existed for the stop. Around 4:00 p.m., an officer followed the defendant's vehicle for about 1 1/2 miles. After the officer saw the defendant's vehicle swerve to the white line on the right side of the traffic lane three times, the officer stopped the vehicle for impaired driving. The court noted that the officer did not observe the defendant violating any laws, such as driving above or below the speed limit, the hour of the stop was not unusual, and there was no evidence that the defendant was near any places to purchase alcohol.

Speeding

State v. Royster, __ N.C. App. __, 737 S.E.2d 400 (Dec. 18, 2012). (1) An officer had reasonable suspicion to stop the defendant's vehicle for speeding. The court rejected the defendant's argument that because the officer only observed the vehicle for three to five seconds, the officer did not have a reasonable opportunity to judge the vehicle's speed. The court noted that after his initial observation of the vehicle, the officer made a U-turn and began pursuing it; he testified that during his pursuit, the defendant "maintained his speed." Although the officer did not testify

to a specific distance he observed the defendant travel, "some distance was implied" by his testimony regarding his pursuit of the defendant. Also, although it is not necessary for an officer to have specialized training to be able to visually estimate a vehicle's speed, the officer in question had specialized training in visual speed estimation. (2) The court rejected the defendant's argument that an officer lacked reasonable suspicion to stop his vehicle for speeding on grounds that there was insufficient evidence identifying the defendant as the driver. Specifically, the defendant noted that the officer lost sight of the vehicle for a short period of time. The officer only lost sight of the defendant for approximately thirty seconds and when he saw the vehicle again, he recognized both the car and the driver. [Author's note: On this point the opinion discusses the court's earlier opinion in *State v. Lindsey*, __ N.C. App. __, 725 S.E.2d 350 (2012); that opinion was reversed by the N.C. Supreme Court earlier this week. However, because the court distinguished *Lindsey*, its discussion of the now-reversed decision does not seem to undermine the ultimate holding.]

Turning From a Checkpoint

State v. Griffin, 366 N.C. 473 (April 12, 2013). The defendant's act of stopping his vehicle in the middle of the roadway and turning away from a license checkpoint gave rise to reasonable suspicion for a vehicle stop. The trial court denied the defendant's motion to suppress, finding the stop constitutional. In an unpublished opinion, the court of appeals reversed on grounds that the checkpoint was unconstitutional. That court did not, however, comment on whether reasonable suspicion for the stop existed. The supreme court allowed the State's petition for discretionary review to determine whether there was reasonable suspicion to initiate a stop of defendant's vehicle and reversed. It reasoned:

> Defendant approached a checkpoint marked with blue flashing lights. Once the patrol car lights became visible, defendant stopped in the middle of the road, even though he was not at an intersection, and appeared to attempt a three-point turn by beginning to turn left and continuing onto the shoulder. From the checkpoint [the officer] observed defendant's actions and suspected defendant was attempting to evade the checkpoint. . . . It is clear that this Court and the Fourth Circuit have held that even a legal turn, when viewed in the totality of the circumstances, may give rise to reasonable suspicion. Given the place and manner of defendant's turn in conjunction with his proximity to the checkpoint, we hold there was reasonable suspicion that defendant was violating the law; thus, the stop was constitutional. Therefore, because the [officer] had sufficient grounds to stop defendant's vehicle based on reasonable suspicion, it is unnecessary for this Court to address the constitutionality of the driver's license checkpoint.

License and Tag Numbers

State v. Burke, 365 N.C. 415 (Jan. 27, 2012). In a per curiam opinion, the court affirmed the decision below in *State v. Burke*, 212 N.C. App. 654 (June 21, 2011) (over a dissent, the court held that the trial judge erred by denying the defendant's motion to suppress when no reasonable suspicion supported a stop of the defendant's vehicle; the officer stopped the vehicle because the numbers on the 30-day tag looked low and that the "low" number led him to "wonder[] about the possibility of the tag being fictitious"; the court noted that it has previously held that 30-day tags

that were unreadable, concealed, obstructed, or illegible, justified stops of the vehicles involved; here, although the officer testified that the 30-day tag was dirty and worn, he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible; and the information was accurate and proper).

State v. Hernandez, __ N.C. App. __, 742 S.E.2d 825 (June 4, 2013). An investigative stop of the defendant's vehicle was lawful. Officers stopped the defendant's vehicle because it was registered in her name, her license was suspended, and they were unable to determine the identity of the driver.

Other Motor Vehicle Violations

State v. Canty, __ N.C. App. __, 736 S.E.2d 532 (Dec. 18, 2012). No reasonable suspicion supported a traffic stop. The State had argued reasonable suspicion based on the driver's alleged crossing of the fog line, her and her passenger's alleged nervousness and failure to make eye contact with officers as they drove by and alongside the patrol car, and the vehicle's slowed speed. The court found that the evidence failed to show that the vehicle crossed the fog line and that in the absence of a traffic violation, the officers' beliefs about the conduct of the driver and passenger were nothing more than an "unparticularized suspicion or hunch." It noted that nervousness, slowing down, and not making eye contact is not unusual when passing law enforcement. The court also found it "hard to believe" that the officers could tell that the driver and passenger were nervous as they passed the officers on the highway and as the officers momentarily rode alongside the vehicle. The court also found the reduction in speed—from 65 mph to 59 mph—insignificant.

State v. Osterhoudt, 222 N.C. App. 620 (Aug. 21, 2012). (1) The trial court erred in connection with its ruling on a suppression motion in an impaired driving case. The trial court failed to look beyond whether the defendant's driving was normal in assessing whether the officer had reasonable suspicion to stop the defendant's vehicle. (2) The officer had a reasonable, articulable suspicion to stop the defendant's vehicle based on observed traffic violations notwithstanding the officer's mistaken belief that the defendant also had violated G.S. 20-146(a). The officer's testimony that he initiated the stop after observing the defendant drive over the double yellow line was sufficient to establish a violation of G.S. 20-146(d)(3-4), 20-146(d)(1), and 20-153; therefore regardless of his subjective belief that the defendant violated G.S. 20-146(a), the officers testimony establishes objective criteria justifying the stop. The stop was reasonable and the superior court erred in holding otherwise. The court noted that because the officer's reason for the stop was not based solely on his mistaken belief that the defendant violated G.S. 20-146(a) but also because the defendant crossed the double yellow line, the case was distinguishable from others holding that an officer's mistaken belief that a defendant has committed a traffic violation is not an objectively reasonable basis for a stop.

State v. Lopez, 219 N.C. App. 139 (Feb. 21, 2012). An officer lawfully stopped a vehicle after observing the defendant drive approximately 10 mph above the speed limit. The court rejected the defendant's argument that the traffic stop was a pretext to search for drugs as irrelevant in light of the fact that the defendant was lawfully stopped for speeding.

State v. Williams, 209 N.C. App. 255 (Jan. 18, 2011). Officers had reasonable suspicion to stop a vehicle in which the defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales provided by three informants. Two of the informants were confidential informants who had provided good information in the past. The third was a patron of the hotel where the drug sales allegedly occurred and met with an officer face-to-face. Additionally, officers corroborated the informants' information. As such, the informants' information provided a sufficient indicia of reliability. The officer's mistake about who was driving the vehicle was reasonable, under the circumstances.

State v. Ford, 208 N.C. App. 699 (Dec. 21, 2010). The trial court properly denied the defendant's motion to suppress when officers had reasonable suspicion to believe that the defendant committed a traffic violation supporting the traffic stop. The stop was premised on the defendant's alleged violation of G.S. 20-129(d), requiring that a motor vehicle's rear plate be lit so that under normal atmospheric conditions it can be read from a distance of 50 feet. The trial court found that normal conditions existed when officers pulled behind the vehicle; officers were unable to read the license plate with patrol car's lights on; when the patrol car's lights were turned off, the plate was not visible within the statutory requirement; and officers cited the defendant for the violation. The defendant's evidence that the vehicle, a rental car, was "fine" when rented did not controvert the officer's testimony that the tag was not sufficiently illuminated on the night of the stop.

State v. Hopper, 205 N.C. App. 175 (July 6, 2010). The trial court properly concluded that an officer had reasonable suspicion to believe that the defendant was committing a traffic violation when he saw the defendant driving on a public street while using his windshield wipers in inclement weather but not having his taillights on. The trial court's conclusion that the street at issue was a public one was supported by competent evidence, even though conflicting evidence had been presented. The court noted that its conclusion that the officer correctly believed that the street was a public one distinguished the case from those holding that an officer's mistaken belief that a defendant had committed a traffic violation is constitutionally insufficient to support a traffic stop.

State v. McRae, 203 N.C. App. 319 (Apr. 6, 2010). The officer had reasonable suspicion to stop when the officer saw the defendant commit a violation of G.S. 20-154(a) (driver must give signal when turning whenever the operation of any other vehicle may be affected by such movement). Because the defendant was driving in medium traffic, a short distance in front of the officer, the defendant's failure to signal could have affected another vehicle.

Drug Transactions

State v. Mello, 364 N.C. 421 (Oct. 8, 2010). The court affirmed per curiam *State v. Mello*, 200 N.C. App. 437 (Nov. 3, 2009) (holding, over a dissent, that reasonable suspicion supported a vehicle stop; while in a drug-ridden area, an officer observed two individuals approach and insert their hands into the defendant's car; after the officer became suspicious and approached the group, the two pedestrians fled, and the defendant began to drive off).

State v. McKnight, ___ N.C. App. ___, 767 S.E.2d 689 (Jan. 20, 2015). In this drug trafficking case, the trial court did not commit plain error by finding that officers had reasonable suspicion to stop the defendant's vehicle. The court began by rejecting the State's argument that the defendant's evasive action while being followed by the police provided reasonable suspicion for the stop. The court reasoned that there was no evidence showing that the defendant was aware of the police presence when he engaged in the allegedly evasive action (backing into a driveway and then driving away without exiting his vehicle). The court noted that for a suspect's action to be evasive, there must be a nexus between the defendant's action and the police presence; this nexus was absent here. Nevertheless, the court found that other evidence supported a finding that reasonable suspicion existed. Immediately before the stop and while preparing to execute a search warrant for drug trafficking at the home of the defendant's friend, Travion Stokes, the defendant pulled up to Stokes' house, accepted 2 large boxes from Stokes, put them in his car, and drove away. The court noted that the warrant to search Stokes' home allowed officers to search any containers in the home that might contain marijuana, including the boxes in question.

State v. Ellison, 213 N.C. App. 300 (July 19, 2011), *aff'd on other grounds*, 366 N.C. 439 (Mar. 8, 2013). An officer had reasonable suspicion to stop the defendant's vehicle. An informant told the officer that after having his prescriptions for hydrocodone and Xanax filled, Mr. Shaw would immediately take the medication to defendant Treadway's residence, where he sold the medications to Treadway; Treadway then sold some or all of the medications to defendant Ellison. Subsequently, the officer learned that Shaw had a prescription for Lorcet and Xanax, observed Shaw fill the prescriptions, and followed Shaw from the pharmacy to Treadway's residence. The officer watched Shaw enter and exit Treadway's residence. Minutes later the officer observed Ellison arrive. The officer also considered activities derived from surveillance at Ellison's place of work, which were consistent with drug-related activities. Although the officer had not had contact with the informant prior to this incident, one of his co-workers had worked with the informant and found the informant to be reliable; specifically, information provided by the informant on previous occasions had resulted in arrests.

Tips

See also Non-Vehicle Stops; Reasonable Suspicion; Tips, above

Navarette v. California, 572 U.S. __, 134 S. Ct. 1683 (April 22, 2014). The Court held in this "close case" that an officer had reasonable suspicion to make a vehicle stop based on a 911 call. After a 911 caller reported that a truck had run her off the road, a police officer located the truck the caller identified and executed a traffic stop. As officers approached the truck, they smelled marijuana. A search of the truck bed revealed 30 pounds of marijuana. The defendants moved to suppress the evidence, arguing that the traffic stop violated the Fourth Amendment because the officer lacked reasonable suspicion of criminal activity. Even assuming that the 911 call was anonymous, the Court found that it bore adequate indicia of reliability for the officer to credit the caller's account that the truck ran her off the road. The Court explained: "By reporting that she had been run off the road by a specific vehicle—a silver Ford F-150 pickup, license plate 8D94925—the caller necessarily claimed eyewitness knowledge of the alleged dangerous driving. That basis of knowledge lends significant support to the tip's reliability." The Court noted that in this respect, the case contrasted with *Florida v. J. L.*, 529 U. S. 266 (2000), where

the tip provided no basis for concluding that the tipster had actually seen the gun reportedly possessed by the defendant. It continued: "A driver's claim that another vehicle ran her off the road, however, necessarily implies that the informant knows the other car was driven dangerously." The Court noted evidence suggesting that the caller reported the incident soon after it occurred and stated, "That sort of contemporaneous report has long been treated as especially reliable." Again contrasting the case to *J.L.*, the Court noted that in *J.L.*, there was no indication that the tip was contemporaneous with the observation of criminal activity or made under the stress of excitement caused by a startling event. The Court determined that another indicator of veracity is the caller's use of the 911 system, which allows calls to be recorded and law enforcement to verify information about the caller. Thus, "a reasonable officer could conclude that a false tipster would think twice before using such a system and a caller's use of the 911 system is therefore one of the relevant circumstances that, taken together, justified the officer's reliance on the information reported in the 911 call." But the Court cautioned, "None of this is to suggest that tips in 911 calls are per se reliable."

The Court went on, noting that a reliable tip will justify an investigative stop only if it creates reasonable suspicion that criminal activity is afoot. It then determined that the caller's report of being run off the roadway created reasonable suspicion of an ongoing crime such as drunk driving. It stated:

> The 911 caller . . . reported more than a minor traffic infraction and more than a conclusory allegation of drunk or reckless driving. Instead, she alleged a specific and dangerous result of the driver's conduct: running another car off the highway. That conduct bears too great a resemblance to paradigmatic manifestations of drunk driving to be dismissed as an isolated example of recklessness. Running another vehicle off the road suggests lane positioning problems, decreased vigilance, impaired judgment, or some combination of those recognized drunk driving cues. And the experience of many officers suggests that a driver who almost strikes a vehicle or another object—the exact scenario that ordinarily causes "running [another vehicle] off the roadway"—is likely intoxicated. As a result, we cannot say that the officer acted unreasonably under these circumstances in stopping a driver whose alleged conduct was a significant indicator of drunk driving. (Citations omitted).

State v. Maready, 362 N.C. 614 (Dec. 12, 2008). Reasonable suspicion supported the officer's stop of a vehicle in a case in which the defendant was convicted of second-degree murder and other charges involving a vehicle crash and impaired driving. Officers saw an intoxicated man stumble across the road and enter a Honda. They then were flagged down by a vehicle that they observed driving in front of the Honda. The vehicle's driver, who was distraught, told them that the driver of the Honda had been running stop signs and stop lights. The officers conducted an investigatory stop of the Honda, and the defendant was driving. The court considered the following facts as supporting the indicia of reliability of the informant's tip: the tipster had been driving in front of the Honda and thus had firsthand knowledge of the reported traffic violations; the driver's own especially cautious driving and apparent distress were consistent with what one would expect of a person who had observed erratic driving; the driver approached the officers in person and gave them information close in time and place to the scene of the alleged violations, with little time to fabricate; and because the tip was made face-to-face, the driver was not entirely anonymous.

State v. Blankenship, __ N.C. App. __, 748 S.E.2d 616 (Oct. 15, 2013). Officers did not have reasonable suspicion to stop the defendant based on an anonymous tip from a taxicab driver. The taxicab driver anonymously contacted 911 by cell phone and reported that a red Mustang convertible with a black soft top, license plate XXT-9756, was driving erratically, running over traffic cones and continuing west on a specified road. Although the 911 operator did not ask the caller's name, the operator used the caller's cell phone number to later identify the taxicab driver as John Hutchby. The 911 call resulted in a "be on the lookout" being issued; minutes later officers spotted a red Mustang matching the caller's description, with "X" in the license plate, heading as indicated by the caller. Although the officers did not observe the defendant violating any traffic laws or see evidence of improper driving that would suggest impairment, the officers stopped the defendant. The defendant was charged with DWI. The court began:

> [T]he officers did not have the opportunity to judge Hutchby's credibility firsthand or confirm whether the tip was reliable, because Hutchby had not been previously used and the officers did not meet him face-to-face. Since the officers did not have an opportunity to assess his credibility, Hutchby was an anonymous informant. Therefore, to justify a warrantless search and seizure, either the tip must have possessed sufficient indicia of reliability or the officers must have corroborated the tip.

The court went on to find that neither requirement was satisfied.

State v. Coleman, __ N.C. App. __, 743 S.E.2d 62 (June 18, 2013). An officer lacked reasonable suspicion to stop the defendant's vehicle. A "be on the lookout" call was issued after a citizen caller reported that there was a cup of beer in a gold Toyota sedan with license number VST-8773 parked at the Kangaroo gas station at the corner of Wake Forest Road and Ronald Drive. Although the complainant wished to remain anonymous, the communications center obtained the caller's name as Kim Creech. An officer responded and observed a vehicle fitting the caller's description. The officer followed the driver as he pulled out of the lot and onto Wake Forest Road and then pulled him over. The officer did not observe any traffic violations. After a test indicated impairment, the defendant was charged with DWI. Noting that the officer's sole reason for the stop was Creech's tip, the court found that the tip was not reliable in its assertion of illegality because possessing an open container of alcohol in a parking lot is not illegal. It concluded: "Accordingly, Ms. Creech's tip contained no actual allegation of criminal activity." It further found that the officer's mistaken belief that the tip included an actual allegation of illegal activity was not objectively reasonable. Finally, the court concluded that even if the officer's mistaken belief was reasonable, it still would find the tip insufficiently reliable. Considering anonymous tip cases, the court held that although Creech's tip provided the license plate number and location of the car, "she did not identify or describe defendant, did not provide any way for [the] Officer . . . to assess her credibility, failed to explain her basis of knowledge, and did not include any information concerning defendant's future actions."

State v. Watkins, 220 N.C. App. 384 (May 1, 2012). Officers had reasonable suspicion to stop the defendant's vehicle. Officers had received an anonymous tip that a vehicle containing "a large amount of pills and drugs" would be traveling from Georgia through Macon County and possibly Graham County; the vehicle was described as a small or mid-sized passenger car, maroon or purple in color, with Georgia license plates. Officers set up surveillance along the most likely

route. When a small purple car passed the officers, they pulled out behind it. The car then made an abrupt lane change without signaling and slowed down by approximately 5-10 mph. The officers ran the vehicle's license plate and discovered the vehicle was registered a person known to have outstanding arrest warrants. Although the officers where pretty sure that the driver was not the wanted person, they were unable to identify the passenger. They also saw the driver repeatedly looking in his rearview mirror and glancing over his shoulder. They then pulled the vehicle over. The court concluded that the defendant's lane change in combination with the anonymous tip and defendant's other activities were sufficient to give an experienced law enforcement officer reasonable suspicion that some illegal activity was taking place. Those other activities included the defendant's slow speed in the passing lane, frequent glances in his rearview mirrors, repeated glances over his shoulder, and that he was driving a car registered to another person. Moreover, it noted, not only was the defendant not the owner of the vehicle, but the owner was known to have outstanding arrest warrants; it was reasonable to conclude that the unidentified passenger may have been the vehicle's owner.

State v. Ellison, 213 N.C. App. 300 (July 19, 2011), *aff'd on other grounds*, 366 N.C. 439 (Mar. 8, 2013). An officer had reasonable suspicion to stop the defendant's vehicle. An informant told the officer that after having his prescriptions for hydrocodone and Xanax filled, Mr. Shaw would immediately take the medication to defendant Treadway's residence, where he sold the medications to Treadway; Treadway then sold some or all of the medications to defendant Ellison. Subsequently, the officer learned that Shaw had a prescription for Lorcet and Xanax, observed Shaw fill the prescriptions, and followed Shaw from the pharmacy to Treadway's residence. The officer watched Shaw enter and exit Treadway's residence. Minutes later the officer observed Ellison arrive. The officer also considered activities derived from surveillance at Ellison's place of work, which were consistent with drug-related activities. Although the officer had not had contact with the informant prior to this incident, one of his co-workers had worked with the informant and found the informant to be reliable; specifically, information provided by the informant on previous occasions had resulted in arrests.

State v. Williams, 209 N.C. App. 255 (Jan. 18, 2011). Officers had reasonable suspicion to stop a vehicle in which the defendant was a passenger based on the officers' good faith belief that the driver had a revoked license and information about the defendant's drug sales provided by three informants. Two of the informants were confidential informants who had provided good information in the past. The third was a patron of the hotel where the drug sales allegedly occurred and met with an officer face-to-face. Additionally, officers corroborated the informants' information. As such, the informants' information provided a sufficient indicia of reliability. The officer's mistake about who was driving the vehicle was reasonable, under the circumstances.

State v. Crowell, 204 N.C. App. 362 (June 1, 2010). A tip from a confidential informant had a sufficient indicia of reliability to support a stop of the defendant's vehicle where the evidence showed that: (1) a confidential informant who had previously provided reliable information told police that the defendant would be transporting cocaine that day and described the vehicle defendant would be driving; (2) the informant indicated to police that he had seen cocaine in defendant's possession; (3) a car matching the informant's description arrived at the designated location at the approximate time indicated by the informant; and (4) the informant, waiting at the specified location, called police to confirm that the driver was the defendant.

State v. McRae, 203 N.C. App. 319 (Apr. 6, 2010). In a drug case, a tip from a confidential informant provided reasonable suspicion justifying the stop where the relevant information was known by the officer requesting the stop but not by the officer conducting the stop. The confidential informant had worked with the officer on several occasions, had provided reliable information in the past that lead to the arrest of drug offenders, and gave the officer specific information (including the defendant's name, the type of car he would be driving, the location where he would be driving, and the amount and type of controlled substance that he would have in his possession).

State v. Hudgins, 195 N.C. App. 430 (Feb. 17, 2009). Following *Maready* and holding that there was reasonable suspicion to stop the defendant's vehicle. At 2:55 am, a man called the police and reported that his car was being followed by a man with a gun. The caller reported that he was in the vicinity of a specific intersection. The caller remained on the line and described the vehicle following him, and gave updates on his location. The caller was directed to a specific location, so that an officer could meet him. When the vehicles arrived, they matched the descriptions provided by the caller. The officer stopped the vehicles. The caller identified the driver of the other vehicle as the man who had been following him and drove away without identifying himself. The officer ended up arresting the driver of the other vehicle for DWI. No weapon was found. The court held that there were indicia of reliability similar to those that existed in *Maready*: (1) the caller telephoned police and remained on the telephone for approximately eight minutes; (2) the caller provided specific information about the vehicle that was following him and their location; (3) the caller carefully followed the dispatcher's instructions, which allowed the officer to intercept the vehicles; (4) defendant followed the caller over a peculiar and circuitous route between 2 and 3 a.m.; (5) the caller remained on the scene long enough to identify defendant to the officer; and (6) by calling on a cell phone and remaining at the scene, caller placed his anonymity at risk.

State v. Peele, 196 N.C. App. 668 (May 5, 2009). Neither an anonymous tip nor an officer's observation of the vehicle weaving once in its lane provided reasonable suspicion to stop the vehicle in this DWI case. At approximately 7:50 p.m., an officer responded to a dispatch concerning "a possible careless and reckless, D.W.I., headed towards the Holiday Inn intersection." The vehicle was described as a burgundy Chevrolet pickup truck. The officer immediately arrived at the intersection and saw a burgundy Chevrolet pickup truck. After following the truck for about 1/10 of a mile and seeing the truck weave once in its lane once, the officer stopped the truck. Although the anonymous tip accurately described the vehicle and its location, it provided no way for officer to test its credibility. Neither the tip nor the officer's observation, alone or together established reasonable suspicion to stop.

Miscellaneous Cases

State v. Verkerk, 367 N.C. 483 (June 12 2014). Reversing the court of appeals in a DWI case where the defendant was initially stopped by a firefighter, the court determined that the trial court properly denied the defendant's motion to suppress which challenged the firefighter's authority to make the initial stop. After observing the defendant's erratic driving and transmitting this information to the local police department, the firefighter stopped the defendant's vehicle.

After some conversation, the driver drove away. When police officers arrived on the scene, the firefighter indicated where the vehicle had gone. The officers located the defendant, investigated her condition and charged her with DWI. On appeal, the defendant argued that because the firefighter had no authority to stop her, evidence from the first stop was improperly obtained. However, the court determined that it need not consider the extent of the firefighter's authority to conduct a traffic stop or even whether the encounter with him amounted to a "legal stop." The court reasoned that the firefighter's observations of the defendant's driving, which were transmitted to the police before making the stop, established that the police officers had reasonable suspicion to stop the defendant. The court noted that this evidence was independent of any evidence derived from the firefighter's stop.

State v. Brown, 217 N.C. App. 566 (Dec. 20, 2011). The trial court erred by denying the defendant's motion to suppress evidence of his alleged impairment where the evidence was the fruit of an illegal stop. An officer who was surveying an area in the hope of locating robbery suspects saw the defendant pull off to the side of a highway in a wooded area. The officer heard yelling and car doors slamming. Shortly thereafter, the defendant accelerated rapidly past the officer, but not to a speed warranting a traffic violation. Thinking that the defendant may have been picking up the robbery suspects, the officer followed the defendant for almost a mile. Although he observed no traffic violations, the officer pulled over the defendant's vehicle. The officer did not have any information regarding the direction in which the suspects fled, nor did he have a description of the getaway vehicle. The officer's reason for pulling over the defendant's vehicle did not amount to the reasonable, articulable suspicion necessary to warrant a *Terry* stop.

State v. Chlopek, 209 N.C. App. 358 (Jan. 18, 2011). An officer lacked reasonable suspicion to stop the defendant's vehicle. Around midnight, officers were conducting a traffic stop at Olde Waverly Place, a partially developed subdivision. While doing so, an officer noticed the defendant's construction vehicle enter the subdivision and proceed to an undeveloped section. Although officers had been put on notice of copper thefts from subdivisions under construction in the county, no such thefts had been reported in Olde Waverly Place. When the defendant exited the subdivision 20-30 minutes later, his vehicle was stopped. The officer did not articulate any specific facts about the vehicle or how it was driven which would justify the stop; the fact that there had been numerous copper thefts in the county did not support the stop.

State v. Allen, 197 N.C. App. 208 (May 19, 2009). Reasonable suspicion existed for a stop. An assault victim reported to a responding officer that the perpetrator was a tall white male who left in a small dark car driven by a blonde, white female. The officer saw a small, light-colored vehicle travelling away from the scene; driver was a blonde female. The driver abruptly turned into a parking lot and drove quickly over rough pavement. When the officer approached, the defendant was leaning on the vehicle and appeared intoxicated. Although there was a passenger in the car, the officer could not determine if the passenger was male or female. The officer questioned the defendant, determined that she was not involved in the assault, but arrested her for impaired driving. The court held that although there was no information in the record about the victim's identity, this was not an anonymous tip case; it was a face-to-face encounter with an officer that carried a higher indicia of reliability than an anonymous tip. Additionally, the officer's actions were not based solely on the tip. The officer observed the defendant's "hurried

actions," it appeared that the defendant was trying to avoid the officer, and the defendant was in the proximity of the crime scene. Even though the defendant's vehicle did not match the description given by the victim, the totality of the circumstances supported a finding of reasonable suspicion.

Collective Knowledge Doctrine

State v. Shaw, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014), *temporary stay allowed*, __ N.C. __, __ S.E.2d __ (Jan. 15, 2015). When determining whether an officer had reasonable suspicion to stop the defendant's vehicle, the trial court properly considered statements made by other officers to the stopping officer that the defendant's vehicle had weaved out of its lane of travel several times. Reasonable suspicion may properly be based on the collective knowledge of law enforcement officers.

Community Caretaking Justification

State v. Smathers, __ N.C. App. __, 753 S.E.2d 380 (Jan. 21, 2014). In a case where the State conceded that the officer had neither probable cause nor reasonable suspicion to seize the defendant, the court decided an issue of first impression and held that the officer's seizure of the defendant was justified by the "community caretaking" doctrine. The officer stopped the defendant to see if she and her vehicle were "okay" after he saw her hit an animal on a roadway. Her driving did not give rise to any suspicion of impairment. During the stop the officer determined the defendant was impaired and she was arrested for DWI. The court noted that in adopting the community caretaking exception, "we must apply a test that strikes a proper balance between the public's interest in having officers help citizens when needed and the individual's interest in being free from unreasonable governmental intrusion." It went on adopt the following test for application of the doctrine:

> [T]he State has the burden of proving that: (1) a search or seizure within the meaning of the Fourth Amendment has occurred; (2) if so, that under the totality of the circumstances an objectively reasonable basis for a community caretaking function is shown; and (3) if so, that the public need or interest outweighs the intrusion upon the privacy of the individual.

After further fleshing out the test, the court applied it and found that the stop at issue fell within the community caretaking exception.

Checkpoints

State v. McDonald, ___ N.C. App. ___, 768 S.E.2d 913 (Mar. 3, 2015). Although the trial court properly found that the checkpoint had a legitimate proper purpose of checking for driver's license and vehicle registration violations, the trial court failed to adequately determine the checkpoint's reasonableness. The court held that the trial court's "bare conclusion" on reasonableness was insufficient and vacated and remanded for appropriate findings as to reasonableness.

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). The trial court did not err by denying the defendant's motion to suppress evidence obtained as a result of a

vehicle checkpoint. The checkpoint was conducted for a legitimate primary purpose of checking all passing drivers for DWI violations and was reasonable.

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). In a DWI case, the court rejected the defendant's argument that the checkpoint at issue was unconstitutional. The court first found that the checkpoint had a legitimate primary programmatic purpose, checking for potential driving violations. Next, it found that the checkpoint was reasonable.

State v. White, __ N.C. App. __, 753 S.E.2d 698 (Feb. 4, 2014). The trial court did not err by granting the defendant's motion to suppress evidence obtained as a result of a vehicle checkpoint. Specifically, the trial court did not err by concluding that a lack of a written policy in full force and effect at the time of the defendant's stop at the checkpoint constituted a substantial violation of G.S. 20-16.3A (requiring a written policy providing guidelines for checkpoints). The court also rejected the State's argument that a substantial violation of G.S. 20-16.3A could not support suppression; the State had argued that evidence only can be suppressed if there is a Constitutional violation or a substantial violation of Chapter 15A.

State v. Collins, 219 N.C. App. 374 (Mar. 6, 2012). The trial court erred by granting the defendant's motion to suppress on grounds that a checkpoint was unlawful under G.S. 20-16.3A. Because the defendant did not actually stop at the checkpoint, its invalidity was irrelevant to whether an officer had sufficient reasonable suspicion to stop the defendant once he attempted to evade the checkpoint. The court vacated the order granting the motion to suppress and remanded.

State v. Nolan, 365 N.C. App. 337 (Apr. 19, 2011). The trial court did not err by concluding that the vehicle checkpoint passed constitutional muster. The trial court properly concluded that the primary programmatic purpose of the checkpoint was "the detection of drivers operating a motor vehicle while impaired and that the 'procedure was not merely to further general crime control'" and that this primary programmatic purpose was constitutionally permissible. Applying the three-pronged test of *Brown v. Texas*, 443 U.S. 47, 50 (1979), the trial court properly determined that the checkpoint was reasonable.

State v. Jarrett, 203 N.C. App. 675 (May 4, 2010). The vehicle checkpoint did not violate the defendant's Fourth Amendment rights. The primary programmatic purpose of the checkpoint—to determine if drivers were complying with drivers license laws and to deter citizens from violating these laws—was a lawful one. Additionally, the checkpoint itself was reasonable, based on the gravity of the public concerns served by the seizure, the degree to which the seizure advanced the public interest, and the severity of the interference with individual liberty. The court also held that the officer had reasonable, articulable suspicion to continue to detain the 18-year-old defendant after he produced a valid license and registration and thus satisfied the primary purpose of the vehicle checkpoint. Specifically, when the officer approached the car, he saw an aluminum can between the driver's and passenger's seat, and the passenger was attempting to conceal the can. When the officer asked what was in the can, the defendant raised it, revealing a beer can.

State v. Corpening, 200 N.C. App. 311 (Oct. 6, 2009). Declining to consider the defendant's challenge to the constitutionality of a vehicle checkpoint where officers did not stop the

defendant's vehicle as a part of the checkpoint but rather approached it after the defendant parked it on the street about 100-200 feet from the checkpoint.

Duration/Extending Stop

Rodriguez v. United States, 575 U.S. __ (April 21, 2015). A dog sniff that prolongs the time reasonably required for a traffic stop violates the Fourth Amendment. After an officer completed a traffic stop, including issuing the driver a warning ticket and returning all documents, the officer asked for permission to walk his police dog around the vehicle. The driver said no. Nevertheless, the officer instructed the driver to turn off his car, exit the vehicle and wait for a second officer. When the second officer arrived, the first officer retrieved his dog and led it around the car, during which time the dog alerted to the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine. All told, 7-8 minutes elapsed from the time the officer issued the written warning until the dog's alert. The defendant was charged with a drug crime and unsuccessfully moved to suppress the evidence seized from his car, arguing that the officer prolonged the traffic stop without reasonable suspicion to conduct the dog sniff. The defendant was convicted and appealed. The Eighth Circuit held that the de minimus extension of the stop was permissible. The Supreme Court granted certiorari "to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff."

The Court reasoned that an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." The Court noted that during a traffic stop, beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop" such as checking the driver's license, determining whether the driver has outstanding warrants, and inspecting the automobile's registration and proof of insurance. It explained: "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." A dog sniff by contrast "is a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing." (quotation omitted). It continued: "Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

Noting that the Eighth Circuit's de minimus rule relied heavily on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (reasoning that the government's "legitimate and weighty" interest in officer safety outweighs the "de minimis" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle), the Court distinguished *Mimms*:

> Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are "especially fraught with danger to police officers," so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. On-scene investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government's

> endeavor to detect crime in general or drug trafficking in particular. (citations omitted)

The Court went on to reject the Government's argument that an officer may "incremental[ly]" prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Court dismissed the notion that "by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation." It continued:

> If an officer can complete traffic-based inquiries expeditiously, then that is the amount of "time reasonably required to complete [the stop's] mission." As we said in *Caballes* and reiterate today, a traffic stop "prolonged beyond" that point is "unlawful." The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff "prolongs"—i.e., adds time to—"the stop". (citations omitted).

In this case, the trial court ruled that the defendant's detention for the dog sniff was not independently supported by individualized suspicion. Because the Court of Appeals did not review that determination the Court remanded for a determination by that court as to whether reasonable suspicion of criminal activity justified detaining the defendant beyond completion of the traffic infraction investigation.

State v. Heien, 367 N.C. 163 (Nov. 8, 2013), *aff'd on other grounds*, 574 U.S. ___, 135 S. Ct. 530 (Dec. 15, 2014). The court per curiam affirmed the decision below, *State v. Heien*, __ N.C. App. __, 741 S.E.2d 1 (2013). Over a dissent the court of appeals had held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. The court of appeals also had held, again over a dissent, that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

State v. Williams, 366 N.C. 110 (June 14, 2012). The court affirmed *State v. Williams*, 215 N.C. App. 1 (Aug. 16, 2011) (reasonable articulable suspicion justified extending the traffic stop). The officer stopped the vehicle in which the defendant was a passenger for having illegally tinted windows and issued a citation. The officer then asked for and was denied consent to search the vehicle. Thereafter he called for a canine trained in drug detection; when the dog arrived it alerted on the car and drugs were found. Several factors supported the trial court's determination that reasonable suspicion supported extending the stop. First, the driver told the officer that she and the defendant were coming from Houston, Texas, which was illogical given their direction of

travel. Second, the defendant's inconsistent statement that they were coming from Kentucky and were traveling to Myrtle Beach "raises a suspicion as to the truthfulness of the statements." Third, the driver's inability to tell the officer where they were going, along with her illogical answer about driving from Houston, permitted an inference that she "was being deliberately evasive, that she had been hired as a driver and intentionally kept uninformed, or that she had been coached as to her response if stopped." Fourth, the fact that the defendant initially suggested the two were cousins but then admitted that they just called each other cousins based on their long-term relationship "could raise a suspicion that the alleged familial relationship was a prearranged fabrication." Finally, the vehicle, which had illegally tinted windows, was owned by a third person. The court concluded:

> Viewed individually and in isolation, any of these facts might not support a reasonable suspicion of criminal activity. But viewed as a whole by a trained law enforcement officer who is familiar with drug trafficking and illegal activity on interstate highways, the responses were sufficient to provoke a reasonable articulable suspicion that criminal activity was afoot and to justify extending the detention until a canine unit arrived.

State v. Warren, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). In this post-*Rodriguez* case, the court held, over a dissent, that the officer had reasonable suspicion to extend the scope and duration of a routine traffic stop to allow a police dog to perform a drug sniff outside the defendant's vehicle. The court noted that under *Rodriguez v. United States*, ___ U.S. ___, 191 L.Ed. 2d 492 (2015), an officer who lawfully stops a vehicle for a traffic violation but who otherwise does not have reasonable suspicion that any crime is afoot beyond a traffic violation may execute a dog sniff only if the check does not prolong the traffic stop. It further noted that earlier N.C. case law applying the de minimus rule to traffic stop extensions had been overruled by *Rodriguez.* The court continued, concluding that in this case the trial court's findings support the conclusion that the officer developed reasonable suspicion of illegal drug activity during the course of his investigation of the traffic offense and was therefore justified to prolong the traffic stop to execute the dog sniff. Specifically:

> Defendant was observed and stopped "in an area [the officer] knew to be a high crime/high drug activity area[;]" that while writing the warning citation, the officer observed that Defendant "appeared to have something in his mouth which he was not chewing and which affected his speech[;]"that "during his six years of experience [the officer] who has specific training in narcotics detection, has made numerous 'drug stops' and has observed individuals attempt to hide drugs in their mouths and . . . swallow drugs to destroy evidence[;]" and that during their conversation Defendant denied being involved in drug activity "any longer."

State v. Leak, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In a case in which there was a dissenting opinion, the court held that the defendant's Fourth Amendment rights were violated when an officer, who had approached the defendant's legally parked car without reasonable suspicion, took the defendant's driver's license to his patrol vehicle. Until the officer took the license, the encounter was consensual and no reasonable suspicion was required: "[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver's license and registration." However, the officer's conduct of taking the defendant's license to his patrol

car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing the recent U.S. Supreme Court case *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court rejected the suggestion that no violation occurred because any seizure was "de minimus" in nature.

State v. Cottrell, __ N.C. App. __, 760 S.E.2d. 274 (July 1, 2014). The trial court erred by denying the defendant's motion to suppress where the defendant was subjected to a seizure in violation of the Fourth Amendment. Specifically, the officer continued to detain the defendant after completing the original purpose of the stop without having reasonable, articulable suspicion of criminal activity. The officer initiated a traffic stop because of a headlights infraction and a potential noise violation. The defendant turned his headlights on before he stopped and apologized to the officer for not having his headlights on. The officer asked the defendant for his license and registration and said that if everything checked out, the defendant would soon be cleared to go. The defendant did not smell of alcohol, did not have glassy eyes, was not sweating or fidgeting, and made no contradictory statements. A check revealed that the defendant's license and registration were valid. However a criminal history check revealed that the defendant had a history of drug charges and felonies. When the officer re-approached the car, he told the defendant to keep his music down because of a noise ordinance. At this point the officer smelled a strong odor that he believed was a fragrance to cover up the smell of drugs. The officer asked the defendant about the odor, and the defendant showed him a small, clear glass bottle, stating that it was a body oil. Still holding the defendant's license and registration, the officer asked for consent to search. The defendant declined consent but after the officer said he would call for a drug dog, the defendant agreed to the search. Contraband was found and the defendant moved to suppress. The court began by following *State v. Myles*, 188 N.C. App. 42, *aff'd per curiam*, 362 N.C. 344 (2008), and concluding that the purpose of the initial stop was concluded by the time the officer asked for consent to search. The court held that once the officer returned to the vehicle and told the defendant to keep his music down, the officer had completely addressed the original purpose for the stop. It continued:

> Defendant had turned on his headlights, he had been warned about his music, his license and registration were valid, and he had no outstanding warrants. Consequently, [the officer] was then required to have "defendant's consent or 'grounds which provide a reasonable and articulable suspicion in order to justify further delay' before" asking defendant additional questions.

Next, the court held that the officer had no reasonable and articulable suspicion of criminal activity in order to extend the stop beyond its original scope: "a strong incense-like fragrance, which the officer believes to be a 'cover scent,' and a known felony and drug history are not, without more, sufficient to support a finding of reasonable suspicion of criminal activity." Finally, the court rejected the argument that the detention of the defendant after the original purpose had ended was proper because it equated to a "de minimis" extension for a drug dog sniff. The court declined to extend the de minimis analysis to situations where—as here—no drug dog was at the scene prior to the completion of the purpose of the stop.

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014). In a drug trafficking case, the trial court did not err by denying the defendant's motion to suppress drugs seized from a truck during a vehicle stop. The defendant argued that once the officer handed the driver the

warning citation, the purpose of the stop was over and anything that occurred after that time constituted unconstitutionally prolonged the stop. The court noted that officers routinely check relevant documentation while conducting traffic stops. Here, although the officer had completed writing the warning citation, he had not completed his checks related to the licenses, registration, insurance, travel logs, and invoices of the commercial vehicle. Thus, "The purpose of the stop was not completed until [the officer] finished a proper document check and returned the documents to [the driver and the passenger, who owned the truck]." The court noted that because the defendant did not argue the issue, it would not address which documents may be properly investigated during a routine commercial vehicle stop.

State v. Sellars, 222 N.C. App. 245 (Aug. 7, 2012). The trial court erred by granting the defendant's motion to suppress on grounds that officers impermissibly prolonged a lawful vehicle stop. Officers McKaughan and Jones stopped the defendant's vehicle after it twice weaved out of its lane. The officers had a drug dog with them. McKaughan immediately determined that the defendant was not impaired. Although the defendant's hand was shaking, he did not show extreme nervousness. McKaughan told the defendant he would not get a citation but asked him to come to the police vehicle. While "casual conversation" ensued in the police car, Jones stood outside the defendant's vehicle. The defendant was polite, cooperative, and responsive. Upon entering the defendant's identifying information into his computer, McKaughan found an "alert" indicating that the defendant was a "drug dealer" and "known felon." He returned the defendant's driver's license and issued a warning ticket. While still in the police car, McKaughan asked the defendant if he had any drugs or weapons in his car. The defendant said no. After the defendant refused to give consent for a dog sniff of the vehicle, McKaughan had the dog do a sniff. The dog alerted to narcotics in the vehicle and a search revealed a bag of cocaine. The period between when the warning ticket was issued and the dog sniff occurred was four minutes and thirty-seven seconds. Surveying two lines of cases from the court which "appear to reach contradictory conclusions" on the question of whether a de minimis delay is unconstitutional, the court reconciled the cases and held that any prolonged detention of the defendant for the purpose of the drug dog sniff was de minimis and did not violate his rights.

State v. Fisher, 219 N.C. App. 498 (Mar. 20, 2012) (COA11-1980). The trial court erred by concluding that an officer lacked reasonable suspicion to detain the defendant beyond the scope of a routine traffic stop. The officer lawfully stopped the vehicle for a seatbelt violation but then extended the detention for arrival of a canine unit. The State argued that numerous factors established reasonable suspicion that the defendant was transporting contraband: an overwhelming odor of air freshener in the car; the defendant claimed to have made a five hour round trip to go shopping but had not purchased anything; the defendant was nervous; the defendant had pending drug charges and was known as a distributor of marijuana and cocaine; the defendant was driving in a pack of cars; the car was registered to someone else; the defendant never asked why he had been stopped; the defendant was "eating on the go"; and a handprint indicated that something recently had been placed in the trunk. Although the officer did not know about the pending charges until after the canine unit was called, the court found this to be a relevant factor. It reasoned: "The extended detention of defendant is ongoing from the time of the traffic citation until the canine unit arrives and additional factors that present themselves during that time are relevant to why the detention continued until the canine unit arrived." Even discounting several of these factors that might be indicative of innocent behavior, the court found

that other factors--nervousness, the smell of air freshener, inconsistency with regard to travel plans, driving a car not registered to the defendant, and the pending charges--supported a finding that reasonable suspicion existed.

State v. Lopez, 219 N.C. App. 139 (Feb. 21, 2012). Reasonable suspicion supported the length of the stop. The officer's initial questions regarding the defendant's license, route of travel, and occupation were within the scope of the traffic stop. Any further detention was appropriate in light of the following facts: the defendant did not have a valid driver's license; although the defendant said he had just gotten off work at a construction job, he was well kept with clean hands and clothing; the defendant "became visibly nervous by breathing rapidly[;] . . . his heart appeared to be beating rapidly[,] he exchanged glances with his passenger and both individuals looked at an open plastic bag in the back seat of the vehicle"; an officer observed dryer sheets protruding from an open bag containing a box of clear plastic wrap, which, due to his training and experience, the officer knew were used to package and conceal drugs; and the defendant told the officer that the car he was driving belonged to a friend but that he wasn't sure of the friend's name.

State v. Hernandez, 208 N.C. App. 591 (Dec. 21, 2010). The trial court properly denied a motion to suppress asserting that a vehicle stop was improperly prolonged. An officer stopped the truck after observing it follow too closely and make erratic lane changes. The occupants were detained until a Spanish language consent to search form could be brought to the location. The defendant challenged as unconstitutional this detention, which lasted approximately one hour and ten minutes. The court distinguished cases cited by the defendant, explaining that in both, vehicle occupants were detained after the original purpose of the initial investigative detention had been addressed and the officer attempted to justify an additional period of detention solely on the basis of the driver's nervousness or uncertainty about travel details, a basis held not to provide a reasonable suspicion that criminal activity was afoot. Here, however, since none of the occupants had a driver's license or other identification, the officer could not issue a citation and resolve the initial stop. Because the challenged delay occurred when the officer was attempting to address issues arising from the initial stop, the court determined that it need not address whether the officer had a reasonable suspicion of criminal activity sufficient to justify a prolonged detention. Nevertheless, the court went on to conclude that even if the officer was required to have such a suspicion in order to justify the detention, the facts supported the existence of such a suspicion. Specifically: (a) the driver did not have a license or registration; (b) a man was in the truck bed covered by a blanket; (c) the defendant handed the driver a license belonging to the defendant's brother; (d) the occupants gave inconsistent stories about their travel that were confusing given the truck's location and direction of travel; (e) no occupant produced identification or a driver's license; (f) the men had no luggage despite the fact that they were traveling from North Carolina to New York; and (g) the driver had tattoos associated with criminal gang activity.

State v. Hodges, 195 N.C. App. 390 (Feb. 17, 2009). Reasonable suspicion supported prolonging the detention of the defendant after the officer returned his license and the car rental contract and issued him a verbal warning for speeding. The defendant misidentified his passenger and was nervous. Additionally other officers had informed the officer that they had been conducting narcotics surveillance on the vehicle; that they had observed passenger appear to put something under his seat which might be drugs or a weapon; and that the officer should be careful in

conducting the traffic stop.

State v. Jackson, 199 N.C. App. 236 (Aug. 18, 2009). There were no grounds providing reasonable and articulable suspicion for extending a vehicle stop once the original purpose of the stop (suspicion that the driver was operating the vehicle without a license) had been addressed. After the officer verified that the driver had a valid license, she extended the stop by asking whether there was anything illegal in the vehicle, and the defendant gave consent to search the vehicle. The encounter did not become consensual after the officer verified that the driver was licensed. Although such an encounter could have become consensual if the officer had returned the driver's license and registration, here there was no evidence that the driver's documentation was returned. Because the extended detention was unconstitutional, the driver's consent was ineffective to justify the search of the vehicle and the weapon and drugs found were fruits of the poisonous tree.

Frisk

Arizona v. Johnson, 555 U.S. 323 (Jan. 26, 2009). Summarizing existing law, the Court noted that a "stop and frisk" is constitutionally permissible if: (1) the stop is lawful; and (2) the officer reasonably suspects that the person stopped is armed and dangerous. It noted that that in an on-the-street encounter, the first requirement—a lawful stop—is met when the officer reasonably suspects that the person is committing or has committed a criminal offense. The Court held that in a traffic stop setting, the first requirement—a lawful stop—is met whenever it is lawful for the police to detain an automobile and its occupants pending inquiry into a vehicular violation. The police do not need to have cause to believe that any occupant of the vehicle is involved in criminal activity. Also, an officer may ask about matters unrelated to the stop provided that those questions do not measurably extend the duration of the stop. The Court further held that to justify a frisk of the driver or a passenger during a lawful stop, the police must believe that the person is armed and dangerous.

State v. Morton, 363 N.C. 737 (Dec. 11, 2009). For reasons stated in a dissent to the opinion below, the North Carolina Supreme Court reversed a Court of Appeals ruling that the trial judge erred by concluding that a frisk was justified because officers had reasonable suspicion to believe that the defendant was armed or dangerous. The dissent had concluded that, under the totality of the circumstances, the officers had reasonable suspicion to frisk the defendant for officer safety.

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). Even if the defendant had properly preserved the issue, a frisk conducted during a valid traffic stop was proper where the officer knew that the defendant had prior drug convictions; the defendant appeared nervous; the defendant deliberately concealed his right hand and refused to open it despite repeated requests; and the officer knew from his training and experience that people who deal drugs frequently carry weapons and that weapons can be concealed in a hand.

State v. Phifer, __ N.C. App. __, 741 S.E.2d 446 (April 2, 2013). The trial court improperly denied the defendant's motion to suppress. An officer saw the defendant walking in the middle of the street. The officer stopped the defendant to warn him about impeding the flow of street

traffic. After issuing this warning, the officer frisked the defendant because of his "suspicious behavior," specifically that the "appeared to be nervous and kept moving back and forth." The court found that "the nervous pacing of a suspect, temporarily detained by an officer to warn him not to walk in the street, is insufficient to warrant further detention and search."

State v. Robinson, 221 N.C. App. 266 (June 19, 2012). The court rejected the defendant's argument that an officer's discovery of drugs in his buttocks occurred during a separate, second search after a pat down was completed. The drugs were found during a valid pat down for weapons.

State v. Hemphill, 219 N.C. App. 50 (Feb. 21, 2012). Upon feeling a screwdriver and wrench on the defendant's person during a pat-down, the officer was justified in removing these items as they constituted both a potential danger to the officer and were further suggestive of criminal activity being afoot.

In re D.B., 214 N.C. App. 489 (Aug. 16, 2011). The trial court erred by admitting evidence obtained by an officer who exceeded the proper scope of a *Terry* frisk. After the officer stopped the juvenile, he did a weapons frisk and found nothing. When the officer asked the juvenile to identify himself, the juvenile did not respond. Because the officer thought he felt an identification card in the juvenile's pocket during the frisk, he retrieved it. It turned out to be a stolen credit card, which was admitted into evidence. Although officers who lawfully stop a person may ask a moderate number of questions to determine his or her identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop, no authority suggests that an officer may physically search a person for evidence of his identity in connection with a *Terry* stop.

State v. Morton, 204 N.C. App. 578 (June 15, 2010). On remand, the court held that officers did not exceed the scope of the frisk by confiscating a digital scale from the defendant's pocket. An officer testified that he knew the object was a digital scale based on his pat-down without manipulation of the object and that individuals often carry such scales in order to weigh controlled substances. When asked, the defendant confirmed that the object was a scale. These facts in conjunction with informant tips that the defendant was engaging in the sale of illegal drugs are sufficient to support the trial court's conclusion that the officer was reasonable and justified in seizing the scale.

State v. Miller, 198 N.C. App. 196 (July 7, 2009). An officer had reasonable suspicion to frisk the defendant after stopping him for a traffic violation. Even though the officer could see something in the defendant's clenched right hand, the defendant stated that he had nothing in his hand; the defendant appeared to be attempting to physically evade the officer; the defendant continually refused to show the officer what was in his hand; and the defendant raised his fist, suggesting an intent to strike the officer.

State v. King, 206 N.C. App. 585 (Aug. 17, 2010). An officer had reasonable suspicion to believe that the defendant was armed and dangerous justifying a pat-down frisk. Around midnight, the officer stopped the defendant's vehicle after determining that the tag was registered to a different car; prior to the stop, the defendant and his passenger had looked oddly at the officer. After the

stop, the defendant held his hands out of the window, volunteered that he had a gun, which was loaded, and when exiting the vehicle, removed his coat, even though it was cold outside. At this point, the pat down occurred. The court rejected the defendant's argument that his efforts to show that he did not pose a threat obviated the need for the pat down. It also rejected the defendant's argument that the discovery of the gun could not support a reasonable suspicion that he still might be armed and dangerous; instead the court concluded that the confirmed presence of a weapon is a compelling factor justifying a frisk, even where that weapon is secured and out of the defendant's reach. Additionally, the officer was entitled to formulate "common-sense conclusions," based upon an observed pattern that one weapon often signals the presence other weapons, in believing that the defendant, who had already called the officer's attention to one readily visible weapon, might be armed.

Arrests

Generally

State v. Thorpe, __ N.C. App. __, 754 S.E.2d 213 (Feb. 18, 2014). Because the trial court failed to make adequate findings to permit review of its determination on the defendant's motion to suppress that the defendant was not placed under arrest when he was detained by an officer for nearly two hours, the court remanded for findings on this issue. The court noted that the officer's stop of the defendant was not a "de facto" arrest simply because the officer handcuffed the defendant and placed him in the front passenger seat of his police car. However, it continued, "the length of Defendant's detention may have turned the investigative stop into a de facto arrest, necessitating probable cause . . . for the detention." It added: "Although length in and of itself will not normally convert an otherwise valid seizure into a de facto arrest, where the detention is more than momentary, as here, there must be some strong justification for the delay to avoid rendering the seizure unreasonable."

State v. Mello, 200 N.C. App. 561 (Nov. 3, 2009). A provision in a city ordinance prohibiting loitering for the purpose of engaging in drug-related activity and allowing the police to arrest in the absence of probable cause violated the Fourth Amendment.

Probable Cause for Arrest

State v. Biber, 365 N.C. 162 (June 16, 2011). The court reversed a decision of the Court of Appeals and held that probable cause supported the defendant's arrest for drug possession. In the decision below, the Court of Appeals held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room's bathroom light fixture while the defendant and two others were present. Although the case was before the Court of Appeals on an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence. The North Carolina Supreme Court concluded that the Court of Appeals applied the wrong analysis, conflating the sufficiency of the evidence standard with the standard that applies when assessing whether officers had probable cause to arrest. The court went on to conclude that unchallenged facts supported the trial court's conclusion that the officers had probable cause to arrest. Specifically, responding officers knew they were being dispatched to a motel to assist its manager in determining whether illegal drug use was occurring in Room 312, after a complaint had been made. The officers' initial conversation with the

manager confirmed the possibility of suspicious activities. When the door to the room was opened, they saw a woman with a crack pipe and drug paraphernalia next to her. The woman fled to the bathroom, ignoring instructions to open the door while she flushed the toilet. A search of the bathroom revealed a bag of what looked like narcotics in the light fixture. The defendant ignored instructions to remain still. When asked, the defendant claimed the room was his and that a bag containing clothing was his.

Steinkrause v. Tatum, 364 N.C. 419 (Oct. 8, 2010). The court affirmed per curiam *Steinkrause v. Tatum*, 201 N.C. App. 289 (Dec. 8, 2009) (holding, over a dissent, that there was probable cause to arrest the defendant for impaired driving in light of the severity of the one-car accident coupled with an odor of alcohol).

State v. Overocker, __ N.C. App. __, 762 S.E.2d 921 (Sept. 16, 2014). The trial court properly granted the defendant's motion to suppress where no probable cause supported the defendant's arrest for impaired driving and unsafe movement. The defendant was arrested after he left a bar, got in his SUV and backed into a motorcycle that was illegally parked behind him. The officer relied on the following facts to support probable cause: the accident, the fact that the defendant had been at a bar and admitted to having three drinks (in fact he had four), the defendant's performance tests, and the odor of alcohol on the defendant. However, the trial court found that the officer testified that the alcohol odor was "light." Additionally, none of the officers on the scene observed the defendant staggering or stumbling, and his speech was not slurred. Also, the only error the defendant committed in the field sobriety tests was to ask the officer half-way through each test what to do next. When instructed to finish the tests, the defendant did so. The court concluded:

> [W]hile defendant had had four drinks in a bar over a four-hour time frame, the traffic accident . . . was due to illegal parking by another person and was not the result of unsafe movement by defendant. Further, defendant's performance on the field sobriety tests and his behavior at the accident scene did not suggest impairment. A light odor of alcohol, drinks at a bar, and an accident that was not defendant's fault were not sufficient circumstances, without more, to provide probable cause to believe defendant was driving while impaired.

The court also rejected the State's argument that the fact that the officer knew the defendant's numerical reading from a portable breath test supported the arrest, noting that under G.S. 20-16.3(d), the alcohol concentration result from an alcohol screening test may not be used by an officer in determining if there are reasonable grounds to believe that the driver committed an implied consent offense, such as driving while impaired.

State v. Townsend, __ N.C. App. __, 762 S.E.2d 898 (Sept. 16, 2014). Probable cause supported the defendant's arrest for DWI. When the officer stopped the defendant at a checkpoint, the defendant had bloodshot eyes and a moderate odor of alcohol. The defendant admitted to "drinking a couple of beers earlier" and that he "stopped drinking about an hour" before being stopped. Two alco-sensor tests yielded positive results and the defendant exhibited clues indicating impairment on three field sobriety tests. The court rejected the defendant's argument that because he did not exhibit signs of intoxication such as slurred speech, glassy eyes, or physical instability, there was insufficient probable cause, stating: "as this Court has held, the

odor of alcohol on a defendant's breath, coupled with a positive alco-sensor result, is sufficient for probable cause to arrest a defendant for driving while impaired."

State v. Williams, __ N.C. App. __, 738 S.E.2d 211 (Feb. 19, 2013). Officers had probable cause to arrest the defendant for impaired driving. An officer saw the defendant lying behind a car on the ground, with his shirt over his head and his head in the sleeve hole. The defendant appeared unconscious. When the officer tried to arouse the defendant, he woke up and started chanting. His speech was slurred, he had a strong odor of alcohol, he was unsteady on his feet, and his eyes were bloodshot. The keys were in the ignition and the car was not running. Another officer searched the area and found no sign of anyone else present.

State v. Robinson, 221 N.C. App. 266 (June 19, 2012). An officer had probable cause to arrest the defendant after he felt something hard between the defendant's buttocks during a weapons pat down. Based on his training and experience the officer inferred that the defendant may have been hiding drugs in his buttocks. The court noted that the location of the item was significant, since the buttocks is an unlikely place for carrying legal substances. Additionally, the officer knew that the defendant was sitting in a car parked in a high crime area; a large machete was observed in the car; a passenger possessed what appeared to be cocaine; when officers began speaking with the vehicle's occupants the defendant dropped a large sum of cash onto the floor; and after dropping the money on the floor, the defendant made a quick movement behind his back.

Beeson v. Palombo, 220 N.C. App. 274 (May 1, 2012). Because probable cause supported the issuance of arrest warrants for assault on a female, the defendants were shielded by public official immunity from the plaintiff's claims based on false imprisonment and other grounds. The defendant officer told the magistrate that the plaintiff, a teacher, had "touched [the] breast area" of two minor female students after at least one of the students had covered herself with her arms and asked the plaintiff not to touch her. This evidence was enough for a reasonable person to conclude that an offense had been committed and that the plaintiff was the perpetrator.

State v. Brown, 199 N.C. App. 253 (Aug. 18, 2009). A detailed tip by an individual, who originally called the police anonymously but then identified himself and met with the police in person, was sufficiently corroborated by the police to establish probable cause to arrest the defendant.

State v. Washington, 193 N.C. App. 670 (Nov. 18, 2008). There was probable cause to arrest the defendant for resisting, delaying, and obstructing when the defendant fled from an officer who was properly making an investigatory stop. Although the investigatory stop was not justified by the fact that a passenger in the defendant's car was wanted on several outstanding warrants, it was justified by the fact that the defendant was driving a car that had no insurance and with an expired registration plate. It was immaterial that the officer had not explained the proper basis for the stop before the defendant fled.

Order for Arrest

State v. Banner, 207 N.C. App. 729 (Nov. 2, 2010). Provided the underlying charges that form

the basis for an order for arrest (OFA) for failure to appear remain unresolved at the time the OFA is executed, the OFA is not invalid and an arrest made pursuant to it is not unconstitutional merely because a clerk or judicial official failed to recall the OFA after learning that it was issued erroneously. On February 22, 2007, the defendant was cited to appear in Wilkes County Court for various motor vehicle offenses ("Wilkes County charges"). On June 7, 2007 he was convicted in Caldwell County of unrelated charges ("unrelated charges") and sent to prison. When a court date was set on the Wilkes County charges, the defendant failed to appear because he was still in prison on the unrelated charges and no writ was issued to secure his presence. The court issued an OFA for the failure to appear. When the defendant was scheduled to be released from prison on the unrelated charges, DOC employees asked the Wilkes County clerk's office to recall the OFA, explaining defendant had been incarcerated when it was issued. However, the OFA was not recalled and on October 1, 2007, the defendant was arrested pursuant to that order, having previously been released from prison. When he was searched incident to arrest, officers found marijuana and cocaine on his person. The court rejected the defendant's argument that the OFA was invalid because the Wilkes County clerk failed to recall it as requested, concluding that because the underlying charges had not been resolved at the time of arrest, no automatic recall occurred. The court further noted that even if good cause to recall existed, recall was not mandatory and therefore failure to recall did not nullify the OFA. Thus, the officers were entitled to rely on it, and no independent probable cause was required to arrest the defendant. The court declined to resolve the issue of whether there is a good faith exception to Article I, Section 20 of the state Constitution.

Use of Deadly Force to Stop Flight

Plumhoff v. Rickard, 572 U.S. __, 134 S. Ct. 2012 (May 27, 2014). Officers did not use excessive force in violation of the Fourth Amendment when using deadly force to end a high speed car chase. The chase ended when officers shot and killed the fleeing driver. The driver's daughter filed a § 1983 action, alleging that the officers used excessive force in terminating the chase in violation of the Fourth Amendment. Given the circumstances of the chase—among other things, speeds in excess of 100 mph when other cars were on the road—the Court found it "beyond serious dispute that [the driver's] flight posed a grave public safety risk, and . . . the police acted reasonably in using deadly force to end that risk." Slip Op. at 11. The Court went on to reject the respondent's contention that, even if the use of deadly force was permissible, the officers acted unreasonably in firing a total of 15 shots, stating: "It stands to reason that, if police officers are justified in firing at a suspect in order to end a severe threat to public safety, the officers need not stop shooting until the threat has ended." *Id.*

Pretext

Ashcroft v. al-Kidd, 563 U.S. __, 131 S. Ct. 2074 (May 31, 2011). In the context of a qualified immunity analysis, the Court reversed the Ninth Circuit and held, in relevant part, that an objectively reasonable arrest and detention pursuant to a validly obtained material witness arrest warrant cannot be challenged as unconstitutional on the basis of allegations that the arresting authority had an improper motive. The complaint had alleged that in the aftermath of the September 11th terrorist attacks, then-Attorney General John Ashcroft authorized federal prosecutors and law enforcement officials to use the material-witness statute to detain individuals

with suspected ties to terrorist organizations, that federal officials had no intention of calling most of these individuals as witnesses, and that they were detained, at Ashcroft's direction, because officials suspected them of supporting terrorism but lacked sufficient evidence to charge them with a crime.

Dog Sniff/Search

For cases on extending vehicle stops for dog sniffs, see Vehicle Stops; Duration/Extending Stop, above.

Florida v. Jardines, 569 U.S. __, 133 S. Ct. 1409 (Mar. 26, 2013). Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. The Court's reasoning was based on the theory that the officers engaged in a physical intrusion of a constitutionally protected area. Applying that principle, the Court held:

> The officers were gathering information in an area belonging to [the defendant] and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Slip Op. at pp. 3-4. In this way the majority did not decide the case on a reasonable expectation of privacy analysis; the concurring opinion came to the same conclusion on both property and reasonable expectation of privacy grounds.

Florida v. Harris, 568 U.S. __, 133 S. Ct. 1050 (Feb. 19, 2013). Concluding that a dog sniff "was up to snuff," the Court reversed the Florida Supreme Court and held that the dog sniff in this case provided probable cause to search a vehicle. The Court rejected the holding of the Florida Supreme Court which would have required the prosecution to present, in every case, an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability. The Court found this "demand inconsistent with the 'flexible, common-sense standard' of probable cause. It instructed:

> In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Applying that test to the drug dog's sniff in the case at hand, the Court found it satisfied.

State v. Miller, ___ N.C. ___, 766 S.E.2d 289 (Dec. 19, 2014). The court held that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment. Responding to a burglar alarm, officers arrived at the defendant's home with a police dog, Jack. The officers deployed Jack to search the premises for intruders. Jack went from room to room until he reached a side bedroom where he remained. When an officer entered to investigate, Jack was sitting on the bedroom floor staring at a dresser drawer, alerting the officer to the presence of drugs. The officer opened the drawer and found a brick of marijuana. Leaving the drugs there, the officer and Jack continued the protective sweep. Jack stopped in front of a closet and began barking at the closet door, alerting the officer to the presence of a human suspect. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officers opened the closet and found two large black trash bags on the closet floor. When Jack nuzzled a bag, marijuana was visible. The officers secured the premises and obtained a search warrant. At issue on appeal was whether Jack's nuzzling of the bags in the closet violated the Fourth Amendment. The court of appeals determined that Jack's nuzzling of the bags was an action unrelated to the objectives of the authorized intrusion that created a new invasion of the defendant's privacy unjustified by the exigent circumstance that validated the entry. That court viewed Jack as an instrumentality of the police and concluded that "his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." The Supreme Court disagreed, concluding that "Jack's actions are different from the actions of an officer, particularly if the dog's actions were instinctive, undirected, and unguided by the police." It held:

> If a police dog is acting without assistance, facilitation, or other intentional action by its handler (. . . acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of whether his actions were instinctive, is reversed. (citation omitted)

Ultimately, the court remanded for the trial court to decide whether Jack's nuzzling in this case was in fact instinctive, undirected, and unguided by the officers.

State v. Washburn, 201 N.C. App. 93 (Nov. 17, 2009). Use of a dog by officers to sweep the common area of a storage facility, altering them to the presence of drugs in the defendant's storage unit, did not implicate a legitimate privacy interest protected by the Fourth Amendment.

Exclusionary Rule & Related Issues

Herring v. United States, 555 U.S. 135 (Jan. 14, 2009). The exclusionary rule does not require the exclusion of evidence found during a search incident to arrest when the officer reasonably believed that there was an outstanding warrant but that belief was wrong because of a negligent bookkeeping error by another police employee. An officer arrested the defendant based on an outstanding arrest warrant listed in a neighboring county sheriff's computer database. A search incident to arrest discovered drugs and a gun, which formed the basis for criminal charges. Minutes after the search was completed, it became known that the warrant had been recalled but that a law enforcement official had negligently failed to record the recall in the system. The Court reasoned that the exclusionary rule is not an individual right and that it applies only where it will result in appreciable deterrence. Additionally, the benefits of deterrence must outweigh the social costs of exclusion of the evidence. An important part of the calculation is the culpability of the law enforcement conduct. Thus, the abuses that gave rise to the exclusionary rule featured intentional conduct that was patently unconstitutional. An error that arises from nonrecurring and attenuated negligence is far removed from the core concerns that lead to adoption of the rule. The Court concluded: "To trigger the exclusionary rule, police conduct must be sufficiently deliberate that exclusion can meaningfully deter it, and sufficiently culpable that such deterrence is worth the price paid by the justice system. . . . [T]he . . . rule serves to deter deliberate, reckless, or grossly negligent conduct, or in some circumstances recurring or systemic negligence." The negligence in recordkeeping at issue, the Court held, did not rise to that level. Finally the Court noted that not all recordkeeping errors are immune from the exclusionary rule: "[i]f the police have been shown to be reckless in maintaining a warrant system, or to have knowingly made false entries to lay the groundwork for future false arrests, exclusion would be . . . justified . . . ."

Davis v. United States, 564 U.S. __, 131 S. Ct. 2419 (June 16, 2011). The exclusionary rule (a deterrent sanction baring the prosecution from introducing evidence obtained by way of a Fourth Amendment violation) does not apply when the police conduct a search in compliance with binding precedent that is later overruled. Alabama officers conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens for driving while intoxicated and passenger Willie Davis for giving a false name to police. The police handcuffed both individuals and placed them in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle and found a revolver inside Davis's jacket pocket. The search was done in reliance on precedent in the jurisdiction that had interpreted *New York v. Belton*, 453 U.S. 454 (1981), to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. Davis was indicted on a weapons charge and unsuccessfully moved to suppress the revolver. He was convicted. While Davis's case was on appeal, the Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), adopting a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. Analyzing whether to apply the exclusionary rule to the search at issue, the Court determined that "[the] acknowledged absence of police culpability dooms Davis's claim." Slip Op. at 10. It stated: "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a

high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Slip Op. at 1.

Combs v. Robertson, ___ N.C. App. ___, 767 S.E.2d 925___ (Feb 3, 2015). The Fourth Amendment's exclusionary rule does not apply in civil drivers' license revocation proceedings. The evidence used in the proceeding was obtained as a result of an unconstitutional stop; after the same evidence previously had been used to support criminal charges, it was suppressed and the criminal charges were dismissed. The court held that while the evidence was subject to the exclusionary rule in a criminal proceeding, that rule did not apply in this civil proceeding, even if it could be viewed as "quasi-criminal in nature."

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). In an assault on an officer case, the court rejected the defendant's argument that evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his initial arrest for resisting an officer was unlawful. The doctrine does not exclude evidence of attacks on police officers where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights; "[a]pplication of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved[.]" (quotation omitted). Thus the court held that even if the initial stop and arrest violated the defendant's Fourth Amendment rights, evidence of his subsequent assaults on officers were not "fruits" under the relevant doctrine.

State v. Barron, 202 N.C. App. 686 (Mar. 2, 2010). Even if the defendant was arrested without probable cause, his subsequent criminal conduct of giving the officers a false name, date of birth, and social security number need not be suppressed. "The exclusionary rule does not operate to exclude evidence of crimes committed subsequent to an illegal search and seizure."

Hartman v. Robertson, 208 N.C. App. 692 (Dec. 21, 2010). The exclusionary rule does not apply in a civil license revocation proceeding.

Exigent Circumstances

Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (June 25, 2014). The police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. This decision involved a pair of cases in which both defendants were arrested and cell phones were seized. In both cases, officers examined electronic data on the phones without a warrant as a search incident to arrest. The Court held that "officers must generally secure a warrant before conducting such a search." The Court noted that "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board." In this regard it added however that "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." Next, the Court rejected the argument that preventing the destruction of evidence justified the search. It was unpersuaded by the prosecution's argument that a different result should obtain because remote wiping and data encryption may be used to destroy digital evidence. The Court noted that

"[t]o the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If the police are truly confronted with a 'now or never' situation—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately" (quotation omitted). Alternatively, the Court noted, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." The Court noted that such a procedure would be assessed under case law allowing reasonable steps to secure a scene to preserve evidence while procuring a warrant. Turning from an examination of the government interests at stake to the privacy issues associated with a warrantless cell phone search, the Court rejected the government's argument that a search of all data stored on a cell phone is materially indistinguishable the other types of personal items, such as wallets and purses. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and that they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." It also noted the complicating factor that much of the data viewed on a cell phone is not stored on the device itself, but rather remotely through cloud computing. Concluding, the Court noted:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.
>
> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

(Slip Op at. p. 25). And finally, the Court noted that even though the search incident to arrest does not apply to cell phones, other exceptions may still justify a warrantless search of a particular phone, such as exigent circumstances.

Missouri v. McNeely, 569 U.S. __, 133 S.Ct. 1552 (April 17, 2013). The Court held that in drunk driving investigations, the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant. After stopping the defendant's vehicle for speeding and crossing the centerline, the officer noticed several signs that the defendant was intoxicated and the defendant acknowledged that he had consumed "a couple of beers." When the defendant performed poorly on field sobriety tests and declined to use a portable breath-test device, the officer placed him under arrest and began driving to the stationhouse. But when the defendant said he would again refuse to provide a breath sample, the officer took him to a nearby hospital for blood testing where a blood sample was drawn. The officer did not attempt to secure a warrant. Tests results showed the defendant's BAC above the legal limit. The defendant was charged with impaired driving and he moved to suppress the blood test. The trial court granted the defendant's motion, concluding that the exigency exception to the warrant requirement did not apply because, apart from the fact that as in all intoxication cases, the defendant's blood alcohol was being metabolized by his liver, there were no circumstances suggesting the officer faced an emergency in which he could not practicably obtain a warrant. The state supreme court affirmed, reasoning that *Schmerber v.*

California, 384 U. S. 757 (1966), required lower courts to consider the totality of the circumstances when determining whether exigency permits a nonconsensual, warrantless blood draw. The state court concluded that *Schmerber* "requires more than the mere dissipation of blood-alcohol evidence to support a warrantless blood draw in an alcohol-related case." The U.S. Supreme Court granted certiorari to resolve a split of authority on the question whether the natural dissipation of alcohol in the bloodstream establishes a per se exigency that suffices on its own to justify an exception to the warrant requirement for nonconsensual blood testing in drunk driving investigations. The Court affirmed. The Court began by noting that under *Schmerber* and the Court's case law, applying the exigent circumstances exception requires consideration of all of the facts and circumstances of the particular case. It went on to reject the State's request for a per se rule for blood testing in drunk driving cases, declining to "depart from careful case-by-case assessment of exigency." It concluded: "while the natural dissipation of alcohol in the blood may support a finding of exigency in a specific case, as it did in *Schmerber*, it does not do so categorically. Whether a warrantless blood test of a drunk-driving suspect is reasonable must be determined case by case based on the totality of the circumstances."

Kentucky v. King, 563 U.S. ___, 131 S. Ct. 1849 (May 16, 2011). The Court reversed and remanded a decision of the Kentucky Supreme Court and held that the exigent circumstances rule applies when police, by knocking on the door of a residence and announcing their presence, cause the occupants to attempt to destroy evidence. Police officers set up a controlled buy of crack cocaine outside an apartment complex. After an undercover officer watched the deal occur, he radioed uniformed officers to move in, telling them that the suspect was moving quickly toward the breezeway of an apartment building and urging them to hurry before the suspect entered an apartment. As the uniformed officers ran into the breezeway, they heard a door shut and detected a strong odor of burnt marijuana. At the end of the breezeway they saw two apartments, one on the left and one on the right; they did not know which apartment the suspect had entered. Because they smelled marijuana coming from the apartment on the left, they approached that door, banged on it as loudly as they could and announced their presence as the police. They heard people and things moving inside, leading them to believe that drug related evidence was about to be destroyed. The officers then announced that they were going to enter, kicked in the door, and went in. They found three people inside: the defendant, his girlfriend, and a guest who was smoking marijuana. During a protective sweep, the officers saw marijuana and powder cocaine in plain view. In a subsequent search, they found crack cocaine, cash, and drug paraphernalia. The police eventually entered the apartment on the right, where they found the suspected drug dealer who was the initial target of their investigation. On these facts, the state supreme court determined that the exigent circumstances rule did not apply because the police should have foreseen that their conduct would prompt the occupants to attempt to destroy evidence. The U.S. Supreme Court rejected this interpretation stating, "the exigent circumstances rule justifies a warrantless search when the conduct of the police preceding the exigency is reasonable." It concluded: "Where, as here, the police did not create the exigency by engaging or threatening to engage in conduct that violates the Fourth Amendment, warrantless entry to prevent the destruction of evidence is reasonable and thus allowed." The Court did not rule on whether exigent circumstances existed in this case.

Michigan v. Fisher, 558 U.S. 45 (Dec. 7, 2009). An officer's entry into a home without a warrant was reasonable under the emergency aid doctrine. Responding to a report of a disturbance, a

couple directed officers to a house where a man was "going crazy." A pickup in the driveway had a smashed front, there were damaged fence posts along the side of the property, and the home had three broken windows, with the glass still on the ground outside. The officers saw blood on the pickup and on clothes inside the truck, as well as on one of the doors to the house. They could see the defendant screaming and throwing things inside the home. The back door was locked and a couch blocked the front door. The Court concluded that it would be objectively reasonable to believe that the defendant's projectiles might have a human target (such as a spouse or a child), or that the defendant would hurt himself in the course of his rage.

Ryburn v. Huff, 565 U.S. __, 132 S. Ct. 987 (Jan. 23, 2012). The Court reversed a Ninth Circuit ruling that officers were not entitled to qualified immunity in a § 1983 action that arose after the officers entered a home without a warrant. When officers responded to a call from a high school, the principal informed them that a student, Vincent Huff, was rumored to have written a letter threatening to "shoot up" the school. The officers learned that Vincent had been absent two days, that he was a victim of bullying, and that a classmate believed him to be capable of carrying out the alleged threat. Officers found these facts concerning in light of training suggesting to them that these characteristics are common among perpetrators of school shootings. When the officers went to Vincent's home and knocked at the door, no one answered. They then called the home phone and no one answered. When they called Vincent's mother's cell phone, she reported that she and Vincent were inside. Vincent and Mrs. Huff then came outside to talk with the officers. Mrs. Huff declined an officer's request to continue the discussion inside. When an officer asked Mrs. Huff if there were any guns in the house, she immediately turned around and ran inside. The officers followed and eventually determined the threat to be unfounded. The Huffs filed a § 1983 action. The District Court found for the officers, concluding that they were entitled to qualified immunity because Mrs. Huff's odd behavior, combined with the information the officers gathered at the school, could have led reasonable officers to believe that there could be weapons inside the house, and that family members or the officers themselves were in danger. A divided panel of the Ninth Circuit disagreed with the conclusion that the officers were entitled to qualified immunity. The U.S. Supreme Court reversed, determining that reasonable officers could have come to the conclusion that the Fourth Amendment permitted them to enter the residence if there was an objectively reasonable basis for fearing that violence was imminent. It further determined that a reasonable officer could have come to such a conclusion based on the facts as found by the trial court.

State v. Grice, ___ N.C. ___, 767 S.E.2d 312 (Jan. 23, 2015). (1) Reversing the court of appeals, the court held that officers did not violate the Fourth Amendment by seizing marijuana plants seen in plain view. After receiving a tip that the defendant was growing marijuana at a specified residence, officers went to the residence to conduct a knock and talk. Finding the front door inaccessible, covered with plastic, and obscured by furniture, the officers noticed that the driveway led to a side door, which appeared to be the main entrance. One of the officers knocked on the side door. No one answered. From the door, the officer noticed plants growing in several buckets about 15 yards away. Both officers recognized the plants as marijuana. The officers seized the plants, returned to the sheriff's office and got a search warrant to search the home. The defendant was charged with manufacturing a controlled substance and moved to suppress evidence of the marijuana plants. The trial court denied the motion and the court of appeals reversed. The supreme court began by finding that the officers observed the plants in plain view.

It went on to explain that a warrantless seizure may be justified as reasonable under the plain view doctrine if the officer did not violate the Fourth Amendment in arriving at the place from where the evidence could be plainly viewed; the evidence's incriminating character was immediately apparent; and the officer had a lawful right of access to the object itself. Additionally, it noted, "[t]he North Carolina General Assembly has . . . required that the discovery of evidence in plain view be inadvertent." The court noted that the sole point of contention in this case was whether the officers had a lawful right of access from the driveway 15 yards across the defendant's property to the plants' location. Finding against the defendant on this issue, the court stated: "Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage." The court rejected the defendant's argument that the seizure was improper because the plants were on the curtilage of his property, stating:

> [W]e conclude that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects "the privacies of life" inside the home. However, even if the property at issue can be considered the curtilage of the home for Fourth Amendment purposes, we disagree with defendant's claim that a justified presence in one portion of the curtilage (the driveway and front porch) does not extend to justify recovery of contraband in plain view located in another portion of the curtilage (the side yard). By analogy, it is difficult to imagine what formulation of the Fourth Amendment would prohibit the officers from seizing the contraband if the plants had been growing on the porch—the paradigmatic curtilage—rather than at a distance, particularly when the officers' initial presence on the curtilage was justified. The plants in question were situated on the periphery of the curtilage, and the protections cannot be greater than if the plants were growing on the porch itself. The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home. Traveling within the curtilage to seize contraband in plain view within the curtilage did not violate the Fourth Amendment.

(citation omitted). (2) The court went on to hold that the seizure also was justified by exigent circumstances, concluding: "Reviewing the record, it is objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property."

State v. Jordan, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). In this drug case, the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of a warrantless search of her residence. According to the court: "The trial court's findings that the officers observed a broken window, that the front door was unlocked, and that no one responded when the officers knocked on the door are insufficient to show that they had an objectively reasonable belief that a breaking and entering had *recently* taken place or *was still in progress*, such that there existed an urgent need to enter the property" and that the search was justified under the exigent circumstances exception to the warrant requirement. It continued:

> In this case, the only circumstances justifying the officers' entry into defendant's residence were a broken window, an unlocked door, and the lack of response to

> the officers' knock at the door. We hold that although these findings may be sufficient to give the officers a reasonable belief that an illegal entry had occurred *at some point*, they are insufficient to give the officers an objectively reasonable belief that a breaking and entering was in progress or had occurred recently.

State v. McCrary, __ N.C. App. __, 764 S.E.2d 477 (Oct. 21, 2014), *temporary stay allowed*, __ N.C. __, 764 S.E.2d 475 (Nov. 07, 2014). In this DWI case, the court—over a dissent—remanded for additional findings of fact on whether exigent circumstances supported a warrantless blood draw. The trial judge denied the motion to suppress before the U.S. Supreme Court issued its decision in *McNeely*, holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every DWI case sufficient to justify conducting a blood test without a warrant. The court remanded for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed. The dissenting judge would have reversed the trial court's denial of the motion to suppress and remanded for a new trial.

State v. Granger, __ N.C. App. __, 761 S.E.2d 923 (July 15, 2014). In this DWI case, the court held that under *Missouri v. McNeely* (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant), exigent circumstances justified the warrantless blood draw. The officer was concerned about the dissipation of alcohol from the defendant's blood because it took over an hour for the officer to establish probable cause to make his request for the defendant's blood. The delay occurred because the defendant's injuries and need for medical care prevented the officer from investigating the matter until he arrived at the hospital, where the defendant was taken after his accident. The officer was concerned about the delay in getting a warrant (about 40 minutes), including the need to wait for another officer to come to the hospital and stay with the defendant while he left to get the warrant. Additionally, the officer was concerned that if he waited for a warrant, the defendant would receive pain medication for his injuries, contaminating his blood sample.

State v. Dahlquist, __ N.C. App. __, 752 S.E.2d 665 (Dec. 3, 2013). In this DWI case, the trial court properly denied the defendant's motion to suppress evidence obtained from blood samples taken at a hospital without a search warrant where probable cause and exigent circumstances supported the warrantless blood draw. Noting the U.S. Supreme Court's recent decision in *Missouri v. McNeely* (the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every case sufficient to justify conducting a blood test without a warrant), the court found that the totality of the circumstances supported the warrantless blood draw. Specifically, when the defendant pulled up to a checkpoint, an officer noticed the odor of alcohol and the defendant admitted to drinking five beers. After the defendant failed field sobriety tests, he refused to take an intoxilyzer test. The officer then took the defendant to the hospital to have a blood sample taken without first obtaining a search warrant. The officer did this because it would have taken 4-5 hours to get the sample if he first had to travel to a magistrate for a warrant. The court noted however that the "'video transmission' option that has been allowed by G.S. 15A-245(a)(3) [for communicating with a magistrate] . . . is a method that should be considered by arresting officers in cases such as this where the technology is available." It also advised: "[W]e

believe the better practice in such cases might be for an arresting officer, where practical, to call the hospital and the [magistrate's office] to obtain information regarding the wait times on that specific night, rather than relying on previous experiences."

State v. Miller, __ N.C. App. __, 746 S.E.2d 421 (Aug. 6, 2013), *reversed on other grounds*, __ N.C. __, 766 S.E.2d 289 (Dec. 19, 2014). Exigent circumstances—investigation of a possible burglary—supported officers' warrantless entry into the defendant's home. The police department received a burglar alarm report concerning a suspected breaking and entering at the defendant's home. The first arriving officer noticed a broken back window and that all of the doors remained locked. Under these circumstances, the officer reasonably believed that the intruder could have still been in the home.

State v. Williams, 209 N.C. App. 255 (Jan. 18, 2011). Probable cause and exigent circumstances supported an officer's warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant's vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant's person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer's presence. Exigent circumstances existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

State v. Cline, 205 N.C. App. 676 (July 20, 2010). Exigent circumstances existed for an officer to make a warrantless entry into the defendant's home to ascertain whether someone inside was in need of immediate assistance or under threat of serious injury. The officer was summoned after motorists discovered a young, naked, unattended toddler on the side of a major highway. The officer was able to determine that the child was the defendant's son with reasonable certainty and that the defendant resided at the premises in question. When the officer knocked and banged on front door, he received no response. The officer found the back door ajar. It would have taken the officer approximately two hours to get a search warrant for the premises.

State v. Fuller, 196 N.C. App. 412 (Apr. 21, 2009). Exigent circumstances supported officers' warrantless entry into a mobile home to arrest the defendant pursuant to an outstanding warrant. The officers knew that the defendant previously absconded from a probation violation hearing and thus was a flight risk, that defendant had previously engaged in violent behavior and was normally armed, and when they announced their presence, they watched, through a window, as the defendant disappeared from view. The officers reasonably believed that the defendant was attempting to escape and presented a danger to the officers and others in the home.

State v. Stover, 200 N.C. App. 506 (Nov. 3, 2009). Exigent circumstances justified officers' entry into a home. The officers were told by an informant told that she bought marijuana at the house. When they approached for a knock and talk, they detected a strong odor of marijuana, and saw the defendant with his upper body partially out of a window. The possible flight by the defendant and concern with destruction of evidence given the smell provided exigent circumstances.

State v. Fletcher, 202 N.C. App. 107 (Jan. 19, 2010). G.S. 20-139.1(d1) (providing that in order to proceed with a non-consensual blood test without a warrant, there must be probable cause and the officer must have a reasonable belief that a delay in testing would result in dissipation of the person's blood alcohol content), codifies exigent circumstances with respect to impaired driving and is constitutional. Competent evidence supported the trial court's conclusions that the officer had a reasonable belief that a delay in testing would result in dissipation of the defendant's blood alcohol content and that exigent circumstances existed; the facts showed, in part, that obtaining a warrant to procure the blood would have caused a two to three hour delay.

Good Faith Exception

State v. Lowe, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). Although a search warrant to search a home was supported by probable cause, law enforcement exceeded the scope of the warrant when they searched a vehicle parked in the driveway but not owned or controlled by the home's resident; the trial court thus erred by denying the defendant's motion to suppress. The affidavit supporting the warrant indicated that one Terrence Turner was selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. No vehicles were specified in the warrant. When executing the warrant officers found Turner inside the home, as well as two overnight guests, the defendant and his girlfriend, Margaret Doctors. Parked in the driveway was a rental car, which the officers learned was being leased by Doctors and operated by both her and the defendant. Although the officers knew that Turner had no connection to the vehicle, they searched it and found controlled substances inside. As a result the defendant was charged with drug offenses. Prior to trial he unsuccessfully moved to suppress, arguing that the warrant was not supported by probable cause and alternatively that the search of his vehicle exceeded the scope of the warrant. (1) The court held that the warrant was supported by probable cause. The affidavit stated that after receiving information that Turner was involved in drug activity at the home the officer examined trash and found correspondence addressed to Turner at the home and a small amount of marijuana residue in a fast food bag. (2) The court agreed that the search of the defendant's vehicle exceed the scope of the warrant issued to search Turner's home. Noting that the officers could have searched the vehicle if it belonged to Turner, the court further noted that they knew Turner had no connection to the car. The court stated that the issue presented, "whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," was one of first impression. The court rejected the State's argument that a warrant to search a home permitted a search of any vehicle found within the curtilage, reasoning: "The State's proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search." (3) Finally, the court rejected the State's argument that the good faith exception should apply because police department policy allowed officers to search all vehicles within the curtilage of premises specified in a warrant. The court found the good faith exception "inappropriate" where the error, as here, is attributable to the police, not a judicial official who issued the warrant.

State v. Elder, __ N.C. App. __, 753 S.E.2d 504 (Jan. 21, 2014), *modified and affirmed on other grounds*, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). (1) The district court exceeded its statutory authority by ordering a general search of the defendant's person, vehicle, and residence

for unspecified "weapons" as a provision of the ex parte DVPO under G.S. 50B-3(a)(13). Thus, the resulting search of the defendant's home was unconstitutional. In its ruling, the court rejected the State's argument that the good faith exception applied. The court noted that the good faith exception might have applied if the defendant challenged the search only under the US constitution; here, however the defendant also challenged the search under the NC Constitution, and there is a no good faith exception to the exclusionary rule applied as to violations of the state Constitution.

Identification of Defendant

In Court

State v. Macon, __ N.C. App. __, 762 S.E.2d. 378 (Sept. 2, 2014). The trial court did not err by admitting in-court identification of the defendant by two officers. The defendant argued that the trial court erred in denying his motion to suppress the officers' in-court identifications because the procedure they used to identify him violated the Eyewitness Identification Reform Act (EIRA) and his constitutional due process rights. After the officers observed the defendant at the scene, they returned to the police station and put the suspect's name into their computer database. When a picture appeared, both officers identified the defendant as the perpetrator. The officers then pulled up another photograph of the defendant and confirmed that he was the perpetrator. This occurred within 10-15 minutes of the incident in question. The court concluded that the identification based on two photographs was not a "lineup" and therefore was not subject to the EIRA. Next, the court held that even assuming the procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source, their clear, close and unobstructed view of the suspect at the scene.

State v. Hussey, 194 N.C. App. 516 (Dec. 16, 2008). An armed robbery victim's identification of the defendant in the courtroom did not violate due process. When contacted prior to trial for a photo lineup, the victim had refused to view the pictures. The victim saw the defendant for the first time since the robbery at issue when the victim saw him sitting in the courtroom immediately prior to trial. This identification, without law enforcement involvement or suggestion, was not impermissibly suggestive.

Pretrial Line-Up

State v. Stowes, 220 N.C. App. 330 (May 1, 2012). (1) In a store robbery case, the court found no plain error in the trial court's determination that a photo lineup was not impermissibly suggestive. The defendant argued that the photo lineup was impermissibly suggestive because one of the officers administering the procedure was involved in the investigation, and that officer may have made unintentional movements or body language which could have influenced the eyewitness. The court noted that the eyewitness (a store employee) was 75% certain of his identification; the investigating officer's presence was the only irregularity in the procedure; the eyewitness did not describe any suggestive actions on the part of the investigating officer; and there was no testimony from the officers to indicate such. Also, the lineup was conducted within days of the crime. The perpetrator was in the store for 45-50 minutes and spoke with the employee several times. (2) The trial court did not commit plain error by granting the defendant relief under the Eyewitness Identification Reform Act (EIRA) but not excluding evidence of a pretrial

identification. The trial court found that an EIRA violation occurred because one of the officers administering the procedure was involved in the investigation. The court concluded: "We are not persuaded that the trial court committed plain error by granting Defendant all other available remedies under EIRA, rather than excluding the evidence."

State v. Rainey, 198 N.C. App. 427 (Aug. 4, 2009). Pretrial photographic line-ups were not suggestive, on the facts.

Show Ups

State v. Harvell, __ N.C. App. __, 762 S.E.2d 659 (Sept. 5, 2014). In this felony breaking and entering and larceny case, the trial court did not commit plain error by denying the defendant's motion to suppress the victim's show-up identification of the defendant as the person he found in his home on the date in question. Among other things, the court noted that the victim viewed the defendant's face three separate times during the encounter and that during two of those observations was only 20 feet from the defendant. Additionally, the identification occurred within 15-20 minutes of the victim finding the suspect in his home. Although the show-up identification was suggestive, it was not so impermissibly suggestive as to cause irreparable mistaken identification and violate defendant's constitutional right to due process.

State v. Jackson, __ N.C. App. __, 748 S.E.2d 50 (Sept. 17, 2013). An out-of-court show-up identification was not impermissibly suggestive. Police told a victim that they "believed they had found the suspect." The victim was then taken to where the defendant was standing in a front yard with officers. With a light shone on the defendant, the victim identified the defendant as the perpetrator from the patrol car. For reasons discussed in the opinion, the court held that the show-up possessed sufficient aspects of reliability to outweigh its suggestiveness.

State v. Watkins, 218 N.C. App. 94 (Jan. 17, 2012). A pretrial show-up was not impermissibly suggestive. The robbery victim had ample opportunity to view the defendant at the time of the crime and there was no suggestion that the description of the perpetrator given by the victim to the police officer was inaccurate. During the show-up, the victim stood in close proximity to the defendant, and the defendant was illuminated by spotlights and a flashlight. The victim stated that he was "sure" that the defendant was the perpetrator, both at the scene and in court. Also, the time interval between the crime and the show-up was relatively short.

State v. Rawls, 207 N.C. App. 415 (Oct. 19, 2010). (1) The Eyewitness Identification Reform Act, G.S. 15A-284.52, does not apply to show ups. (2) Although a show up procedure was unduly suggestive, there was no substantial likelihood of irreparable misidentification and thus the trial judge did not err by denying a motion to suppress the victim's pretrial identification. The show up was unduly suggestive when an officer told the witness beforehand that "they think they found the guy," and at the show up, the defendant was detained and several officers were present. However, there was no substantial likelihood of irreparable misidentification when, although only having viewed the suspects for a short time, the witness looked "dead at" the suspect and made eye contact with him from a table's length away during daylight hours with nothing obstructing her, the show up occurred fifteen minutes later, and the witness was "positive" about her identification of the three suspects, as "she could not forget their faces."

Other Pretrial Identification

Perry v. New Hampshire, 565 U.S. __, 132 S. Ct. 716 (Jan. 11, 2012). The Due Process Clause does not require a preliminary judicial inquiry into the reliability of an eyewitness identification when the identification was not procured under unnecessarily suggestive circumstances arranged by law enforcement. New Hampshire police received a call reporting that an African-American male was trying to break into cars parked in the lot of the caller's apartment building. When an officer responding to the call asked eyewitness Nubia Blandon to describe the man, Blandon, who was standing in her apartment building just outside the open door to her apartment, pointed to her kitchen window and said the man she saw breaking into the car was standing in the parking lot, next to a police officer. Petitioner Perry, who was that person, was arrested. About a month later, when the police showed Blandon a photographic array that included a picture of Perry and asked her to point out the man who had broken into the car, she was unable to identify Perry. At trial Perry unsuccessfully moved to suppress Blandon's identification on the ground that admitting it would violate due process. The Court began by noting that an identification infected by improper police influence is not automatically excluded. Instead, the Court explained, the trial judge must screen the evidence for reliability pretrial. If there is a very substantial likelihood of irreparable misidentification, the judge must disallow presentation of the evidence at trial. But, it continued, if the indicia of reliability are strong enough to outweigh the corrupting effect of the police-arranged suggestive circumstances, the identification evidence ordinarily will be admitted, and the jury will ultimately determine its worth. In this case, Perry asked the Court to extend pretrial screening for reliability to cases in which the suggestive circumstances were not arranged by law enforcement officers because of the grave risk that mistaken identification will yield a miscarriage of justice. The Court declined to do so, holding: "When no improper law enforcement activity is involved . . . it suffices to test reliability through the rights and opportunities generally designed for that purpose, notably, the presence of counsel at postindictment lineups, vigorous cross-examination, protective rules of evidence, and jury instructions on both the fallibility of eyewitness identification and the requirement that guilt be proved beyond a reasonable doubt." Justice Thomas filed a concurring opinion. Justice Sotomayor dissented.

State v. Macon, __ N.C. App. __, 762 S.E.2d. 378 (Sept. 2, 2014). The trial court did not err by admitting in-court identification of the defendant by two officers. The defendant argued that the trial court erred in denying his motion to suppress the officers' in-court identifications because the procedure they used to identify him violated the Eyewitness Identification Reform Act (EIRA) and his constitutional due process rights. After the officers observed the defendant at the scene, they returned to the police station and put the suspect's name into their computer database. When a picture appeared, both officers identified the defendant as the perpetrator. The officers then pulled up another photograph of the defendant and confirmed that he was the perpetrator. This occurred within 10-15 minutes of the incident in question. The court concluded that the identification based on two photographs was not a "lineup" and therefore was not subject to the EIRA. Next, the court held that even assuming the procedure was impermissibly suggestive, the officers' in-court identification was admissible because it was based on an independent source, their clear, close and unobstructed view of the suspect at the scene.

State v. Wilson, __ N.C. App. __, 737 S.E.2d 186 (Feb. 5, 2013). The court rejected the defendant's argument that a photographic lineup was impermissibly suggestive because the defendant's photo was smaller than others in the array.

State v. Jones, 216 N.C. App. 225 (Oct. 4, 2011). The trial court's admission of photo identification evidence did not violate the defendant's right to due process. The day after a break-in at her house, one of the victims, a high school student, became upset in school. Her mother was called to school and brought along the student's sister, who was also present when the crime occurred. After the student told the Principal about the incident, the Principal took the student, her sister and her mother into his office and showed the sisters photographs from the N.C. Sex Offender Registry website to identify the perpetrator. Both youths identified the perpetrator from one of the pictures. The mother then contacted the police and the defendant was eventually arrested. At trial, both youths identified the defendant as the perpetrator in court. The court rejected the defendant's argument that the Principal acted as an agent of the State when he showed the youths the photos, finding that his actions "were more akin to that of a parent, friend, or other concerned citizen offering to help the victim of a crime." Because the Principal was not a state actor when he presented the photographs, the defendant's due process rights were not implicated in the identification. Even if the Principal was a state actor and the procedure used was unnecessarily suggestive, the procedure did not give rise to a substantial likelihood of irreparable misidentification given the circumstances of the identification. Finally, because the photo identification evidence was properly admitted, the trial court also properly admitted the in-court identifications of defendant.

State v. Boozer, 210 N.C. App. 371 (Mar. 15, 2011). (1) The trial court properly denied the defendant's motion to suppress asserting that an eyewitness's pretrial identification was unduly suggestive. The eyewitness had the opportunity to view the defendant at close range for an extended period of time and was focused on and paying attention to the defendant for at least fifteen minutes. Additionally, the eyewitness described the defendant by name as someone he knew and had interacted with previously, and immediately identified a photograph of him, indicating high levels of accuracy and confidence in the eyewitness's description and identification. Although, the eyewitness stated that he recognized but could not name all of the suspects on the night of the attack, he named the defendant and identified a photograph of him the next day. (2) No violation of G.S. 15A-284.52 (eyewitness identification procedures) occurred. The eyewitness told the detective that he had seen one of the perpetrators in a weekly newspaper called the The Slammer, but did not recall his name. The detective allowed the eyewitness to look through pages of photographs in The Slammer, and from this process the eyewitness identified one of the defendants. The detective did not know who the eyewitness was looking for and thus could not have pressured him to select one of the defendants, nor does any evidence suggest that this occurred.

Inevitable Discovery

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). The trial court did not err by denying the defendant's motion to suppress. The State established inevitable discovery with respect to a search of the defendant's vehicle that had previously been

illegally seized where the evidence showed that an officer obtained the search warrant for the vehicle based on untainted evidence.

State v. Wells, __ N.C. App. __, 737 S.E.2d 179 (Feb. 5, 2013). In a case in which the defendant was convicted of soliciting a child by computer and attempted indecent liberties on a child, the trial court erred by concluding that the defendant's laptop would have been inevitably discovered. The trial court ordered suppressed the defendant's statements to officers during questioning. In those statements the defendant told officers that he owned a laptop that was located on his bed at the fire station. The trial court denied the defendant' motion to suppress evidence retrieved from his laptop, concluding that it would have been inevitably discovered. The court found that the State had not presented any evidence--from the investigating officers or anyone else--supporting this conclusion.

Informants

Disclosure of Confidential Informant's Identity

State v. Avent, 222 N.C. App. 147 (Aug. 7, 2012). The trial court did not err by denying the defendant's motion to compel disclosure of the identity of a confidential informant who provided the defendant's cell phone number to the police. Applying *Roviaro v. United States*, 353 U.S. 53 (1957), the court noted that the defendant failed to show or allege that the informant participated in the crime and that the evidence did not contradict as to material facts that the informant could clarify. Although the State claimed that the defendant was the shooter and the defendant claimed he was not at the scene, the defendant failed to show how the informant's identity would be relevant to this issue. Additionally, evidence independent of the informant's testimony established the defendant's guilt, including an eyewitness to the murder.

State v. Mack, 214 N.C. App. 169 (Aug. 2, 2011). The trial court did not err by denying the defendant's motion to disclose the identity of a confidential informant in a drug case where—for reasons discussed in the court's opinion—the defendant failed to show that the circumstances of his case required disclosure.

State v. Ellison, 213 N.C. App. 300 (July 19, 2011), *aff'd on other grounds,* 366 N.C. 439 (Mar. 8, 2013). The trial court did not err by denying the defendant's motion for disclosure of an informant's identity where the informant's existence was sufficiently corroborated under G.S. 15A-978(b).

State v. Dark, 204 N.C. App. 591 (June 15, 2010). The trial court did not err by denying the defendant's motion to disclose the identity of a confidential informant in a drug case. The informant set up a drug transaction between an officer and the defendant, accompanied the officer during the transaction, but was not involved in it. When deciding whether disclosure of a confidential informant's identity is warranted, the trial court must balance the government's need to protect an informant's identity (to promote disclosure of crimes) with the defendant's right to present his or her case. However, the trial court is not required to engage in balancing until the defendant makes a sufficient showing that the circumstances mandate disclosure. Factors weighing in favor of disclosure are that the informer was a participant in the crime, and that the evidence contradicts on material facts that the informant could clarify. Factors weighing against

disclosure include whether the defendant admits culpability, offers no defense on the merits, and whether evidence independent of the informer's testimony establishes guilt. Here, only the informant's presence and role in arranging the transaction favor disclosure. The defendant failed to forecast how the informant's identity could provide useful information to clarify any contradiction in the evidence. Moreover, the informant's testimony was not admitted at trial; instead, the officers' testimony established guilt. The defendant did not carry his burden of showing that the facts mandate disclosure of the informant's identity.

Interrogation and Confession

Prerequisites for Admissibility of Statement

State v. Randolph, __ N.C. App. __, 735 S.E.2d 845 (Dec. 18, 2012). The rule of *State v. Walker*, 269 N.C. 135 (1967) (State may not introduce evidence of a written confession unless that written statement bears certain indicia of voluntariness and accuracy) does not apply where an officer testified to the defendant's oral statements.

Voluntariness of Statement

State v. Flood, __ N.C. App. __, 765 S.E.2d 65 (Nov. 18, 2014). In a child sexual assault case, the trial court erred by finding that the defendant's statements were made involuntarily. Although the court found that an officer made improper promises to the defendant, it held, based on the totality of the circumstances, that the statement was voluntarily. Regarding the improper promises, Agent Oaks suggested to the defendant during the interview that she would work with and help the defendant if he confessed and that she "would recommend . . . that [the defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Oaks told the defendant that if he "admit[s] to what happened here," Schwab is "going to probably talk to the District Attorney and say, 'hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?' and talk about it." Because it is clear that the purpose of Oaks' statements "was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed," they were improper promises. However, viewing the totality of the circumstances (length of the interview, the defendant's extensive experience with the criminal justice system given his prior service as a law enforcement officer, etc.), the court found his statement to be voluntarily.

State v. Davis, __ N.C. App. __, 763 S.E.2d 585 (Oct. 21, 2014). The trial court did not err by finding that the defendant's statements were given freely and voluntarily. The court rejected the defendant's argument that they were coerced by fear and hope. The court held that an officer's promise that the defendant would "walk out" of the interview regardless of what she said did not render her confession involuntary. Without more, the officer's statement could not have led the defendant to believe that she would be treated more favorably if she confessed to her involvement in her child's disappearance and death. Next, the court rejected—as a factual matter—the defendant's argument that officers lied about information provided to them by a

third party. Finally, the court rejected the defendant's argument that her mental state rendered her confession involuntary and coerced, where the evidence indicated that the defendant understood what was happening, was coherent and did not appear to be impaired.

State v. McCanless, __ N.C. App. __, 758 S.E.2d 474 (June 3, 2014). Rejecting the defendant's argument that that "[t]he detectives' lies, deceptions, and implantation of fear and hope established a coercive atmosphere", the court relied on the trial court's findings of fact and found that the defendant's statement was voluntary.

State v. Martin, __ N.C. App. __, 746 S.E.2d 307 (Aug. 6, 2013). The defendant's confession was involuntary. The defendant's first confession was made before *Miranda* warnings were given. The officer then gave the defendant *Miranda* warnings and had the defendant repeat his confession. The trial court suppressed the defendant's pre-*Miranda* confession but deemed the post-*Miranda* confession admissible. The court disagreed, concluding that the circumstances and tactics used by the officer to induce the first confession must be imputed to the post-*Miranda* confession. The court found the first confession involuntary, noting that the defendant was in custody, the officer made misrepresentations and/or deceptive statements, the officer made promises to induce the confession, and the defendant may have had an impaired mental condition.

State v. Rollins, __ N.C. App. __, 738 S.E.2d 440 (Mar. 19, 2013). The trial court did not err by finding the defendant's statements to his wife voluntary. The defendant's wife spoke with him five times while he was in prison and while wearing a recording device provided by the police. The wife did not threaten defendant but did make up evidence which she claimed law enforcement had recovered and told him defendant that officers suspected that she was involved in the murder. In response, the defendant provided incriminating statements in which he corrected the wife's lies regarding the evidence and admitted details of the murder. The court rejected the defendant's argument that his statements was involuntary because of his wife's deception and her emotional appeals to him based on these deceptions.

In re A.N.C., __ N.C. App. __, 750 S.E.2d 835 (Feb. 5, 2013). The court rejected the juvenile's argument that his statement was involuntary. The juvenile had argued that because G.S. 20-166(c) required him to provide his name and other information to the nearest officer, his admission to driving the vehicle was involuntary. The court rejected this argument, citing *California v. Byers*, 402 U.S. 424 (1971) (a hit and run statute requiring the driver of a motor vehicle involved in an accident to stop at the scene and give his name and address did not violate the Fifth Amendment).

State v. Cureton, __ N.C. App. __, 734 S.E.2d 572 (Nov. 6, 2012). The defendant's confession was voluntary. The court rejected the defendant's argument that he "was cajoled and harassed by the officers into making statements that were not voluntary," that the detectives "put words in his mouth on occasion," and "bamboozled [him] into speaking against his interest."

State v. Graham, __ N.C. App. __, 733 S.E.2d 100 (Oct. 16, 2012). In this child sexual abuse case, the defendant's confession was not involuntary. After briefly speaking to the defendant at his home about the complaint, an officer asked the defendant to come to the police station to

answer questions. The court rejected the defendant's argument that his confession was involuntary because he was given a false hope of leniency if he was to confess and that additional charges would stem from continued investigation of other children. The officers' offers to "help" the defendant "deal with" his "problem" did not constitute a direct promise that the defendant would receive a lesser or no charge should he confess. The court also rejected the defendant's argument that the confession was involuntary because one of the officers relied on his friendship with the defendant and their shared racial background, and that another asked questions about whether the defendant went to church or believed in God. Finally, the court rejected the defendant's argument that his confession was involuntarily obtained through deception.

State v. Cooper, 219 N.C. App. 390 (Mar. 6, 2012). The court rejected the defendant's argument that his confession was involuntary because it was obtained through police threats. Although the defendant argued that the police threatened to imprison his father unless he confessed, the trial court's findings of fact were more than sufficient to support its conclusion that the confession was not coerced. The trial court found, in part, that the defendant never was promised or told that his father would benefit from any statements that he made.

State v. Cornelius, 219 N.C. App. 329 (Mar. 6, 2012). The trial court did not err by denying the defendant's motion to suppress three statements made while he was in the hospital. The defendant had argued that medication he received rendered the statements involuntary. Based on testimony of the detective who did the interview, hospital records, and the recorded statements, the trial court made extensive findings that the defendant was alert and oriented. Those findings supported the trial court's conclusion that the statements were voluntary.

State v. Bordeaux, 207 N.C. App. 645 (Nov. 2, 2010). The trial court properly suppressed the defendant's confession on grounds that it was involuntary. Although the defendant received *Miranda* warnings, interviewing officers, during a custodial interrogation, suggested that the defendant was involved in an ongoing murder investigation, knowing that to be untrue. The officers promised to testify on the defendant's behalf and these promises aroused in the defendant a hope of more lenient punishment. The officers also promised that if the defendant confessed, he might be able to pursue his plans to attend community college.

State v. Hunter, 208 N.C. App. 506 (Dec. 21, 2010). The court rejected the defendant's argument that because he was under the influence of cocaine he did not knowingly, intelligently, and understandingly waive his *Miranda* rights or make a statement to the police. Because the defendant was not under the influence of any impairing substance and answered questions appropriately, the fact that he ingested crack cocaine several hours prior was not sufficient to invalidate the trial court's finding that his statements were freely and voluntarily made. At 11:40 pm, unarmed agents woke the defendant in his cell and brought him to an interrogation room, where the defendant was not restrained. The defendant was responsive to instructions and was fully advised of his *Miranda* rights; he nodded affirmatively to each right and at 11:46 pm, signed a *Miranda* rights form. When asked whether he was under the influence of any alcohol or drugs, the defendant indicated that he was not but that he had used crack cocaine, at around 1:00 or 2:00 pm that day. He responded to questions appropriately. An agent compiled a written summary, which the defendant was given to read and make changes. Both the defendant and the

agent signed the document at around 2:41 am. The agents thanked the defendant for cooperating and the defendant indicated that he was glad to "get all of this off [his] chest." On these facts, the defendant's statements were free and voluntary; no promises were made to him, and he was not coerced in any way. He was knowledgeable of his circumstances and cognizant of the meaning of his words.

Miranda Warnings

Florida v. Powell, 559 U.S. 50 (Feb. 23, 2010). Advice by law enforcement officers that the defendant had "the right to talk to a lawyer before answering any of [the law enforcement officers'] questions" and that he could invoke this right "at any time . . . during th[e] interview," satisfied *Miranda*'s requirement that the defendant be informed of the right to consult with a lawyer and have the lawyer present during the interrogation. Although the warnings were not as clear as they could have been, they were sufficiently comprehensive and comprehensible when given a commonsense reading. The Court cited the standard warnings used by the FBI as "exemplary," but declined to require that precise formulation to meet *Miranda*'s requirements.

State v. Mohamed, 205 N.C. App. 470 (July 20, 2010). The trial court did not commit plain error by failing to exclude the defendant's statements to investigating officers after his arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant's English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant's ability to comply with an officer's instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter.

"Custodial"

Howes v. Fields, 565 U.S. __, 132 S. Ct. 1181 (Feb. 21, 2012). The Sixth Circuit erroneously concluded that a prisoner is in custody within the meaning of Miranda if the prisoner is taken aside and questioned about events that occurred outside the prison. While incarcerated, Randall Fields was escorted by a corrections officer to a conference room where two sheriff's deputies questioned him about allegations that, before he came to prison, he had engaged in sexual conduct with a 12-year-old boy. In order to get to the conference room, Fields had to go down one floor and pass through a locked door that separated two sections of the facility. Fields arrived at the conference room between 7 and 9 pm and was questioned for between five and seven hours. At the beginning of the interview, Fields was told that he was free to leave and return to his cell. Later, he was again told that he could leave whenever he wanted. The interviewing deputies were armed, but Fields remained free of handcuffs and other restraints. The door to the conference room was sometimes open and sometimes shut. About halfway through the interview, after Fields had been confronted with the allegations of abuse, he became

agitated and began to yell. One of the deputies, using an expletive, told Fields to sit down and said that "if [he] didn't want to cooperate, [he] could leave." Fields eventually confessed to engaging in sex acts with the boy. Fields claimed that he said several times during the interview that he no longer wanted to talk to the deputies, but he did not ask to go back to his cell before the interview ended. When he was eventually ready to leave, he had to wait an additional 20 minutes or so because an officer had to be called to escort him back to his cell, and he did not return to his cell until well after when he generally went to bed. At no time was Fields given Miranda warnings or advised that he did not have to speak with the deputies. Fields was charged with criminal sexual conduct. Fields unsuccessfully moved to suppress his confession and the jury convicted him of criminal sexual conduct. After an unsuccessful direct appeal, Fields filed for federal habeas relief. The federal district court granted relief and the Sixth Circuit affirmed, holding that the interview was a custodial interrogation because isolation from the general prison population combined with questioning about conduct occurring outside the prison makes any such interrogation custodial per se. Reversing, the Court stated: "it is abundantly clear that our precedents do not clearly establish the categorical rule on which the Court of Appeals relied, i.e., that the questioning of a prisoner is always custodial when the prisoner is removed from the general prison population and questioned about events that occurred outside the prison." "On the contrary," the Court stated, "we have repeatedly declined to adopt any categorical rule with respect to whether the questioning of a prison inmate is custodial." The Court went on to hold that based on the facts presented, Fields was not in custody for purpose of Miranda.

J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394 (June 16, 2011). In this North Carolina case, the Court held, in a five-to-four decision, that the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis. J.D.B. was a 13-year-old, seventh-grade middle school student when he was removed from his classroom by a uniformed police officer, brought to a conference room, and questioned by police. This was the second time that police questioned J.D.B. in a week. Five days earlier, two home break-ins occurred, and items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police spoke to J.D.B.'s grandmother—his legal guardian—and his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s school and in his possession. Investigator DiCostanzo went to the school to question J.D.B. A uniformed school resource officer removed J.D.B. from his classroom and escorted him to a conference room, where J.D.B. was met by DiCostanzo, the assistant principal, and an administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for 30-45 minutes. Before the questioning began, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave. J.D.B. eventually confessed to the break-ins. Juvenile petitions were filed against J.D.B. and at trial, J.D.B.'s lawyer moved to suppress his statements, arguing that J.D.B. had been subjected to a custodial police interrogation without *Miranda* warnings. The trial court denied the motion and J.D.B. was adjudicated delinquent. The N.C. Court of Appeals affirmed. The N.C. Supreme Court held that J.D.B. was not in custody, declining to extend the test for custody to include consideration of the age of the individual questioned. The U.S. Supreme Court reversed, holding that the *Miranda* custody analysis includes consideration of a juvenile suspect's age and concluding, in part: "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult

would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis." Slip Op. at 8. The Court distinguished a child's age "from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." Slip Op. at 11. It held: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." Slip Op. at 14. However, the Court cautioned: "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *Id.* The Court remanded for the North Carolina courts to determine whether J.D.B. was in custody when the police interrogated him, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age." Slip Op. at 18.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). A capital defendant was not in custody when he admitted that he stabbed the victim. Considering the totality of the circumstances, the defendant is an adult with prior criminal justice system experience; the officer who first approached the defendant told him that he was being detained until detectives arrived but that he was not under arrest; when the detectives arrived and told him that he was not under arrest, the defendant voluntarily agreed to go to the police station; the defendant was never restrained and was left alone in the interview room with the door unlocked and no guard; he was given several bathroom breaks and offered food and drink; the defendant was cooperative; the detectives did not raise their voices, use threats, or make promises; the defendant was never misled, deceived, or confronted with false evidence; once the defendant admitted his involvement in the killing, the interview ended and he was given his *Miranda* rights. Although the first officer told the defendant that he was "detained," he also told the defendant he was not under arrest. Any custody associated with the detention ended when the defendant voluntarily accompanied detectives, who confirmed that he was not under arrest. The defendant's inability to leave the interview room without supervision or escort did not suggest custody; the defendant was in a non-public area of the station and prevention of unsupervised roaming in such a space would not cause a reasonable person to think that a formal arrest had occurred.

State v. Davis, __ N.C. App. __, 763 S.E.2d 585 (Oct. 21, 2014). The court rejected the defendant's argument that she was in custody within the meaning of *Miranda* during an interview at the police station about her missing child. The trial court properly used an objective test to determine whether the interview was custodial. Furthermore competent evidence supported the trial court's findings of fact that the defendant was not threatened or restrained; she voluntarily went to the station; she was allowed to leave at the end of the interviews; the interview room door was closed but unlocked; the defendant was allowed to take multiple bathroom and cigarette breaks and was given food and drink; and defendant was offered the opportunity to leave the fourth interview but refused.

In re A.N.C., __ N.C. App. __, 750 S.E.2d 835 (Feb. 5, 2013). A thirteen-year-old juvenile was not in custody within the meaning of G.S. 7B-2101 or *Miranda* during a roadside questioning by an officer. Responding to a report of a vehicle accident, the officer saw the wrecked vehicle, which had crashed into a utility pole, and three people walking from the scene. When the officer questioned all three, the juvenile admitted that he had been driving the wrecked vehicle. Noting

that under *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011), a reviewing court must take into account a juvenile's age if it was known to the officer or would have been objectively apparent to a reasonable officer, the court nevertheless concluded that the juvenile was not in custody.

State v. Braswell, 222 N.C. App. 176 (Aug. 7, 2012). Citing *Berkemer v. McCarty*, 468 U.S. 420, 442 (1984), the court held that the defendant was not in custody for purposes of *Miranda* during a traffic stop.

State v. Yancey, 221 N.C. App. 397 (June 19, 2012). The juvenile defendant was not in custody for purposes of *Miranda.* After the defendant had been identified as a possible suspect in several breaking or entering cases, two detectives dressed in plain clothes and driving an unmarked vehicle went to the defendant's home and asked to speak with him. Because the defendant had friends visiting his home, the detectives asked the defendant to ride in their car with them. The detectives told the defendant he was free to leave at any time, and they did not touch him. The defendant sat in the front seat of the vehicle while it was driven approximately 2 miles from his home. When the vehicle stopped, one of the detectives showed the defendant reports of the break-ins. The detectives told the defendant that if he was cooperative, they would not arrest him that day. The defendant admitted to committing the break-ins. The juvenile was 17 years and 10 months old at the time. Considering the totality of the circumstances—including the defendant's age—the court concluded that the defendant was not in custody. The court rejected the argument that *J.D.B. v. North Carolina*, ___ U.S. ___, ___, 131 S. Ct. 2394 (June 6, 2011), required a different conclusion.

State v. Hemphill, 219 N.C. App. 50 (Feb. 21, 2012). The defendant's response to the officer's questioning while on the ground and being restrained with handcuffs should have been suppressed because the defendant had not been given *Miranda* warnings. The officer's questioning constituted an interrogation and a reasonable person in the defendant's position, having been forced to the ground by an officer with a taser drawn and in the process of being handcuffed, would have felt his freedom of movement had been restrained to a degree associated with formal arrest. Thus, there was a custodial interrogation. The court went on, however, to find that the defendant was not prejudiced by the trial court's failure to suppress the statements. A concurring judge agreed that the defendant was not entitled to a new trial but believed that the defendant was not in custody and thus not subjected to a custodial interrogation.

State v. Carter, 212 N.C. App. 516 (June 21, 2011). The defendant was not in custody when he made a statement to detectives. The defendant rode with the detectives to the police station voluntarily, without being frisked or handcuffed. He was told at least three times — once in the car, once while entering the police station, and once at the beginning of the interview — that he was not in custody and that he was free to leave at any time. He was not restrained during the interview and was left unattended in the unlocked interview room before the interview began. The defendant was not coerced or threatened. To the contrary, he was repeatedly asked if he wanted anything to eat or drink and was given food and a soda when he asked for it.

State v. Hartley, 212 N.C. App. 1 (May 17, 2011). The defendant was not in custody when he confessed to three homicides. Officers approached the defendant as he was walking on the road,

confirmed his identity and that he was okay, told him that three people had been injured at his residence, and asked him if he knew anything about the situation. After the defendant stated that he did not know about it, an officer conducted a pat down of the defendant. The defendant's clothes were damp and his hands were shaking. An officer told the defendant that the officer would like to talk to him about what happened and asked if the defendant would come to the fire department, which was being used as an investigation command post. The officer did not handcuff the defendant and told him that he was not under arrest. The defendant agreed to go with the officers, riding in the front passenger seat of the police car. The officers entered a code to access the fire department and the defendant followed them to a classroom where he sat at one table while two officers sat across from him at a different table. Officers asked the defendant if he wanted anything to eat or drink or to use the restroom and informed him that he was not under arrest. An officer noticed cuts on the defendant's hands and when asked about them, the defendant stated that he did not know how he got them. Although the officer decided that she would not allow the defendant to leave, she did not tell the defendant that; rather, she said that forensic evidence would likely lead to apprehension of the perpetrator. When she asked the defendant if there was anything else that he wanted to tell her, he confessed to the murders. Due to a concern for public safety, the officer asked where the murder weapon was located and the defendant told her where it was. The officer then left the room to inform others about the confession while another officer remained with the defendant. The defendant then was arrested and given *Miranda* warnings. He was not handcuffed and he remained seated at the same table. He waived his rights and restated his confession. The court concluded that the defendant was not in custody when he gave his initial confession, noting that he was twice told that he was not under arrest; he voluntarily went to the fire department; he was never handcuffed; he rode in the front of the vehicle; officers asked him if he needed food, water, or use of the restroom; the defendant was never misled or deceived; the defendant was not questioned for a long period of time; and the officers kept their distance during the interview and did not use physical intimidation. The court rejected the defendant's argument that the pat-down and the officer's subjective intent to detain him created a custodial situation. The court also rejected the defendant's argument that the interrogation was an impermissible two-stage interrogation under *Missouri v. Seibert*, 542 U.S. 600 (2004), concluding that the case was distinguishable from *Seibert* because the defendant was not in custody when he made his first confession.

State v. Clark, 211 N.C. App. 60 (Apr. 19, 2011). A reasonable person in the defendant's position would not have believed that he or she was under arrest or restrained in such a way as to necessitate *Miranda* warnings. Key factors in the *Miranda* custody determination include: whether a suspect is told he or she is free to leave, is handcuffed, or is in the presence of uniformed officers and the nature of any security around the suspect. There was no evidence that officers ever explicitly told the defendant that he was being detained. The court rejected the defendant's argument that because he was moved to a patrol car and instructed to remain there when he came in contact with the victim's father and that he was told to "come back and stay" when he attempted to talk to his girlfriend, the victim's sister, this was tantamount to a formal arrest. The court concluded that the officers' actions were nothing more than an attempt to control the scene and prevent emotional encounters between a suspect and members of the victim's family. Moreover, even if the defendant was detained at the scene, his statements are untainted given that the detective expressly told him that he was not under arrest, the defendant

repeatedly asked to speak with the detective, and the defendant voluntarily accompanied the detective to the sheriff's department.

State v. Allen, 200 N.C. App. 709 (Nov. 3, 2009). The defendant was not in custody while being treated at a hospital. Case law suggests that the following factors should be considered when determining whether questioning in a hospital constitutes a custodial interrogation: whether the defendant was free to go; whether the defendant was coherent in thought and speech, and not under the influence of drugs or alcohol; and whether officers intended to arrest the defendant. Additionally, courts have distinguished between questioning that is accusatory and that which is investigatory. On the facts presented, the defendant was not in custody. As to separate statements made by the defendant at the police station, the court held that although interrogation must cease once the accused invokes the right to counsel and may not be resumed without an attorney present, an exception exists where, as here, the defendant initiates further communication.

State v. Little, 203 N.C. App. 684 (May 4, 2010). The proper standard for determining whether a person was in custody for purposes of *Miranda* is not whether one would feel free to leave but whether there was indicia of formal arrest. On the facts presented, there was no indicia of arrest.

"Interrogation"

State v. Hogan, __ N.C. App. __, 758 S.E.2d 465 (June 3, 2014). The defendant's statements, made while a police officer who responded to a domestic violence scene questioned the defendant's girlfriend, were spontaneous and in not response to interrogation. The State conceded that the defendant was in custody at the time. The court rejected the defendant's argument that asking his girlfriend what happened in front of him was a coercive technique designed to elicit an incriminating statement. Conceding that the "case is a close one," the court concluded that the officer's question to the girlfriend did not constitute the functional equivalent of questioning because the officer's question did not call for a response from the defendant and therefore was not reasonably likely to elicit an incriminating response from him.

State v. Herrera, 195 N.C. App. 181 (Feb. 3, 2009). The police did not impermissibly interrogate the defendant after he requested a lawyer by offering to allow him to speak with his grandmother by speaker phone. Once the defendant stated that he wished to have a lawyer, all interrogation ceased. However, before leaving for the magistrate's office, an interpreter who had been working with the police, informed an officer that he had promised to let the defendant's grandmother know when the defendant was in custody. The officer allowed the interpreter to use a speaker phone to call the grandmother to so inform the grandmother. When the interpreter asked the defendant if he wanted to speak with his grandmother, the defendant responded affirmatively. While on the phone with his grandmother, the defendant admitted that he did the acts charged. The grandmother urged him to tell the police everything. Thereafter, the defendant indicated that he wanted to make a statement, was given *Miranda* warnings, waived his rights, and made a statement confessing to the crime.

State v. Stover, 200 N.C. App. 506 (Nov. 3, 2009). Officers did not interrogate the defendant within the meaning of *Miranda.* An officer asked the defendant to explain why he was hanging out of a window of a house that officers had approached on an informant's tip that she bought

marijuana there. The defendant responded, “Man, I’ve got some weed.” When the officer asked if that was the only reason for the defendant’s behavior, the defendant made further incriminating statements. Additional statements made by the defendant were unsolicited.

In Re D.L.D, 203 N.C. App. 434 (Apr. 20, 2010). The trial judge properly determined that a juvenile’s statements, made after an officer’s search of his person revealed cash, were admissible. The juvenile’s stated that the cash was not from selling drugs and that it was his mother’s rent money. The statement was unsolicited and spontaneous.

State v. Clodfelter, 203 N.C. App. 60 (Mar. 16, 2010). Defendant’s mother was not acting as an agent of the police when, at the request of officers, she asked her son to tell the truth about his involvement in the crime. This occurred in a room at the police station, with officers present.

State v. Hensley, 201 N.C. App. 607 (Jan. 5, 2010). The defendant was subject to interrogation within the meaning of *Miranda* when he made incriminating statements to a detective. The detective should have known that his conduct was likely to elicit an incriminating response when, after telling the defendant that their conversation would not be on the record, the detective turned discussion to the defendant’s cooperation with the investigation. Also, the detective knew that the defendant was particularly susceptible to an appeal to the defendant’s relationship with the detective, based on prior dealings with the defendant, and that the defendant was still under the effects of an attempted overdose on prescription medication and alcohol. Additionally the defendant testified that he knew that the detective was trying to get him to talk.

In Re L.I., 205 N.C. App. 155 (July 6, 2010). A juvenile’s statement, made while in custody, was the product interrogation and not a voluntary, spontaneous statement. The trial court thus erred by denying the juvenile’s motion to suppress the statement, since the juvenile had not advised her of her rights under *Miranda* and G.S. 7B-2101(a). The juvenile was a passenger in a vehicle stopped by an officer. When the officer ordered the juvenile out of the vehicle, he asked, “[Where is] the marijuana I know you have[?]” After handcuffing and placing juvenile in the back of the patrol car, the officer told her that he was going to "take her downtown" and that "if [she] t[ook] drugs into the jail it[] [would be] an additional charge." The juvenile later told the officer that she had marijuana and that it was in her coat pocket. The court went on to hold that the trial judge did not err by admitting the seized marijuana. Rejecting the juvenile’s argument that the contraband must be excluded as fruit of the poisonous tree, the court concluded that because there was no coercion, the exclusionary rule does not preclude the admission of physical evidence obtained as a result of a *Miranda* violation. Although the juvenile was in custody at the time of her statement and her *Miranda* rights were violated, the court found no coercion, noting that there was no evidence that the juvenile was deceived, held incommunicado, threatened or intimidated, promised anything, or interrogated for an unreasonable period of time; nor was there evidence that the juvenile was under the influence of drugs or alcohol or that her mental condition was such that she was vulnerable to manipulation.

Assertion of Miranda Rights

Berghuis v. Thompkins, 560 U.S. 370 (June 1, 2010). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of

the defendant, officers presented him with a written notification of his constitutional rights, which contained *Miranda* warnings. During the three-hour interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or he wanted a lawyer. Although he was largely silent, he gave a limited number of verbal answers, such as "yeah," "no," and "I don't know," and on occasion he responded by nodding his head. After two hours and forty-five minutes, the defendant was asked whether he believed in God and whether he prayed to God. When he answered in the affirmative, he was asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant answered "yes," and the interrogation ended shortly thereafter. The Court rejected the defendant's argument that his answers to the officers' questions were inadmissible because he had invoked his privilege to remain silent by not saying anything for a sufficient period of time such that the interrogation should have ceased before he made his inculpatory statements. Noting that in order to invoke the *Miranda* right to counsel, a defendant must do so unambiguously, the Court determined that there is no reason to adopt a different standard for determining when an accused has invoked the *Miranda* right to remain silent. It held that in the case before it, the defendant's silence did not constitute an invocation of the right to remain silent. The Court went on to hold that the defendant knowingly and voluntarily waived his right to remain silent when he answered the officers' questions. The Court clarified that a waiver may be implied through the defendant's silence, coupled with an understanding of rights, and a course of conduct indicating waiver. In this case, the Court concluded that there was no basis to find that the defendant did not understand his rights, his answer to the question about praying to God for forgiveness for the shooting was a course of conduct indicating waiver, and there was no evidence that his statement was coerced. Finally, the Court rejected the defendant's argument that the police were not allowed to question him until they first obtained a waiver as inconsistent with the rule that a waiver can be inferred from the actions and words of the person interrogated.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). The court rejected the defendant's argument that by telling officers that he did not want to snitch on anyone and declining to reveal the name of his accomplice, the defendant invoked his right to remain silent requiring that all interrogation cease.

State v. Cooper, 219 N.C. App. 390 (Mar. 6, 2012). The court rejected the defendant's argument that his Fifth Amendment right to remain silent was violated where there was ample evidence to support the trial court's finding that the defendant did not invoke that right. The defendant had argued that his refusal to talk to police about the crimes, other than to deny his involvement, was an invocation of the right to remain silent. The court found that the defendant's "continued assertions of his innocence cannot be considered unambiguous invocations of his right to remain silent."

State v. Bordeaux, 207 N.C. App. 645 (Nov. 2, 2010). Citing *Berghuis v. Thompkins*, 560 U.S. 370 (2010), the court held that the defendant's silence or refusal to answer the officers' questions was not an invocation of the right to remain silent.

Waiver of Rights Generally

State v. Cureton, __ N.C. App. __, 734 S.E.2d 572 (Nov. 6, 2012). (1) After being read his *Miranda* rights, the defendant knowingly and intelligently waived his right to counsel. The court rejected the defendant's argument that the fact that he never signed the waiver of rights form established that that no waiver occurred. The court also rejected the defendant's argument that he was incapable of knowingly and intelligently waiving his rights because his borderline mental capacity prevented him from fully understanding those rights. In this regard, the court relied in part on a later psychological evaluation diagnosing the defendant as malingering and finding him competent to stand trial. (2) After waiving his right to counsel the defendant did not unambiguously ask to speak a lawyer. The court rejected the defendant's argument that he made a clear request for counsel. It concluded: "Defendant never expressed a clear desire to speak with an attorney. Rather, he appears to have been seeking clarification regarding whether he had a right to speak with an attorney before answering any of the detective's questions." The court added: "There is a distinct difference between inquiring whether one has the right to counsel and actually requesting counsel. Once defendant was informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right."

State v. Robinson, 221 N.C. App. 509 (July 17, 2012). The defendant's waiver of *Miranda* rights was knowing, voluntary, and intelligent. Among other things, the defendant was familiar with the criminal justice system, no threats or promises were made to him before he agreed to talk, and the defendant was not deprived of any necessaries. Although there was evidence documenting the defendant's limited mental capacity, the record in no way indicated that the defendant was confused during the interrogation, that he did not understand any of the rights as they were read to him, or that he was unable to comprehend the ramifications of his statements.

State v. Brown, 204 N.C. App. 567 (June 15, 2010). A SBI Agent's testimony at the suppression hearing supported the trial court's finding that the Agent advised the defendant of his *Miranda* rights, read each statement on the *Miranda* form and asked the defendant if he understood them, put check marks on the list by each statement as he went through indicating that the defendant had assented, and then twice confirmed that the defendant understood all of the rights read to him. The totality of the circumstances fully supports the trial court's conclusion that the defendant's waiver of *Miranda* rights was made freely, voluntarily, and understandingly.

State v. Medina, 205 N.C. App. 683 (July 20, 2010). The defendant's waiver of *Miranda* rights was valid where *Miranda* warnings were given by an officer who was not fluent in Spanish. The officer communicated effectively with the defendant in Spanish, notwithstanding the lack of fluency. The defendant gave clear, logical, and appropriate responses to questions. Also, when the officer informed the defendant of his *Miranda* rights, he did not translate English to Spanish but rather read aloud the Spanish version of the waiver of rights form. Even if the defendant did not understand the officer, the defendant read each right, written in Spanish, initialed next to each right, and signed the form indicating that he understood his rights. The court noted that officers are not required to orally apprise a defendant of *Miranda* rights to effectuate a valid waiver.

State v. Mohamed, 205 N.C. App. 470 (July 20, 2010). The trial court did not commit plain error by failing to exclude the defendant's statements to investigating officers after his arrest. The defendant had argued that because of his limited command of English, the *Miranda* warnings

were inadequate and he did not freely and voluntarily waive his *Miranda* rights. The court determined that there was ample evidence to support a conclusion that the defendant's English skills sufficiently enabled him to understand the *Miranda* warnings that were read to him. Among other things, the court referenced the defendant's ability to comply with an officer's instructions and the fact that he wrote his confession in English. The court also concluded that the evidence was sufficient to permit a finding that the defendant's command of English was sufficient to permit him to knowingly and intelligently waive his *Miranda* rights, referencing, among other things, his command of conversational English and the fact that he never asked for an interpreter.

Waiver of Right to Counsel

State v. Council, __ N.C. App. __, 753 S.E.2d 223 (Jan. 21, 2014). No prejudicial error occurred when the trial court denied the defendant's motion to suppress statements made by him while being transported in a camera-equipped police vehicle. After being read his *Miranda* rights, the defendant invoked his right to counsel. He made the statements at issue while later being transported in the vehicle. The court explained that to determine whether a defendant's invoked right to counsel has been waived, courts must consider whether the post-invocation interrogation was police-initiated and whether the defendant knowingly and intelligently waived the right. Although the trial court did not apply the correct legal standard and failed to make the necessary factual findings, any error was harmless beyond a reasonable doubt, given that the defendant's statements contained little relevant evidence, they were not "particularly prejudicial," and the other evidence in the case in strong.

State v. Quick, __ N.C. App. __, 739 S.E.2d 608 (April 16, 2013). The court rejected the State's argument that the defendant initiated contact with the police following his initial request for counsel and thus waived his right to counsel. After the defendant asserted his right to counsel, the police returned him to the interrogation room and again asked if he wanted counsel, to which he said yes. Then, on the way from the interrogation room back to the jail, a detective told the defendant that an attorney would not able to help him and that he would be served with warrants regardless of whether an attorney was there. The police knew or should have known that telling the defendant that an attorney could not help him with the warrants would be reasonably likely to elicit an incriminating response. It was only after this statement by police that the defendant agreed to talk. Therefore, the court concluded, the defendant did not initiate the communication. The court went on to conclude that even if the defendant had initiated communication with police, his waiver was not knowing and intelligent. The trial court had found that the prosecution failed to meet its burden of showing that the defendant made a knowing and intelligent waiver, relying on the facts that the defendant was 18 years old and had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and there was no audio or video recording. The court found that the defendant's age and inexperience, when combined with the circumstances of his interrogation, support the trial court's conclusion that the State failed to prove the defendant's waiver was knowing and intelligent.

Waiver of the Right to Remain Silent

Berghuis v. Thompkins, 560 U.S. 370 (June 1, 2010). The defendant was arrested in connection with a shooting that left one victim dead and another injured. At the start of their interrogation of the defendant, officers presented him with a written notification of his constitutional rights, which contained *Miranda* warnings. During the three-hour interrogation, the defendant never said that he wanted to remain silent, did not want to talk with the police, or he wanted a lawyer. Although he was largely silent, he gave a limited number of verbal answers, such as "yeah," "no," and "I don't know," and on occasion he responded by nodding his head. After two hours and forty-five minutes, the defendant was asked whether he believed in God and whether he prayed to God. When he answered in the affirmative, he was asked, "Do you pray to God to forgive you for shooting that boy down?" The defendant answered "yes," and the interrogation ended shortly thereafter. The Court rejected the defendant's argument that his answers to the officers' questions were inadmissible because he had invoked his privilege to remain silent by not saying anything for a sufficient period of time such that the interrogation should have ceased before he made his inculpatory statements. Noting that in order to invoke the *Miranda* right to counsel, a defendant must do so unambiguously, the Court determined that there is no reason to adopt a different standard for determining when an accused has invoked the *Miranda* right to remain silent. It held that in the case before it, the defendant's silence did not constitute an invocation of the right to remain silent. The Court went on to hold that the defendant knowingly and voluntarily waived his right to remain silent when he answered the officers' questions. The Court clarified that a waiver may be implied through the defendant's silence, coupled with an understanding of rights, and a course of conduct indicating waiver. In this case, the Court concluded that there was no basis to find that the defendant did not understand his rights, his answer to the question about praying to God for forgiveness for the shooting was a course of conduct indicating waiver, and there was no evidence that his statement was coerced. Finally, the Court rejected the defendant's argument that the police were not allowed to question him until they first obtained a waiver as inconsistent with the rule that a waiver can be inferred from the actions and words of the person interrogated.

Re-Interrogation After an Assertion of Rights
Break in custody

Maryland v. Shatzer, 559 U.S. 98 (Feb. 24, 2010). The Court held that a 2½ year break in custody ended the presumption of involuntariness established in *Edwards v. Arizona*, 451 U.S. 477 (1981) (when a defendant invokes the right to have counsel present during a custodial interrogation, a valid waiver of that right cannot be established by showing that the defendant responded to further police-initiated custodial interrogation even if the defendant has been advised of his *Miranda* rights; the defendant is not subject to further interrogation until counsel has been provided or the defendant initiates further communications with the police). The defendant was initially interrogated about a sexual assault while in prison serving time for an unrelated crime. After *Miranda* rights were given, he declined to be interviewed without counsel, the interview ended, and the defendant was released back into the prison's general population. 2½ years later another officer interviewed the defendant in prison about the same sexual assault. After the officer read the defendant his *Miranda* rights, the defendant waived those rights in writing and made incriminating statements. At trial, the defendant unsuccessfully tried to suppress his statements pursuant to *Edwards.* The Court concluded: "The protections offered by *Miranda*, which we have deemed sufficient to ensure that the police respect the suspect's desire

to have an attorney present the first time police interrogate him, adequately ensure that result when a suspect who initially requested counsel is reinterrogated after a break in custody that is of sufficient duration to dissipate its coercive effects." The Court went on to set a 14-day break in custody as the bright line rule for when the *Edwards* protection terminates. It also concluded that the defendant's release back into the general prison population to continue serving a sentence for an unrelated conviction constituted a break in *Miranda* custody.

Defendant's Initiation of Communication

State v. Quick, __ N.C. App. __, 739 S.E.2d 608 (April 16, 2013). The court rejected the State's argument that the defendant initiated contact with the police following his initial request for counsel and thus waived his right to counsel. After the defendant asserted his right to counsel, the police returned him to the interrogation room and again asked if he wanted counsel, to which he said yes. Then, on the way from the interrogation room back to the jail, a detective told the defendant that an attorney would not able to help him and that he would be served with warrants regardless of whether an attorney was there. The police knew or should have known that telling the defendant that an attorney could not help him with the warrants would be reasonably likely to elicit an incriminating response. It was only after this statement by police that the defendant agreed to talk. Therefore, the court concluded, the defendant did not initiate the communication. The court went on to conclude that even if the defendant had initiated communication with police, his waiver was not knowing and intelligent. The trial court had found that the prosecution failed to meet its burden of showing that the defendant made a knowing and intelligent waiver, relying on the facts that the defendant was 18 years old and had limited experience with the criminal justice system, there was a period of time between 12:39 p.m. and 12:54 p.m. where there is no evidence as to what occurred, and there was no audio or video recording. The court found that the defendant's age and inexperience, when combined with the circumstances of his interrogation, support the trial court's conclusion that the State failed to prove the defendant's waiver was knowing and intelligent.

State v. Cooper, 219 N.C. App. 390 (Mar. 6, 2012). The court rejected the defendant's argument that his confession was improperly obtained after he invoked his right to counsel. Although the defendant invoked his right to counsel before making the statements at issue, because he re-initiated the conversation with police, his right to counsel was not violated when detectives took his later statements.

State v. Moses, 205 N.C. App. 629 (July 20, 2010). The trial court did not err by denying the defendant's motion to suppress where, although the defendant initially invoked his *Miranda* right to counsel during a custodial interrogation, he later reinitiated conversation with the officer. The defendant was not under the influence of impairing substances, no promises or threats were made to him, and the defendant was again fully advised of and waived his *Miranda* rights before he made the statement at issue.

Re-Interrogation After Unwarned Interrogation

Bobby v. Dixon, 565 U.S. __, 132 S. Ct. 26 (Nov. 7, 2011). The Court, per curiam, held that the Sixth Circuit erroneously concluded that a state supreme court ruling affirming the defendant's

murder conviction was contrary to or involved an unreasonable application of clearly established federal law. The defendant and an accomplice murdered the victim, obtained an identification card in the victim's name, and sold the victim's car. An officer first spoke with the defendant during a chance encounter when the defendant was voluntarily at the police station for completely unrelated reasons. The officer gave the defendant *Miranda* warnings and asked to talk to him about the victim's disappearance. The defendant declined to answer questions without his lawyer and left. Five days later, after receiving information that the defendant had sold the victim's car and forged his name, the defendant was arrested for forgery and was interrogated. Officers decided not to give the defendant *Miranda* warnings for fear that he would again refuse to speak with them. The defendant admitted to obtaining an identification card in the victim's name but claimed ignorance about the victim's disappearance. An officer told the defendant that "now is the time to say" whether he had any involvement in the murder because "if [the accomplice] starts cutting a deal over there, this is kinda like, a bus leaving. The first one that gets on it is the only one that's gonna get on." When the defendant continued to deny knowledge of the victim's disappearance, the interrogation ended. That afternoon the accomplice led the police to the victim's body, saying that the defendant told him where it was. The defendant was brought back for questioning. Before questioning began, the defendant said that he heard they had found a body and asked whether the accomplice was in custody. When the police said that the accomplice was not in custody, the defendant replied, "I talked to my attorney, and I want to tell you what happened." Officers read him *Miranda* rights and obtained a signed waiver of those rights. At this point, the defendant admitted murdering the victim. The defendant's confession to murder was admitted at trial and the defendant was convicted of, among other things, murder and sentenced to death. After the state supreme court affirmed, defendant filed for federal habeas relief. The district court denied relief but the Sixth Circuit reversed.

The Court found that the Sixth Circuit erred in three respects. First, it erred by concluding that federal law clearly established that police could not speak to the defendant when five days earlier he had refused to speak to them without his lawyer. The defendant was not in custody during the chance encounter and no law says that a person can invoke his *Miranda* rights anticipatorily, in a context other than custodial interrogation. Second, the Sixth Circuit erroneously held that police violated the Fifth Amendment by urging the defendant to "cut a deal" before his accomplice did so. No precedent holds that this common police tactic is unconstitutional. Third, the Sixth Circuit erroneously concluded that the state supreme court unreasonably applied *Oregon v. Elstad*, 470 U.S. 298 (1985), when it held that the defendant's second confession was voluntary. As the state supreme court explained, the defendant's statements were voluntary. During the first interrogation, he received several breaks, was given water and offered food, and was not abused or threatened. He freely acknowledged that he forged the victim's name and had no difficulty denying involvement with the victim's disappearance. Prior to his second interrogation, the defendant made an unsolicited declaration that he had spoken with his attorney and wanted to tell the police what happened. Then, before giving his confession, the defendant received *Miranda* warnings and signed a waiver-of-rights form. The state court recognized that the defendant's first interrogation involved an intentional *Miranda* violation but concluded that the breach of *Miranda* procedures involved no actual compulsion and thus there was no reason to suppress the later, warned confession. The Sixth Circuit erred by concluding that *Missouri v. Seibert*, 542 U.S. 600 (2004), mandated a different result. The nature of the interrogation here was different from that in *Seibert*. Here, the Court

explained, the defendant denied involvement in the murder and then after *Miranda* warnings were given changed course and confessed (in *Seibert* the defendant confessed in both times). Additionally, the Court noted, in contrast to *Seibert*, the two interrogations at issue here did not occur in one continuum.

Sixth Amendment Right to Counsel

Montejo v. Louisiana, 556 U.S. 778 (May 26, 2009). The defendant was arrested for murder, waived his *Miranda* rights, and gave statements in response to officers' interrogation. He was brought before a judge for a preliminary hearing, who ordered that the defendant be held without bond and appointed counsel to represent him. Later that day, two officers visited the defendant in prison and asked him to accompany them to locate the murder weapon. He was again read his *Miranda* rights and agreed to go with the officers. During the trip, he wrote an inculpatory letter of apology to the murder victim's widow. Only on his return did the defendant finally meet his court-appointed attorney. The issue before the Court was whether the letter of apology was erroneously admitted in violation of the defendant's Sixth Amendment right to counsel. In *Michigan v. Jackson*, 475 U.S. 625 (1986), the Court had ruled that when a defendant requests counsel at an arraignment or similar proceeding at which the Sixth Amendment right to counsel attaches, an officer is thereafter prohibited under the Sixth Amendment from initiating interrogation. In this case, the defendant was appointed counsel as a matter of course per state law; no specific request for counsel was made. Instead of deciding whether *Jackson* barred the officers from initiating interrogation of the defendant after counsel was appointed, the Court overruled *Jackson.* Thus, it now appears that the Sixth Amendment is not violated when officers interrogate a defendant after the defendant has requested counsel, provided a waiver of the right to counsel is obtained. The Court hinted that a standard *Miranda* waiver will suffice to waive both the Fifth Amendment right to counsel and Sixth Amendment right to counsel. The Court remanded the case to the state court to determine unresolved factual and legal issues. Note that after *Montejo*, a defendant's 5th Amendment right to counsel under *Miranda* for custodial interrogations remains intact.

Offense Specific Right

State v. Williams, 209 N.C. App. 441 (Feb. 1, 2011). No violation of the defendant's sixth amendment right to counsel occurred when detectives interviewed him on new charges when he was in custody on other unrelated charges. The sixth amendment right to counsel is offense specific and had not attached for the new crimes.

Request for a Lawyer

State v. Cureton, __ N.C. App. __, 734 S.E.2d 572 (Nov. 6, 2012). After waiving his right to counsel the defendant did not unambiguously ask to speak a lawyer. The court rejected the defendant's argument that he made a clear request for counsel. It concluded: "Defendant never expressed a clear desire to speak with an attorney. Rather, he appears to have been seeking clarification regarding whether he had a right to speak with an attorney before answering any of the detective's questions." The court added: "There is a distinct difference between inquiring whether one has the right to counsel and actually requesting counsel. Once defendant was

informed that it was his decision whether to invoke the right to counsel, he opted not to exercise that right."

State v. Dix, 194 N.C. App. 151 (Dec. 2, 2008). The defendant's statement, "I'm probably gonna have to have a lawyer," was not an invocation of his right to counsel. The defendant had already expressed a desire to tell his side of the story and was asked to wait until they got to the station. Notwithstanding this, he gave a brief unsolicited statement to one officer while en route to the station, and this statement was relayed to the questioning officer. The questioning officer reasonably expected the defendant to continue their former conversation and proceed with the statement he apparently wished to make. Thus, when the defendant made the remark, the officer was understandably unsure of the defendant's purpose, and followed up with an attempt to clarify the defendant's intentions, at which point the defendant agreed to talk.

State v. Little, 203 N.C. App. 684 (May 4, 2010). When the defendant asked, "Do I need an attorney?" the officer responded, "are you asking for one?" The defendant failed to respond and continued telling the officer about the shooting. The defendant did not unambiguously request a lawyer.

Admissibility of Statements Made in Violation of 6th Amendment Right to Counsel

Kansas v. Ventris, 556 U.S. 586 (Apr. 29, 2009). The defendant's incriminating statement to a jailhouse informant, obtained in violation of the defendant's Sixth Amendment right to counsel, was admissible on rebuttal to impeach the defendant's trial testimony that conflicted with statement. The statement would not have been admissible during the state's presentation of evidence in its case-in-chief.

Juveniles

J.D.B. v. North Carolina, 564 U.S. __, 131 S. Ct. 2394 (June 16, 2011). In this North Carolina case, the Court held, in a five-to-four decision, that the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis. J.D.B. was a 13-year-old, seventh-grade middle school student when he was removed from his classroom by a uniformed police officer, brought to a conference room, and questioned by police. This was the second time that police questioned J.D.B. in a week. Five days earlier, two home break-ins occurred, and items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police spoke to J.D.B.'s grandmother—his legal guardian—and his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.'s school and in his possession. Investigator DiCostanzo went to the school to question J.D.B. A uniformed school resource officer removed J.D.B. from his classroom and escorted him to a conference room, where J.D.B. was met by DiCostanzo, the assistant principal, and an administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for 30-45 minutes. Before the questioning began, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave. J.D.B. eventually confessed to the break-ins. Juvenile

petitions were filed against J.D.B. and at trial, J.D.B.'s lawyer moved to suppress his statements, arguing that J.D.B. had been subjected to a custodial police interrogation without *Miranda* warnings. The trial court denied the motion and J.D.B. was adjudicated delinquent. The N.C. Court of Appeals affirmed. The N.C. Supreme Court held that J.D.B. was not in custody, declining to extend the test for custody to include consideration of the age of the individual questioned. The U.S. Supreme Court reversed, holding that the *Miranda* custody analysis includes consideration of a juvenile suspect's age and concluding, in part: "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis." Slip Op. at 8. The Court distinguished a child's age "from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." Slip Op. at 11. It held: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." Slip Op. at 14. However, the Court cautioned: "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *Id.* The Court remanded for the North Carolina courts to determine whether J.D.B. was in custody when the police interrogated him, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age." Slip Op. at 18.

State v. Saldierna, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). Deciding an issue of first impression, the court held that an ambiguous statement by a juvenile implicating his statutory right to have a parent present during a custodial interrogation requires that the law enforcement officer conducting the interview clarify the meaning of the juvenile's statement before continuing questioning. The 16-year-old defendant was arrested in connection with several home break-ins. During a custodial interrogation, the defendant waived his rights on the Juvenile Waiver of Rights form and indicated that he wished to proceed without a parent. However, at the beginning of the interrogation, the defendant asked to call his mother. The defendant tried to call his mother but was unable to reach her. The interrogation then continued and the defendant gave incriminating statements, which he unsuccessfully moved to suppress. (1) The court found that rather than being an unambiguous request to have his mother present during questioning, the defendant's question, "Can I call my mom?" was an ambiguous request. (2) The court continued, holding that, in the face of this ambiguous statement, the interrogating officer was required to clarify the defendant's desire to proceed without his mother before continuing with questioning. The officer's failure to do so violated G.S. 7B-2101.

In re D.A.C., __ N.C. App. __, 741 S.E.2d 378 (Feb. 19, 2013). The trial court did not err by denying a fourteen-year-old juvenile's motion to suppress his oral admissions to investigating officers. The motion asserted that the juvenile was in custody and had not been advised of his rights under *Miranda* and G.S. 7B-2101. The court found that the juvenile was not in custody. Responding to a report of shots fired, officers approached the juvenile's home. After speaking with the juvenile's parents, the juvenile talked with the officers and admitted firing the shots. Among other things, the court noted that the juvenile was asked—not instructed—to step outside the house, the officers remained at arm's length, one of the officers was in plain clothes, and the conversation took place in an open area of the juvenile's yard while his parents were nearby, it

occurred in broad daylight, and it lasted about five minutes. The court rejected the notion that fact that the juvenile's parents told him to be honest with the officers compelled a different conclusion.

In re A.N.C., __ N.C. App. __, 750 S.E.2d 835 (Feb. 5, 2013). A thirteen-year-old juvenile was not in custody within the meaning of G.S. 7B-2101 or *Miranda* during a roadside questioning by an officer. Responding to a report of a vehicle accident, the officer saw the wrecked vehicle, which had crashed into a utility pole, and three people walking from the scene. When the officer questioned all three, the juvenile admitted that he had been driving the wrecked vehicle. Noting that under *J.D.B. v. North Carolina*, 131 S. Ct. 2394, 2406 (2011), a reviewing court must take into account a juvenile's age if it was known to the officer or would have been objectively apparent to a reasonable officer, the court nevertheless concluded that the juvenile was not in custody.

State v. Williams, 209 N.C. App. 441 (Feb. 1, 2011). The trial court did not err by denying the defendant's motion to suppress statements made during a police interrogation where no violation of G.S. 7B-2101 occurred. The defendant, a 17-year-old juvenile, was already in custody on unrelated charges at the time he was brought to an interview room for questioning. When the defendant invoked his right to have his mother present during questioning, the detectives ceased all questioning. After the detectives had trouble determining how to contact the defendant's mother, they returned to the room and asked the defendant how to reach her. The defendant then asked them when he would be able to talk to them about the new charges (robbery and murder) and explained that the detectives had "misunderstood" him when he requested the presence of his mother for questioning. He explained that he only wanted his mother present for questioning related to the charges for which he was already in custody, not the new crimes of robbery and murder. Although the defendant initially invoked his right to have his mother present during his custodial interrogation, he thereafter initiated further communication with the detectives; that communication was not the result of any further interrogation by the detectives. The defendant voluntarily and knowingly waived his rights.

In Re K.D.L., 207 N.C. App. 453 (Oct. 19, 2010). The trial court erred by denying a juvenile's motion to suppress when the juvenile's confession was made in the course of custodial interrogation but without the warnings required by *Miranda* and G.S. 7B-2101(a), and without being apprised of and afforded his right to have a parent present. Following *In re J.D.B.*, 363 N.C. 664 (2009), a case that was later reversed, the court concluded that when determining whether in-school questioning amounted to a custodial interrogation, the juvenile's age was not relevant. The court found that that the juvenile was in custody, noting that he knew that he was suspected of a crime, he was questioned by a school official for about six hours, mostly in the presence of an armed police officer, and he was frisked by the officer and transported in the officer's vehicle to the principal's office where he remained alone with the officer until the principal arrived. Although the officer was not with the juvenile at all times, the juvenile was never told that he was free to leave. Furthermore, the court held that although the principal, not the officer, asked the questions, an interrogation occurred, noting that the officer's conduct significantly increased the likelihood that the juvenile would produce an incriminating response to the principal's questioning. The court concluded that the officer's near-constant supervision of the juvenile's interrogation and "active listening" could cause a reasonable person to believe that

the principal's interrogation was done in concert with the officer or that the person would endure harsher criminal punishment for failing to answer.

In Re M.L.T.H., 200 N.C. App. 476 (Nov. 3, 2009). The trial court erred by denying the juvenile's motion to suppress his incriminating statement where the juvenile's waiver was not made "knowingly, willingly, and understandingly." The juvenile was not properly advised of his right to have a parent, guardian, or custodian present during questioning. After being told that he had a "right to have a parent, guardian, custodian, or any other person present," the juvenile elected to have his brother present. The brother was not a parent, guardian or custodian.

Recording of Interview

State v. Williams, 209 N.C. App. 441 (Feb. 1, 2011). The trial court did not err by denying the defendant's motion to suppress asserting that his interrogation was not electronically recorded in compliance with G.S. 15A-211. The statute applies to interrogations occurring on or after March 1, 2008; the interrogation at issue occurred more than one year before that date.

Jurisdiction of Officers

State v. Bernard, __ N.C. App. __, 762 S.E.2d. 514 (Sept. 2, 2014). NC A&T campus police had territorial jurisdiction to execute a search warrant at the defendant's off-campus private residence where A&T had entered into a Mutual Aid agreement with local police. The Agreement gave campus police authority to act off-campus with respect to offenses committed on campus. Here, the statutes governing unauthorized access to a computer—the crime in question—provide that any offense "committed by the use of electronic communication may be deemed to have been committed where the electronic communication was originally sent or where it was originally received." Here, the defendant "sent" an "electronic communication" when she accessed the email account of an A&T employee and sent a false email. The court continued, concluding that the offenses were "committed on Campus" because she sent the email through the A&T campus computer servers.

State v. Scruggs, 209 N.C. App. 725 (Mar. 1, 2011). Even if a stop and arrest of the defendant by campus police officers while off campus violated G.S. 15A-402(f), the violation was not substantial. The stop and arrest were constitutional and the officers were acting within the scope of their mutual aid agreement with the relevant municipality.

Parker v. Hyatt, 196 N.C. App. 489 (Apr. 21, 2009). A wildlife enforcement officer had authority under G.S. 113-136(d) to stop the plaintiff's vehicle for impaired driving and to arrest her for that offense. Driving while impaired satisfies the statutory language, "a threat to public peace and order which would tend to subvert the authority of the State if ignored."

Police Power

State v. Yencer, 365 N.C. 292 (Nov. 10, 2011). The supreme court held that the Campus Police Act, as applied to the defendant, does not violate the Establishment Clause of the First Amendment to the U.S. Constitution. The facts underlying the case involved a Davidson College

Police Department officer's arrest of the defendant for impaired and reckless driving. The court of appeals held, in *State v. Yencer*, 206 N.C. App. 552 (Aug. 17, 2010), that because Davidson College is a religious institution, delegation of state police power to Davidson's campus police force was unconstitutional under the Establishment Clause. Applying the three-pronged test of *Lemon v. Kurtzman*, 403 U.S. 602 (1971), the supreme court reversed, holding that as applied to the defendant's case, the Campus Police Act does not offend the Establishment Clause.

King v. Town of Chapel Hill, __ N.C. App. __, 743 S.E.2d 666 (June 4, 2013), *aff'd in part rev'd in part*, 367 N.C. 400 (June 12, 2014) (1) Reversing the trial court, the court held that the Town of Chapel Hill's Towing Ordinance is a valid exercise of police power under G.S. 160A-174(a). (2) The trial court improperly enjoined enforcement of the Town's Mobile Phone Ordinance. The ordinance prohibits the use of mobile phones while driving. The court found that the trial court erred in determining that the Plaintiff was subject to a manifest threat of irreparable harm through enforcement of the Mobile Phone Ordinance. The court noted that "[i]f Plaintiff wishes to challenge the validity of the Mobile Phone Ordinance, he must do so in the context of his own case."

Plain Feel

State v. Reid, __ N.C. App. __, 735 S.E.2d 389 (Dec. 4, 2012). Seizure of cocaine was justified under the "plain feel" doctrine. While searching the defendant the officer "felt a large bulge" in his pocket and immediately knew based on its packing that it was narcotics.

State v. Richmond, 215 N.C. App. 475 (Sept. 6, 2011). The evidence supported the trial court's finding that based on an officer's training and experience, he immediately formed the opinion that a bulge in the defendant's pants contained a controlled substance when conducting a pat down. The officer was present at the location to execute a search warrant in connection with drug offenses.

State v. Williams, 195 N.C. App. 554 (Mar. 3, 2009). Remanding for a determination of whether the officer had probable cause to seize a crack cocaine cookie during a frisk, where the trial court improperly applied a standard of reasonable suspicion to the plain feel doctrine.

Plain View

State v. Grice, ___ N.C. ___, 767 S.E.2d 312 (Jan. 23, 2015). (1) Reversing the court of appeals, the court held that officers did not violate the Fourth Amendment by seizing marijuana plants seen in plain view. After receiving a tip that the defendant was growing marijuana at a specified residence, officers went to the residence to conduct a knock and talk. Finding the front door inaccessible, covered with plastic, and obscured by furniture, the officers noticed that the driveway led to a side door, which appeared to be the main entrance. One of the officers knocked on the side door. No one answered. From the door, the officer noticed plants growing in several buckets about 15 yards away. Both officers recognized the plants as marijuana. The officers seized the plants, returned to the sheriff's office and got a search warrant to search the home. The defendant was charged with manufacturing a controlled substance and moved to suppress evidence of the marijuana plants. The trial court denied the motion and the court of appeals reversed. The supreme court began by finding that the officers observed the plants in plain view.

It went on to explain that a warrantless seizure may be justified as reasonable under the plain view doctrine if the officer did not violate the Fourth Amendment in arriving at the place from where the evidence could be plainly viewed; the evidence's incriminating character was immediately apparent; and the officer had a lawful right of access to the object itself. Additionally, it noted, "[t]he North Carolina General Assembly has . . . required that the discovery of evidence in plain view be inadvertent." The court noted that the sole point of contention in this case was whether the officers had a lawful right of access from the driveway 15 yards across the defendant's property to the plants' location. Finding against the defendant on this issue, the court stated: "Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage." The court rejected the defendant's argument that the seizure was improper because the plants were on the curtilage of his property, stating:

> [W]e conclude that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects "the privacies of life" inside the home. However, even if the property at issue can be considered the curtilage of the home for Fourth Amendment purposes, we disagree with defendant's claim that a justified presence in one portion of the curtilage (the driveway and front porch) does not extend to justify recovery of contraband in plain view located in another portion of the curtilage (the side yard). By analogy, it is difficult to imagine what formulation of the Fourth Amendment would prohibit the officers from seizing the contraband if the plants had been growing on the porch—the paradigmatic curtilage—rather than at a distance, particularly when the officers' initial presence on the curtilage was justified. The plants in question were situated on the periphery of the curtilage, and the protections cannot be greater than if the plants were growing on the porch itself. The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home. Traveling within the curtilage to seize contraband in plain view within the curtilage did not violate the Fourth Amendment.

(citation omitted). (2) The court went on to hold that the seizure also was justified by exigent circumstances, concluding: "Reviewing the record, it is objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property."

State v. Alexander, __ N.C. App. __, 755 S.E.2d 82 (Mar. 18, 2014). The court remanded for findings of fact as to the third element of the plain view analysis. Investigating the defendant's involvement in the theft of copper coils, an officer walked onto the defendant's mobile home porch and knocked on the door. From the porch, the officer saw the coils in an open trailer parked at the home. The officer then seized the coils. The court noted that under the plain view doctrine, a warrantless seizure is lawful if the officer views the evidence from a place where he or she has legal right to be; it is immediately apparent that the items observed constitute evidence of a crime, are contraband, or are subject to seizure based upon probable cause; and the officer has a lawful right of access to the evidence itself. The court found that the officer viewed the coils from the porch, a location where he had a legal right to be. In the course of its ruling, the

court clarified that inadvertence is not a necessary condition of a lawful search pursuant to the plain view doctrine. Next, noting in part that the coils matched the description of goods the officer knew to be stolen, the court concluded that the trial court's factual findings supported its conclusion that it was immediately apparent to the officer that the coils were evidence of a crime. On the third element of the test however—whether the officer had a lawful right of access to the evidence—the trial court did not make the necessary findings. Specifically, the court noted:

> Here, the trial court failed to make any findings regarding whether the officer[] had legal right of access to the coils in the trailer. The trial court did not address whether the trailer was located on private property leased by defendant, private property owned by the mobile home park, or public property. It also did not make any findings regarding whether, assuming that the trailer was located on private property, the officer[] had legal right of access either by consent or due to exigent circumstances.

State v. Lupek, 214 N.C. App. 146 (Aug. 2, 2011). In a drug case, the trial court did not err by denying the defendant's motion to suppress when an officer saw the item in question—a bong—in plain view while standing on the defendant's front porch and looking through the open front door. The court rejected the defendant's argument that the officer had no right to be on the porch. The officer responded to a call regarding a dog shooting, the defendant confirmed that his dog was shot by a neighbor, and the officer went to the defendant's residence to investigate. Once there he encountered a witness from whom he sought to obtain identification as he followed her to the porch.

State v. Carter, 200 N.C. App. 47 (Sept. 15, 2009). Holding that the plain view exception to the warrantless arrest rule did not apply. When the officer approached the defendant's vehicle from the passenger side to ask about an old and worn temporary tag, he inadvertently noticed several whole papers in plain view on the passenger seat. The officer then returned to his cruiser to call for backup. When the officer came back to the defendant's vehicle to arrest the defendant, the previously intact papers had been torn to pieces. Under the plain view doctrine, police may seize contraband or evidence if (1) the officer was in a place where the officer had a right to be when the evidence was discovered; (2) the evidence was discovered inadvertently; and (3) it was immediately apparent to the police that the items observed were evidence of a crime or contraband. The court found that the first two prongs of the test were satisfied but that the third prong was not. It concluded that the officer's suspicion that the defendant was trying to conceal information on the papers was not sufficient to bypass the warrant requirement.

Plain Smell

State v. Corpening, 200 N.C. App. 311 (Oct. 6, 2009). The plain smell of marijuana emanating from the defendant's vehicle provided sufficient probable cause to support a search.

State v. Stover, 200 N.C. App. 506 (Nov. 3, 2009). Officers had probable cause to enter a home and do a protective sweep when an informant told them that she bought marijuana at the house and, as they approached the house for a knock and talk, they detected a strong odor of marijuana.

Protective Sweep

State v. Dial, __ N.C. App. __, 744 S.E.2d 144 (June 18, 2013). The trial court did not err by denying the defendant's motion to suppress evidence discovered as a result of a protective sweep of his residence where the officers had a reasonable belief based on specific and articulable facts that the residence harbored an individual who posed a danger to the officers' safety. Officers were at the defendant's residence to serve an order for arrest. Although the defendant previously had answered his door promptly, this time he did not respond after an officer knocked and announced his presence for 10-15 minutes. The officer heard shuffling on the other side of the front door. When two other officers arrived, the first officer briefed them on the situation, showed them the order for arrest, and explained his belief that weapons were inside. When the deputies again approached the residence, "the front door flew open," the defendant exited and walked down the front steps with his hands raised, failing to comply with the officers' instructions. As soon as the first officer reached the defendant, the other officers entered the home and performed a protective sweep, lasting about 30 seconds. Evidence supporting the protective sweep included that the officers viewed the open door to the residence as a "fatal funnel" that could provide someone inside with a clear shot at the officers, the defendant's unusually long response time and resistance, the known potential threat of weapons inside the residence, shuffling noises that could have indicated more than one person inside the residence, the defendant's alarming exit from the residence, and the defendant's own actions that led him to be arrested in the open doorway.

Random Drug Testing

Jones v. Graham County Board of Education, 197 N.C. App. 279 (June 2, 2009). County Board of Education policy mandating random, suspicionless drug and alcohol testing of all Board employees violated the N.C. Constitutional protection against unreasonable searches and seizures. The policy could not be justified as a "special needs search." The court determined that the policy was "remarkably intrusive," that Board employees did not have a reduced expectation of privacy by virtue of their employment in a public school system, and that there was no evidence of a concrete problem that the policy was designed to prevent. It concluded: "[c]onsidering and balancing all the circumstances . . . the employees' acknowledged privacy interests outweigh the Board's interest . . . ."

Search Warrants

Probable Cause - Generally

Florida v. Harris, 568 U.S. __, 133 S. Ct. 1050 (Feb. 19, 2013). Concluding that a dog sniff "was up to snuff," the Court reversed the Florida Supreme Court and held that the dog sniff in this case provided probable cause to search a vehicle. The Court rejected the holding of the Florida Supreme Court which would have required the prosecution to present, in every case, an exhaustive set of records, including a log of the dog's performance in the field, to establish the dog's reliability. The Court found this "demand inconsistent with the 'flexible, common-sense standard' of probable cause. It instructed:

> In short, a probable-cause hearing focusing on a dog's alert should proceed much like any other. The court should allow the parties to make their best case, consistent with the usual rules of criminal procedure. And the court should then evaluate the proffered evidence to decide what all the circumstances demonstrate. If the State has produced proof from controlled settings that a dog performs

> reliably in detecting drugs, and the defendant has not contested that showing, then the court should find probable cause. If, in contrast, the defendant has challenged the State's case (by disputing the reliability of the dog overall or of a particular alert), then the court should weigh the competing evidence. In all events, the court should not prescribe, as the Florida Supreme Court did, an inflexible set of evidentiary requirements. The question—similar to every inquiry into probable cause—is whether all the facts surrounding a dog's alert, viewed through the lens of common sense, would make a reasonably prudent person think that a search would reveal contraband or evidence of a crime. A sniff is up to snuff when it meets that test.

Applying that test to the drug dog's sniff in the case at hand, the Court found it satisfied.

State v. Bernard, __ N.C. App. __, 762 S.E.2d. 514 (Sept. 2, 2014). In a case involving unlawful access to computers and identity theft, a search warrant authorizing a search of the defendant and her home and vehicle was supported by probable cause. The court rejected the defendant's argument that hearsay evidence was improperly considered in the probable cause determination. It went on to conclude that the warrant was supported by probable cause where the defendant's home was connected to an IP address used to unlawfully access an email account of a NC A&T employee.

State v. Torres-Gonzalez, __ N.C. App. __, 741 S.E.2d 502 (May 7, 2013). In a drug trafficking case, a search warrant was supported by probable cause. The affiant was an officer with more than 22 years of experience and who had been involved in numerous drug investigations. The affidavit included background on the circumstances of the detective's dealings with the defendant's accomplice; detailed that the person who acquired the cocaine went to the house identified in the search warrant; stated that that the same person then delivered the cocaine to the detective; included the fact that a phone registered to the defendant repeatedly called the accomplice after the accomplice was arrested; and stated that the defendant resided at the house that was the subject of the search warrant.

State v. McCain, 212 N.C. App. 228 (May 17, 2011). The court held in this drug case, the search warrant was supported by probable cause. In his affidavit, the Investigator stated that he had received information within the past 30 days from confidential reliable informants ("CRIs") that the defendant was selling narcotics from his residence; during June and July of 2008, the sheriff's department had received information from anonymous callers and CRIs that drugs were being sold at the defendant's residence; in July 2008, the Investigator met with a "concerned citizen" who stated that the defendant was supplying drugs to his sister who was addicted to "crack" cocaine; the defendant's residence had been "synonymous with the constant sale and delivery of illegally controlled substances" as the defendant had been the subject of past charges and arrests for possession with intent to sell and deliver illegal controlled substances; and the defendant's criminal background check revealed a "prior history" of possession of narcotics. Given the specific information from multiple sources that there was ongoing drug activity at the defendant's residence combined with the defendant's past criminal involvement with illegal drugs, sufficient probable cause was presented the affidavit. The court further concluded that the information from the informants properly was considered, noting that the CRIs had been "certified" because information provided by them had resulted in arrests and convictions in the

past, they were familiar with the appearance, packaging, and effects of cocaine, they provided statements against penal interest, the Investigator had met personally with the concerned citizen, and the CRIs, callers, and the concerned citizen had all given consistent information that during the months of June and July 2008, illegal drugs were being sold at the defendant's residence.

State v. Washburn, 201 N.C. App. 93 (Nov. 17, 2009). A positive alert for drugs by a specially trained drug dog provides probable cause to search the area or item where the dog alerts.

State v. Haymond, 203 N.C. App. 151 (Apr. 6, 2010). An affidavit was sufficient to establish probable cause to believe that stolen items would be found in the defendant's home, notwithstanding alleged omissions by the officer.

State v. Hinson, 203 N.C. App. 172 (Apr. 6, 2010), *reversed on other grounds* 364 N.C. 414 (Oct. 8, 2010). An informant's observations of methamphetamine production and materials at the location in question and an officer's opinion that, based on his experience, an ongoing drug production operation was present supplied probable cause supporting issuance of the warrant.

Based on False/Misleading Information

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In this child sex case, the court rejected the defendant's argument that the affidavit was based on false and misleading information, concluding that to the extent the officer-affiant made mistakes in the affidavit, they did not result from false and misleading information and that the affidavit's remaining content was sufficient to establish probable cause.

Drug Activity

State v. McKinney, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this drug case, the court held that the trial court properly denied the defendant's motion to suppress, finding that probable cause existed to justify issuance of a search warrant authorizing a search of defendant's apartment. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large amount of cash, arrested; and a search of Fouchee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court rejected the defendant's argument that the citizen's complaint was unreliable because it gave no indication when the citizen observed the events, that the complaint was only a "naked assertion" that the observed activities were narcotics related, and that the State failed to establish a nexus between Foushee's vehicle and defendant's apartment, finding none of these arguments persuasive, individually or collectively. The court held that "under the totality of circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants recovered from Foushee's vehicle and defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search defendant's apartment."

State v. Lowe, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). A search warrant to search a home was supported by probable cause. The affidavit supporting the warrant indicated that one Terrence Turner was selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. The court held that the warrant was supported by probable cause. The affidavit stated that after receiving information that Turner was involved in drug activity at the home the officer examined trash and found correspondence addressed to Turner at the home and a small amount of marijuana residue in a fast food bag. Also, Turner had prior drug arrests.

DVPO ≠ Search Warrant

State v. Elder, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). Modifying and affirming the decision below, *State v. Elder*, __ N.C. App. __, 753 S.E.2d 504 (2014), the supreme court held that the district court exceeded its statutory authority under G.S. 50B-3 by ordering a search of defendant's person, vehicle, and residence pursuant to an ex parte civil Domestic Violence Order of Protection ("DVPO") and that the ensuing search violated the defendant's constitutional rights. Relying on G.S. 50B-3(a)(13) (authorizing the court to order "any additional prohibitions or requirements the court deems necessary to protect any party or any minor child") the district court included in the DVPO a provision stating: "[a]ny Law Enforcement officer serving this Order shall search the Defendant's person, vehicle and residence and seize any and all weapons found." The district court made no findings or conclusions that probable cause existed to search the defendant's property or that the defendant even owned or possessed a weapon. Following this mandate, the officer who served the order conducted a search as instructed. As a result of evidence found, the defendant was charged with drug crimes. The defendant unsuccessfully moved to suppress, was convicted and appealed. The supreme court concluded that the catch all provision in G.S. 50B-3 "does not authorize the court to order law enforcement, which is not a party to the civil DVPO, to proactively search defendant's person, vehicle, or residence." The court further concluded "by requiring officers to conduct a search of defendant's home under sole authority of a civil DVPO without a warrant or probable cause, the district court's order violated defendant's constitutional rights" under the Fourth Amendment.

"Freezing" The Scene

State v. Allah, __ N.C. App. __, 762 S.E.2d. 524 (Sept. 2, 2014). A search of the defendant's recording studio was proper. After the officers developed probable cause to search the recording studio but the defendant declined to give consent to search, the officers "froze" the scene and properly obtained a search warrant to search the studio.

Informants' Tips

State v. McKinney, ___ N.C. ___, ___ S.E.2d ___ (Aug. 21. 2015). Reversing the court of appeals in this drug case, the court held that the trial court properly denied the defendant's motion to suppress, finding that probable cause existed to justify issuance of a search warrant authorizing a search of defendant's apartment. The application was based on the following evidence: an anonymous citizen reported observing suspected drug-related activity at and around the apartment; the officer then saw an individual named Foushee come to the apartment and leave after six minutes; Foushee was searched and, after he was found with marijuana and a large

amount of cash, arrested; and a search of Fouchee's phone revealed text messages between Foushee and an individual named Chad proposing a drug transaction. The court rejected the defendant's argument that the citizen's complaint was unreliable because it gave no indication when the citizen observed the events, that the complaint was only a "naked assertion" that the observed activities were narcotics related, and that the State failed to establish a nexus between Foushee's vehicle and defendant's apartment, finding none of these arguments persuasive, individually or collectively. The court held that "under the totality of circumstances, all the evidence described in the affidavit both established a substantial nexus between the marijuana remnants recovered from Foushee's vehicle and defendant's residence, and also was sufficient to support the magistrate's finding of probable cause to search defendant's apartment."

State v. Benters, 367 N.C. 660 (Dec. 19, 2014). The court held that an affidavit supporting a search warrant failed to provide a substantial basis for the magistrate to conclude that probable cause existed. In the affidavit, the affiant officer stated that another officer conveyed to him a tip from a confidential informant that the suspect was growing marijuana at a specified premises. The affiant then recounted certain corroboration done by officers. The court first held that the tipster would be treated as anonymous, not one who is confidential and reliable. It explained: "It is clear from the affidavit that the information provided does not contain a statement against the source's penal interest. Nor does the affidavit indicate that the source previously provided reliable information so as to have an established 'track record.' Thus, the source cannot be treated as a confidential and reliable informant on these two bases." The court rejected the State's argument that because an officer met "face-to-face" with the source, the source should be considered more reliable, reasoning: "affidavit does not suggest [the affiant] was acquainted with or knew anything about [the] source or could rely on anything other than [the other officer's] statement that the source was confidential and reliable." Treating the source as an anonymous tipster, the court found that the tip was supported by insufficient corroboration. The State argued that the following corroboration supported the tip: the affiant's knowledge of the defendant and his property resulting "from a criminal case involving a stolen flatbed trailer"; subpoenaed utility records indicating that the defendant was the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation; and officers' observations of items at the premises indicative of an indoor marijuana growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Considering the novel issue of utility records offered in support of probable cause, the court noted that "[t]he weight given to power records increases when meaningful comparisons are made between a suspect's current electricity consumption and prior consumption, or between a suspect's consumption and that of nearby, similar properties." It continued: "By contrast, little to no value should be accorded to wholly conclusory, non-comparative allegations regarding energy usage records." Here, the affidavit summarily concluded that kilowatt usage was indicative of a marijuana grow operation and "the absence of any comparative analysis severely limits the potentially significant value of defendant's utility records." Thus, the court concluded: "these unsupported allegations do little to establish probable cause independently or by corroborating the anonymous tip." The court was similarly unimpressed by the officers' observation of plant growing items, noting:

> The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit

> impermissibly requires the magistrate to make what otherwise might be reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

As to the affidavit's extensive recounting of the officers' experience, the court held:

> We are not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations.

State v. Oates, __ N.C. App. __, 736 S.E.2d 228 (Dec. 31, 2012). Reversing the trial court, the court held that probable cause supported issuance of a search warrant to search the defendant's residence. Although the affidavit was based on anonymous callers, law enforcement corroborated specific information provided by a caller so that the tip had a sufficient indicia of reliability. Additionally, the affidavit provided a sufficient nexus between the items sought and the residence to be searched. Finally, the court held that the information was not stale.

State v. Washburn, 201 N.C. App. 93 (Nov. 17, 2009). The fact that an officer who received the tip at issue had been receiving accurate information from the informant for nearly thirteen years sufficiently established the informant's reliability. The affidavit sufficiently described the source of the informant's information as a waitress who had been involved with the defendant. The reliability of the information was further established by an officer's independent investigation.

Recording Information Not in Affidavit

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In this child sex case, the court held that although the magistrate violated G.S. 15A-245 by considering the officer's sworn testimony when determining whether probable cause supported the warrant but failing to record that testimony as required by the statute, this was not a basis for granting the suppression motion. Significantly, the trial court based its ruling solely on the filed affidavit, not the sworn testimony and the affidavit was sufficient to establish probable cause.

Staleness of Information

State v. Rayfield, __ N.C. App. __, 752 S.E.2d 745 (Jan. 7, 2014). In this child sex case, the trial court did not err by denying the defendant's motion to suppress evidence obtained pursuant to a search warrant authorizing a search of his house. The victim told the police about various incidents occurring in several locations (the defendant's home, a motel, etc.) from the time that she was eight years old until she was eleven. The affidavit alleged that the defendant had shown the victim pornographic videos and images in his home. The affidavit noted that the defendant is a registered sex offender and requested a search warrant to search his home for magazines, videos, computers, cell phones, and thumb drives. The court first rejected the defendant's argument that the victim's information to the officers was stale, given the lengthy gap of time between when the defendant allegedly showed the victim the images and the actual search. It concluded: "Although [the victim] was generally unable to provide dates to the attesting officers . . . her allegations of inappropriate sexual touching by Defendant over a sustained period of time

allowed the magistrate to reasonably conclude that probable cause was present to justify the search of Defendant's residence." It went on to note that "when items to be searched are not inherently incriminating [as here] and have enduring utility for the person to be searched, a reasonably prudent magistrate could conclude that the items can be found in the area to be searched." It concluded:

> There was no reason for the magistrate in this case to conclude that Defendant would have felt the need to dispose of the evidence sought even though acts associated with that evidence were committed years earlier. Indeed, a practical assessment of the information contained in the warrant would lead a reasonably prudent magistrate to conclude that the computers, cameras, accessories, and photographs were likely located in Defendant's home even though certain allegations made in the affidavit referred to acts committed years before.

State v. Oates, __ N.C. App. __, 736 S.E.2d 228 (Dec. 31, 2012). Reversing the trial court, the court held that probable cause supported issuance of a search warrant to search the defendant's residence. Although the affidavit was based an anonymous caller, law enforcement corroborated specific information provided by the caller so that the tip had a sufficient indicia of reliability. Additionally, the affidavit provided a sufficient nexus between the items sought and the residence to be searched. Finally, the court held that the information was not stale.

State v. Hinson, 203 N.C. App. 172 (Apr. 6, 2010), *reversed on other grounds* 364 N.C. 414 (Oct. 8, 2010). Rejecting the defendant's argument that information relied upon by officers to establish probable cause was stale. Although certain information provided by an informant was three weeks old, other information pertained to the informant's observations made only one day before the application for the warrant was submitted. Also an officer opined, based on his experience, that an ongoing drug production operation was present at the location.

Identification of Place to be Searched

State v. Hunter, 208 N.C. App. 506 (Dec. 21, 2010). The court rejected the defendant's argument that a search warrant executed at a residence was invalid because the application and warrant referenced an incorrect street address. Although the numerical portion of the street address was incorrect, the warrant was sufficient because it contained a correct description of the residence.

Executing
Search of Vehicle at Premises

State v. Lowe, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). Although a search warrant to search a home was supported by probable cause, law enforcement exceeded the scope of the warrant when they searched a vehicle parked in the driveway but not owned or controlled by the home's resident; the trial court thus erred by denying the defendant's motion to suppress. The affidavit supporting the warrant indicated that one Terrence Turner was selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. No vehicles were specified in the warrant. When executing the warrant officers found Turner inside the home, as well as two overnight guests, the defendant and his girlfriend, Margaret Doctors. Parked in the driveway was a rental car, which the officers learned was being leased by Doctors and operated by both her and

the defendant. Although the officers knew that Turner had no connection to the vehicle, they searched it and found controlled substances inside. As a result the defendant was charged with drug offenses. Prior to trial he unsuccessfully moved to suppress, arguing that the warrant was not supported by probable cause and alternatively that the search of his vehicle exceeded the scope of the warrant. (1) The court held that the warrant was supported by probable cause. The affidavit stated that after receiving information that Turner was involved in drug activity at the home the officer examined trash and found correspondence addressed to Turner at the home and a small amount of marijuana residue in a fast food bag. (2) The court agreed that the search of the defendant's vehicle exceed the scope of the warrant issued to search Turner's home. Noting that the officers could have searched the vehicle if it belonged to Turner, the court further noted that they knew Turner had no connection to the car. The court stated that the issue presented, "whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," was one of first impression. The court rejected the State's argument that a warrant to search a home permitted a search of any vehicle found within the curtilage, reasoning: "The State's proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search." (3) Finally, the court rejected the State's argument that the good faith exception should apply because police department policy allowed officers to search all vehicles within the curtilage of premises specified in a warrant. The court found the good faith exception "inappropriate" where the error, as here, is attributable to the police, not a judicial official who issued the warrant.

Knock and Announce

State v. Terry, 207 N.C. App. 311 (Oct. 5, 2010). In a drug case, officers properly knocked and announced their presence when executing a search warrant. The court rejected the defendant's argument that the period of time between the knock and announcement and the entry into the house was too short. It concluded that because the search warrant was based on information that marijuana was being sold from the house and because that drug could be disposed of easily and quickly, the brief delay between notice and entry was reasonable.

Detaining Persons On or Off the Premises

Bailey v. United States, 568 U.S. __, 133 S. Ct. 1031 (Feb. 19, 2013). *Michigan v. Summers*, 452 U.S. 692 (1981) (officers executing a search warrant may detain occupants on the premises while the search is conducted), does not justify the detention of occupants beyond the immediate vicinity of the premises covered by a search warrant. In this case, the defendant left the premises before the search began and officers waited to detain him until he had driven about one mile away. The Court reasoned that none of the rationales supporting the *Summers* decision—officer safety, facilitating the completion of the search, and preventing flight—apply with the same or similar force to the detention of recent occupants beyond the immediate vicinity of the premises. It further concluded that "[a]ny of the individual interests is also insufficient, on its own, to justify an expansion of the rule in *Summers* to permit the detention of a former occupant, wherever he may be found away from the scene of the search." It stated: "The categorical authority to detain incident to the execution of a search warrant must be limited to the immediate

vicinity of the premises to be searched." The Court continued, noting that *Summers* also relied on the limited intrusion on personal liberty involved with detaining occupants incident to the execution of a search warrant. It concluded that where officers arrest an individual away from his or her home, there is an additional level of intrusiveness. The Court declined to precisely define the term "immediate vicinity," leaving it to the lower courts to make this determination based on "the lawful limits of the premises, whether the occupant was within the line of sight of his dwelling, the ease of reentry from the occupant's location, and other relevant factors."

Pat Down of Those Present

State v. Richmond, 215 N.C. App. 475 (Sept. 6, 2011). An officer executing a search warrant at a home reasonably believed that for officer safety he should pat down the defendant, who was present at the house when officers arrived to execute the search warrant. The search warrant application stated that illegal narcotics were being sold from the residence and that officers had conducted two previous controlled buys there, one only 72 hours earlier. When officers entered, they found six individuals, including defendant and saw drugs in plain view. Based on his experience as a narcotics officer, the officer testified to a connection between guns and drugs.

Statements Made During Execution of the Warrant

State v. Garcia, 216 N.C. App. 176 (Oct. 4, 2011). The trial court did not err by denying the defendant's motion to suppress statements made while a search warrant was being executed. The defendant and his wife were present when the search warrant was executed. After handcuffing the defendant, an officer escorted him to a bathroom, read him *Miranda* rights, and questioned him about drug activities in the apartment. While this procedure was applied to the defendant's wife, an officer discovered a digital scale and two plastic bags of a white, powdery substance; the defendant then stated that the drugs were his not his wife's. The court rejected the defendant's argument that he was arrested when he was moved to the bathroom and read his rights, noting that the questioning occurred during the search.

Miscellaneous Cases

State v. Chavez, __ N.C. App. __, 767 S.E.2d 581 (Dec. 2, 2014). The court rejected the defendant's argument that the right to have a witness present for blood alcohol testing performed under G.S. 20-16.2 applies to blood draws taken pursuant to a search warrant. The court also rejected the defendant's argument that failure to allow a witness to be present for the blood draw violated his constitutional rights, holding that the defendant had no constitutional right to have a witness present for the execution of the search warrant.

State v. Bernard, __ N.C. App. __, 762 S.E.2d. 514 (Sept. 2, 2014). Although an officer "inappropriately" took documents related to the defendant's civil action against A&T and covered by the attorney-client privilege during his search of her residence, the trial court properly suppressed this material and the officer's actions did not otherwise invalidate the search warrant or its execution.

Sealing Warrants

In Re Baker, 220 N.C. App. 108 (Apr. 17, 2012). Where search warrants were unsealed in accordance with procedures set forth in a Senior Resident Superior Court Judge's administrative order and where the State failed to make a timely motion to extend the period for which the documents were sealed, the trial judge did not err by unsealing the documents. At least 13 search warrants were issued in an investigation. As each was issued, the State moved to have the warrant and return sealed. Various judges granted these motions, ordering the warrants and returns sealed "until further order of the Court." However, an administrative order in place at the time provided that an order directing that a warrant or other document be sealed "shall expire in 30 days unless a different expiration date is specified in the order." Subsequently, media organizations made a made a public records request for search warrants more than thirty days old and the State filed motions to extend the orders sealing the documents. A trial judge ordered that search warrants sealed for more than thirty days at the time of the request be unsealed. The State appealed. The court began by rejecting the State's argument that the trial court erred by failing to give effect to the language in the original orders that the records remain sealed "until further order of the Court." The court noted the validity of the administrative order and the fact that the trial judge acted in compliance with it. The court also rejected the State's argument that the trial judge erred by having the previously sealed documents delivered without any motion, hearing, or notice to the State and without findings of fact. The court noted that the administrative order afforded an opportunity and corresponding procedure for the trial court to balance the right of access to records against the governmental interests sought to be protected by the prior orders. Specifically, the State could make a motion to extend the orders. Here, however, the State failed to make a timely motion to extend the orders. Therefore, the court concluded, the administrative order did not require the trial court to balance the right to access against the governmental interests in protecting against premature release. The court further found that the State had sufficient notice given that all relevant officials were aware of the administrative order.

Searches

Reasonable Expectation of Privacy

State v. Clyburn, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The court reversed and remanded for further findings of fact regarding the defendant's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on the defendant's person which, as a result of the search, was determined to have been stolen. The court held that under *Riley v. California*, 134 S. Ct. 2473 (2014), the search was not justified as a search incident to arrest. As to whether the defendant had a reasonable expectation of privacy in the GPS device, the court held that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. Here, evidence at the suppression hearing would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. However, because the trial court failed to make a factual determination regarding whether the defendant innocently purchased the GPS device, the court reversed and remanded for further findings of fact, providing additional guidance for the trial court in its decision.

Consent Searches

Implied Consent

State v. McLeod, 197 N.C. App. 707 (July 7, 2009). Officers had implied consent to search a residence occupied by the defendant and his mother. After the defendant's mother told the officers that the defendant had a gun in the residence, the defendant confirmed that to be true and told the officers where it was located. The defendant and his mother gave consent by their words and actions for the officers to enter the residence and seize the weapon.

State v. Troy, 198 N.C. App. 396 (July 21, 2009). The defendant gave implied consent to the recording of three-way telephone calls in which he participated while in an out-of-state detention center. Although the defendant did not receive a recorded message when the three-way calls were made informing him that the calls were being monitored and recorded, he was so informed when he placed two other calls days before the three-way calls at issue were made.

Third-Party Consent

State v. Washburn, 201 N.C. App. 93 (Nov. 17, 2009). Police officers lawfully were present in a common hallway outside of the defendant's individual storage unit. The hallway was open to those with an access code and invited guests, the manager previously had given the police department its own access code to the facility, and facility manager gave the officers permission on the day in question to access the common area with a drug dog, which subsequently alerted on the defendant's unit.

Consent by One Occupant

Fernandez v. California, 571 U.S. __, 134 S. Ct. 1126 (Feb. 25, 2014). Consent to search a home by an abused woman who lived there was valid when the consent was given after her male partner, who objected, was arrested and removed from the premises by the police. Cases firmly establish that police officers may search jointly occupied premises if one of the occupants consents. In *Georgia v. Randolph*, 547 U. S. 103 (2006), the Court recognized a narrow exception to this rule, holding that the consent of one occupant is insufficient when another occupant is present and objects to the search. In this case, the Court held that *Randolph* does not apply when the objecting occupant is absent when another occupant consents. The Court emphasized that *Randolph* applies only when the objecting occupant is physically present. Here, the defendant was not present when the consent was given. The Court rejected the defendant's argument that *Randolph* controls because his absence should not matter since he was absent only because the police had taken him away. It also rejected his argument that it was sufficient that he objected to the search while he was still present. Such an objection, the defendant argued should remain in effect until the objecting party no longer wishes to keep the police out of his home. The Court determined both arguments to be unsound.

State v. Allah, __ N.C. App. __, 762 S.E.2d. 524 (Sept. 2, 2014). A search of the defendant's living area, which was connected to his wife's store, was valid where his wife consented to the ALE officers' request to search the living area.

Voluntariness of Consent

State v. Bell, 221 N.C. App. 535 (July 17, 2012). The trial court did not err by finding that the defendant consented to a search of his residence. The court rejected the defendant's argument that the trial court must make specific findings regarding the voluntariness of consent even when there is no conflict in the evidence on the issue. Here, there was a conflict regarding whether the defendant gave consent, not whether if given it was voluntary.

State v. McMillan, 214 N.C. App. 320 (Aug. 2, 2011). The fact that officers advised the defendant that if he did not consent to giving oral swabs and surrendering certain items of clothing they would detain him until they obtained a search warrant did not negate the defendant's voluntary consent to the seizure of those items.

State v. Medina, 205 N.C. App. 683 (July 20, 2010). A warrantless search of the defendant's car was valid on grounds of consent. The court rejected the defendant's argument that his consent was invalid because the officer who procured it was not fluent in Spanish. The court noted that the defendant was non-responsive to initial questions posed in English, but that he responded when spoken to in Spanish. The officer asked simple questions about weapons or drugs and when he gestured to the car and asked to "look," the defendant nodded in the affirmative. Although not fluent in Spanish, the officer had Spanish instruction in high school and college and the two conversed entirely in Spanish for periods of up to 30 minutes. The officer asked open ended-questions which the defendant answered appropriately. The defendant never indicated that he did not understand a question. The court also rejected the defendant's argument that his consent was invalid because the officer wore a sidearm while seeking the consent, concluding that the mere presence of a holstered sidearm does not render consent involuntary.

State v. Kuegel, 195 N.C. App. 310 (Feb. 3, 2009). The defendant's consent to search his residence was voluntary, even though it was induced by an officer's false statements. After receiving information that the defendant was selling marijuana and cocaine from his apartment, an officer went to the apartment to conduct a knock and talk. The officer untruthfully told the defendant that he had conducted surveillance of the apartment, saw a lot of people coming and going, stopped their cars after they left the neighborhood, and each time recovered either marijuana or cocaine. The exchange continued and the defendant gave consent to search. Based on the totality of circumstances, the consent was voluntary.

State v. Stover, 200 N.C. App. 506 (Nov. 3, 2009). The evidence supported the trial court's conclusion that the defendant voluntarily consented to a search of his home. Although an officer aimed his gun at the defendant when he thought that the defendant was attempting to flee, the officer promptly lowered the gun. While the officers kicked down the door, they did not immediately handcuff the defendant. Rather, the defendant sat in his living room and conversed freely with the officers, and one officer escorted him to a neighbor's house to obtain child care. The defendant consented to a search of his house when asked after a protective sweep was completed.

State v. Boyd, 207 N.C. App. 632 (Nov. 2, 2010). The defendant voluntarily consented to allow officers to take a saliva sample for DNA testing. The defendant was told that the sample could be

used to exonerate him in ongoing investigations of break-ins and assaults on women that occurred in Charlotte in 1998. The defendant argued that because the detective failed to inform him of all of the charges that were being investigated—specifically, rape and sexual assault—his consent was involuntary. Following *State v. Barkley*, 144 N.C. App. 514 (2001), the court rejected this argument. The court concluded that the consent was voluntary even though the defendant did not know that the assaults were of a sexual nature and that a reasonable person in the defendant's position would have understood that the DNA could be used generally for investigative purposes.

Scope of Consent

State v. Heien, 367 N.C. 163 (Nov. 8, 2013), *aff'd on other grounds,* 574 U.S. ___, 135 S. Ct. 530 (Dec. 15, 2014). The court per curiam affirmed the decision below, *State v. Heien*, __ N.C. App. __, 741 S.E.2d 1 (2013). Over a dissent the court of appeals had held that a valid traffic stop was not unduly prolonged and as a result the defendant's consent to search his vehicle was valid. The stop was initiated at 7:55 am and the defendant, a passenger who owned the vehicle, gave consent to search at 8:08 am. During this time, the two officers discussed a malfunctioning vehicle brake light with the driver, discovered that the driver and the defendant claimed to be going to different destinations, and observed the defendant behaving unusually (he was lying down on the backseat under a blanket and remained in that position even when approached by an officer requesting his driver's license). After each person's name was checked for warrants, their licenses were returned. The officer then requested consent to search the vehicle. The officer's tone and manner were conversational and non-confrontational. No one was restrained, no guns were drawn and neither person was searched before the request to search the vehicle was made. The trial judge properly concluded that the defendant was aware that the purpose of the initial stop had been concluded and that further conversation was consensual. The court of appeals also had held, again over a dissent, that the defendant's consent to search the vehicle was valid even though the officer did not inform the defendant that he was searching for narcotics.

State v. Schiro, 219 N.C. App. 105 (Feb. 21, 2012). A consent search of the defendant's vehicle was not invalid because it involved taking off the rear quarter panels. The trial court found that both rear quarter panels were fitted with a carpet/cardboard type interior trim and that they "were loose." Additionally, the trial court found that the officer "was easily able to pull back the carpet/cardboard type trim . . . covering the right rear quarter panel where he observed what appeared to be a sock with a pistol handle protruding from the sock."

State v. Lopez, 219 N.C. App. 139 (Feb. 21, 2012). The defendant's voluntary consent to search his vehicle extended to the officer's looking under the hood and in the vehicle's air filter compartment.

State v. Hagin, 203 N.C. App. 561 (Apr. 20, 2010). By consenting to a search of all personal and real property at 19 Doc Wyatt Road, the defendant consented to a search of an outbuilding within the curtilage of the residence. The defendant's failure to object when the outbuilding was searched suggests that he believed that the outbuilding was within the scope of his consent. For a more detailed analysis of this case, see the blog post.

Revocation of Consent

State v. Schiro, 219 N.C. App. 105 (Feb. 21, 2012). The defendant did not withdraw his consent to search his car when, while sitting in a nearby patrol car, he said several times: "they're tearing up my trunk." A reasonable person would not have considered these statements to be an unequivocal revocation of consent.

Of Premises

Homes & Curtilage

Florida v. Jardines, 569 U.S. __, 133 S. Ct. 1409 (Mar. 26, 2013). Using a drug-sniffing dog on a homeowner's porch to investigate the contents of the home is a "search" within the meaning of the Fourth Amendment. The Court's reasoning was based on the theory that the officers engaged in a physical intrusion of a constitutionally protected area. Applying that principle, the Court held:

> The officers were gathering information in an area belonging to [the defendant] and immediately surrounding his house—in the curtilage of the house, which we have held enjoys protection as part of the home itself. And they gathered that information by physically entering and occupying the area to engage in conduct not explicitly or implicitly permitted by the homeowner.

Slip Op. at pp. 3-4. In this way the majority did not decide the case on a reasonable expectation of privacy analysis; the concurring opinion came to the same conclusion on both property and reasonable expectation of privacy grounds.

State v. Jordan, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). In this drug case, the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of a warrantless search of her residence. According to the court: "The trial court's findings that the officers observed a broken window, that the front door was unlocked, and that no one responded when the officers knocked on the door are insufficient to show that they had an objectively reasonable belief that a breaking and entering had *recently* taken place or *was still in progress*, such that there existed an urgent need to enter the property" and that the search was justified under the exigent circumstances exception to the warrant requirement. It continued:

> In this case, the only circumstances justifying the officers' entry into defendant's residence were a broken window, an unlocked door, and the lack of response to the officers' knock at the door. We hold that although these findings may be sufficient to give the officers a reasonable belief that an illegal entry had occurred *at some point*, they are insufficient to give the officers an objectively reasonable belief that a breaking and entering was in progress or had occurred recently.

State v. Williford, ___ N.C. App. ___, 767 S.E.2d 139 (Jan. 6, 2015). The trial court did not err by denying the defendant's motion to suppress DNA evidence obtained from his discarded cigarette butt. When the defendant refused to supply a DNA sample in connection with a rape and murder investigation, officers sought to obtain his DNA by other means. After the defendant discarded a cigarette butt in a parking lot, officers retrieved the butt. The parking lot was located directly in front of the defendant's four-unit apartment building, was uncovered, and included 5-7 unassigned parking spaces used by the residents. The area between the road and the parking lot

was heavily wooded, but no gate restricted access to the lot and no signs suggested either that access to the parking lot was restricted or that the lot was private. After DNA on the cigarette butt matched DNA found on the victim, the defendant was charged with the crimes. At trial the defendant unsuccessfully moved to suppress the DNA evidence. On appeal, the court rejected the defendant's argument that the seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment:

> [W]e conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept."

Next, the court rejected the defendant's argument that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a third party. The court reasoned that the cigarette butt was abandoned property. Finally, the court rejected the defendant's argument that even if officers lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing it for his DNA because he had a legitimate expectation of privacy in his DNA. The court reasoned that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment.

State v. Gentile, __ N.C. App. __, 766 S.E.2d 349 (Nov. 18, 2014). A search of the defendant's garage pursuant to a search warrant was improper. Following up on a tip that the defendant was growing marijuana on his property, officers went to his residence. They knocked on the front door but received no response. They then went to the back of the house because they heard barking dogs and thought that an occupant might not have heard them knock. Once there they smelled marijuana coming from the garage and this discovery formed the basis for the search warrant. The court concluded that "the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage." The court went on to conclude that when the detectives smelled the odor of marijuana, "their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location." The subsequent search based, in part, on the odor of marijuana was unlawful.

Open Fields

State v. Ballance, 218 N.C. App. 202 (Jan. 17, 2012). The trial court did not err by rejecting the defendant's motion to suppress evidence obtained by officers when they entered the property in question. The court concluded that the property constituted an "open field," so that the investigating officers' entry onto the property and the observations made there did not constitute a "search" for Fourth Amendment purposes. The property consisted of 119 acres of wooded land used for hunting and containing no buildings or residences.

Other Warrantless Searches of Premises

State v. Malunda, __ N.C. App. __, 749 S.E.2d 280 (Nov. 5, 2013). The trial court erred by concluding that the police had probable cause to conduct a warrantless search of the defendant, a passenger in a stopped vehicle. After detecting an odor of marijuana on the driver's side of the vehicle, the officers conducted a warrantless search of the vehicle and discovered marijuana in the driver's side door. However, officers did not detect an odor of marijuana on the vehicle's passenger side or on the defendant. The court found that none of the other circumstances, including the defendant's location in an area known for drug activity or his prior criminal history, nervousness, failure to immediately produce identification, or commission of the infraction of possessing an open container of alcohol in a motor vehicle, when considered separately or in combination, amounted to probable cause to search the defendant's person.

State v. Pasour, __ N.C. App. __, 741 S.E.2d 323 (Oct. 16, 2012). The trial court erred by denying the defendant's motion to suppress property seized in a warrantless search. After receiving a tip that a person living at a specified address was growing marijuana, officers went to the address and knocked on the front and side doors. After getting no answer, two officers went to the back of the residence. In the backyard they found and seized marijuana plants. The officers were within the curtilage when they viewed the plants, no evidence indicated that the plants were visible from the front of the house or from the road, and a "no trespassing" sign was plainly visible on the side of the house. Even if the officers did not see the sign, it is evidence of the homeowner's intent that the side and back of the home were not open to the public. There no evidence of a path or anything else to suggest a visitor's use of the rear door; instead, all visitor traffic appeared to be kept to the front door and traffic to the rear was discouraged by the posted sign. Further, no evidence indicated that the officers had reason to believe that knocking at the back door would produce a response after knocking multiple times at the front and side doors had not. The court concluded that on these facts, "there was no justification for the officers to enter Defendant's backyard and so their actions were violative of the Fourth Amendment."

Of People

See also Exigent Circumstances above

Incident to Arrest

Riley v. California, 573 U.S. __, 134 S. Ct. 2473 (June 25, 2014). The police may not, without a warrant, search digital information on a cell phone seized from an individual who has been arrested. This decision involved a pair of cases in which both defendants were arrested and cell phones were seized. In both cases, officers examined electronic data on the phones without a warrant as a search incident to arrest. The Court held that "officers must generally secure a warrant before conducting such a search." The Court noted that "the interest in protecting officer safety does not justify dispensing with the warrant requirement across the board." In this regard it added however that "[t]o the extent dangers to arresting officers may be implicated in a particular way in a particular case, they are better addressed through consideration of case-specific exceptions to the warrant requirement, such as the one for exigent circumstances." Next, the Court rejected the argument that preventing the destruction of evidence justified the search. It was unpersuaded by the prosecution's argument that a different result should obtain because remote wiping and data encryption may be used to destroy digital evidence. The Court noted that

"[t]o the extent that law enforcement still has specific concerns about the potential loss of evidence in a particular case, there remain more targeted ways to address those concerns. If the police are truly confronted with a 'now or never' situation—for example, circumstances suggesting that a defendant's phone will be the target of an imminent remote-wipe attempt—they may be able to rely on exigent circumstances to search the phone immediately" (quotation omitted). Alternatively, the Court noted, "if officers happen to seize a phone in an unlocked state, they may be able to disable a phone's automatic-lock feature in order to prevent the phone from locking and encrypting data." The Court noted that such a procedure would be assessed under case law allowing reasonable steps to secure a scene to preserve evidence while procuring a warrant. Turning from an examination of the government interests at stake to the privacy issues associated with a warrantless cell phone search, the Court rejected the government's argument that a search of all data stored on a cell phone is materially indistinguishable the other types of personal items, such as wallets and purses. The Court noted that "[m]odern cell phones, as a category, implicate privacy concerns far beyond those implicated by the search of a cigarette pack, a wallet, or a purse" and that they "differ in both a quantitative and a qualitative sense from other objects that might be kept on an arrestee's person." It also noted the complicating factor that much of the data viewed on a cell phone is not stored on the device itself, but rather remotely through cloud computing. Concluding, the Court noted:

> We cannot deny that our decision today will have an impact on the ability of law enforcement to combat crime. Cell phones have become important tools in facilitating coordination and communication among members of criminal enterprises, and can provide valuable incriminating information about dangerous criminals. Privacy comes at a cost.
>
> Our holding, of course, is not that the information on a cell phone is immune from search; it is instead that a warrant is generally required before such a search, even when a cell phone is seized incident to arrest.

(Slip Op at. p. 25). And finally, the Court noted that even though the search incident to arrest does not apply to cell phones, other exceptions may still justify a warrantless search of a particular phone, such as exigent circumstances.

State v. Wilkerson, 363 N.C. 382 (Aug. 28, 2009). Seizure and search of the defendant's cell phone was proper as a search incident to arrest. The defendant was arrested for two murders shortly after they were committed. While in custody, he received a cell phone call, at which point the seizure occurred. [Note: The more recent *Riley* decision, above.]

State v. Clyburn, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). The court reversed and remanded for further findings of fact regarding the defendant's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on the defendant's person which, as a result of the search, was determined to have been stolen. The court held that under *Riley v. California*, 134 S. Ct. 2473 (2014), the search was not justified as a search incident to arrest. As to whether the defendant had a reasonable expectation of privacy in the GPS device, the court held that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. Here, evidence at the suppression hearing would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. However, because the trial court failed to make a factual determination regarding whether the defendant innocently purchased the GPS device, the

court reversed and remanded for further findings of fact, providing additional guidance for the trial court in its decision.

State v. Jones, 221 N.C. App. 236 (June 5, 2012). A search of the defendant's jacket incident to arrest was lawful. When the officer grabbed the defendant, the defendant ran. While attempting to evade capture, the defendant tried to punch the officer while keeping his right hand inside his jacket. The defendant refused to remove his hand from his jacket pocket despite being ordered to do so and the jacket eventually came off during the struggle. This behavior led the officer to believe that the defendant may be armed. After the defendant was subdued, handcuffed, and placed in a patrol vehicle, the officer walked about ten feet and retrieved the jacket from the ground. He searched the jacket and retrieved a bag containing crack cocaine.

Of Students

Safford Unified School District v. Redding, 557 U.S. 364 (June 25, 2009). Although school officials had reasonable suspicion to search a middle school student's backpack and outer clothing for pills, they violated the Fourth Amendment when they required her to pull out her bra and underwear. After learning that the student might have prescription strength and over-the-counter pain relief pills, school officials searched her backpack but found no pills. A school nurse then had her remove her outer clothing, pull her bra and shake it, and pull out the elastic on her underpants, exposing her breasts and pelvic area to some degree. No pills were found. Because there was no indication that the drugs presented a danger to students or were concealed in her undergarments, the officials did not have sufficient justification to require the students to pull out her bra and underpants. However, the school officials were protected from civil liability by qualified immunity.

In re T.A.S., 366 N.C. 269 (Oct. 5, 2012). The court vacated and remanded *In re T.A.S.*, 213 N.C. App. 273 (July 19, 2011) (holding that a search of a juvenile student's bra was constitutionally unreasonable), ordering further findings of fact. The court ordered the trial court to

> make additional findings of fact, including but not necessarily limited to: the names, occupations, genders, and involvement of all the individuals physically present at the "bra lift" search of T.A.S.; whether T.A.S. was advised before the search of the Academy's "no penalty" policy; and whether the "bra lift" search of T.A.S. qualified as a "more intrusive" search under the Academy's Safe School Plan.

It provided that "[i]f, after entry of an amended judgment or order by the trial court, either party enters notice of appeal, counsel are instructed to ensure that a copy of the Safe School Plan, discussed at the suppression hearing and apparently introduced into evidence, is included in the record on appeal."

In Re D.L.D, 203 N.C. App. 434 (Apr. 20, 2010). The reasonableness standard of *New Jersey v. T.L.O.*, 469 U.S. 325 (1985), applied to a search of a student by an officer assigned to the school. The officer was working in conjunction with and at the direction of the assistant principal to maintain a safe and educational environment. For the reasons discussed in the opinion, the search satisfied the two-pronged inquiry for determining reasonableness: (1) whether the action was justified at its inception; and (2) whether the search as conducted was reasonably related in scope to the circumstances which justified the interference in the first place.

SBM

Grady v. North Carolina, 575 U.S. ___ (Mar. 30, 2015) (per curiam). Reversing the North Carolina courts, the Court held that under *Jones* and *Jardines*, satellite based monitoring for sex offenders constitutes a search under the Fourth Amendment. The Court stated: "a State … conducts a search when it attaches a device to a person's body, without consent, for the purpose of tracking that individual's movements." The Court rejected the reasoning of the state court below, which had relied on the fact that the monitoring program was "civil in nature" to conclude that no search occurred, explaining: "A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment." The Court did not decide the "ultimate question of the program's constitutionality" because the state courts had not assessed whether the search was reasonable. The Court remanded for further proceedings.

Strip Searches

State v. Johnson, __ N.C. App. __, 737 S.E.2d 442 (Feb. 5, 2013). In a drug case the court held that probable cause and exigent circumstances supported a roadside search of the defendant's underwear conducted after a vehicle stop and that the search was conducted in a reasonable manner. After finding nothing in the defendant's outer clothing, the officer placed the defendant on the side of his vehicle with the vehicle between the defendant and the travelled portion of the highway. Other troopers stood around the defendant to prevent passers-by from seeing him. The officer pulled out the front waistband of the defendant's pants and looked inside. The defendant was wearing two pairs of underwear—an outer pair of boxer briefs and an inner pair of athletic compression shorts. Between the two pairs of underwear the officer found a cellophane package containing several smaller packages. There was probable cause to search where the defendant smelled of marijuana, officers found a scale of the type used to measure drugs in his car, a drug dog alerted in his car, and during a pat-down the officer noticed a blunt object in the inseam of the defendant's pants. Because narcotics can be easily and quickly hidden or destroyed, especially after a defendant has notice of an officer's intent to discover whether the defendant was in possession of them, sufficient exigent circumstances justified the warrantless search. Additionally, the search was conducted in a reasonable manner. Although the officer did not see the defendant's private parts, the level of the defendant's exposure is relevant to the analysis of whether the search was reasonable. The court reasoned that the officer had a sufficient basis to believe that contraband was in the defendant's underwear, including that although the defendant smelled of marijuana a search of his outer clothing found nothing, the defendant turned away from the officer when the officer frisked his groin and thigh area, and that the officer felt a blunt object in the defendant's crotch area during the pat-down. Finally, the court concluded that when conducting the search the officer took reasonable steps to protect defendant's privacy.

State v. Robinson, 221 N.C. App. 266 (June 19, 2012). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to suppress evidence found as a result of a strip search. The court found that the officer had, based on the facts presented, ample basis for believing that the defendant had contraband beneath his underwear and that reasonable steps were taken to protect his privacy.

State v. Fowler, 220 N.C. App. 263 (May 1, 2012). Roadside strip searches of the defendant were reasonable and did not violate the constitution. The court first rejected the State's argument that the searches were not strip searches. During both searches the defendant's private areas were observed by an officer and during one search the defendant's pants were removed and an officer searched inside of the defendant's underwear with his hand. Next, the court held that probable cause supported the searches. The officers stopped the defendant's vehicle for speeding after receiving information from another officer and his informant that the defendant would be traveling on a specified road in a silver Kia, carrying 3 grams of crack cocaine. The strip search occurred after a consensual search of the defendant's vehicle produced marijuana but no cocaine. The court found competent evidence to show that the informant, who was known to the officers and who had provided reliable information in the past, provided sufficient reliable information, corroborated by an officer, to establish probable cause to believe that the defendant would be carrying a small amount of cocaine in his vehicle. When the consensual search of defendant's vehicle did not produce the cocaine, the officers had sufficient probable cause, under the totality of the circumstances, to believe that the defendant was hiding the drugs on his person. Third, the court found that exigent circumstances supported the search. Specifically, the officer knew that the defendant had prior experience with jail intake procedures and that he could reasonably expect that the defendant would attempt to get rid of evidence in order to prevent his going to jail. Finally, the court found the search reasonable. The trial court had determined that although the searches were intrusive, the most intrusive one occurred in a dark area away from the traveled roadway, with no one other than the defendant and the officers in the immediate vicinity. Additionally, the trial court found that the officer did not pull down the defendant's underwear or otherwise expose his bare buttocks or genitals and no females were present or within view during the search. The court determined that these findings support the trial court's conclusion that, although the searches were intrusive, they were conducted in a discreet manner away from the view of others and limited in scope to finding a small amount of cocaine based on the corroborated tip of a known, reliable informant.

State v. Battle, 202 N.C. App. 376 (Feb. 16, 2010). A roadside strip search was unreasonable. The search was a strip search, even though the defendant's pants and underwear were not completely removed or lowered. Although the officer made an effort to shield the defendant from view, the search was a "roadside" strip search, distinguished from a private one. Roadside strip searches require probable cause and exigent circumstances, and no exigent circumstances existed here. Note that although a majority of the three-judge panel agreed that the strip search was unconstitutional, a majority did not agree as to why this was so.

Cheek Swab

Maryland v. King, 569 U.S. __, 133 S. Ct. 1958 (June 3, 2013). The defendant's Fourth Amendment rights were not violated by the taking of a DNA cheek swab as part of booking procedures. When the defendant was arrested in April 2009 for menacing a group of people with a shotgun and charged in state court with assault, he was processed for detention in custody at a central booking facility. Booking personnel used a cheek swab to take the DNA sample from him pursuant to the Maryland DNA Collection Act (Maryland Act). His DNA record was uploaded into the Maryland DNA database and his profile matched a DNA sample from a 2003 unsolved rape case. He was subsequently charged and convicted in the rape case. He challenged the

conviction arguing that the Maryland Act violated the Fourth Amendment. The Maryland appellate court agreed. The Supreme Court reversed. The Court began by noting that using a buccal swab on the inner tissues of a person's cheek to obtain a DNA sample was a search. The Court noted that a determination of the reasonableness of the search requires a weighing of "the promotion of legitimate governmental interests" against "the degree to which [the search] intrudes upon an individual's privacy." It found that "[i]n the balance of reasonableness . . . , the Court must give great weight both to the significant government interest at stake in the identification of arrestees and to the unmatched potential of DNA identification to serve that interest." The Court noted in particular the superiority of DNA identification over fingerprint and photographic identification. Addressing privacy issues, the Court found that "the intrusion of a cheek swab to obtain a DNA sample is a minimal one." It noted that a gentle rub along the inside of the cheek does not break the skin and involves virtually no risk, trauma, or pain. And, distinguishing special needs searches, the Court noted: "Once an individual has been arrested on probable cause for a dangerous offense that may require detention before trial . . . his or her expectations of privacy and freedom from police scrutiny are reduced. DNA identification like that at issue here thus does not require consideration of any unique needs that would be required to justify searching the average citizen." The Court further determined that the processing of the defendant's DNA was not unconstitutional. The information obtained does not reveal genetic traits or private medical information; testing is solely for the purpose of identification. Additionally, the Maryland Act protects against further invasions of privacy, by for example limiting use to identification. It concluded:

> In light of the context of a valid arrest supported by probable cause respondent's expectations of privacy were not offended by the minor intrusion of a brief swab of his cheeks. By contrast, that same context of arrest gives rise to significant state interests in identifying respondent not only so that the proper name can be attached to his charges but also so that the criminal justice system can make informed decisions concerning pretrial custody. Upon these considerations the Court concludes that DNA identification of arrestees is a reasonable search that can be considered part of a routine booking procedure. When officers make an arrest supported by probable cause to hold for a serious offense and they bring the suspect to the station to be detained in custody, taking and analyzing a cheek swab of the arrestee's DNA is, like fingerprinting and photographing, a legitimate police booking procedure that is reasonable under the Fourth Amendment.

Other Warrantless Searches of People

In Re V.C.R., __ N.C. App. __, 742 S.E.2d 566 (May 7, 2013). Although an officer had reasonable suspicion to stop a juvenile, the officer's subsequent conduct of ordering the juvenile to empty her pockets constituted a search and this search was illegal; it was not incident to an arrest nor consensual. The district court thus erred by denying the juvenile's motion to suppress.

State v. Smith, 222 N.C. App. 253 (Aug. 7, 2012). On what it described as an issue of first impression in North Carolina, the court held that a drug dog's positive alert at the front side driver's door of a motor vehicle does not give rise to probable cause to conduct a warrantless search of the person of a recent passenger of the vehicle who is standing outside the vehicle.

State v. Morton, 204 N.C. App. 578 (June 15, 2010). There was probable cause supporting a warrantless search of the defendant. During a pat-down, an officer felt a digital scale in the defendant's pocket and the defendant confirmed the nature of the object. The officer was justified in concluding that the scale was contraband given informant tips that defendant was selling drugs. Additionally, the defendant was coming from the area in which the informants claimed he was selling drugs, and he was acting nervously. The defendant did not challenge the trial court's conclusion that exigent circumstances were present.

State v. Williams, 209 N.C. App. 255 (Jan. 18, 2011). Probable cause and exigent circumstances supported an officer's warrantless search of the defendant's mouth by grabbing him around the throat, pushing him onto the hood of a vehicle, and demanding that he spit out whatever he was trying to swallow. Probable cause to believe that the defendant possessed illegal drugs and was attempting to destroy them was supported by information from three reliable informants, the fact that the defendant's vehicle was covered in talcum powder, which is used to mask the odor of drugs, while conducting a consent search of the defendant's person, the defendant attempted to swallow something, and that other suspects had attempted to swallow drugs in the officer's presence. Exigent circumstances existed because the defendant attempted to swallow four packages of cocaine, which could have endangered his health.

Of Vehicles

Generally

State v. Simmons, 201 N.C. App. 698 (Jan. 5, 2010). Standing alone, the defendant's statement that a plastic bag in his car contained "cigar guts" did not establish probable cause to search the defendant's vehicle. Although the officer testified that gutted cigars had become a popular means of consuming controlled substances, that evidence established a link between hollowed out cigars and marijuana, not between loose tobacco and marijuana. There was no evidence that the defendant was stopped in a drug-ridden area, at an unusual time of day, or that the officer had any basis, apart from the defendant's statements, for believing that the defendant possessed marijuana.

State v. Toledo, 204 N.C. App. 170 (May 18, 2010). A search of a tire found in the undercarriage of the defendant's vehicle was proper. An officer stopped the defendant for following too closely. The officer asked for and received consent to search the vehicle. During the consent search, the officer performed a "ping test" on a tire found inside the vehicle. When the ping test revealed a strong odor of marijuana, the officer arrested the defendant and searched the rest of the vehicle. At that point, the officer found a second tire located in the vehicle's undercarriage, which also contained marijuana. The search was justified because the discovery of marijuana in the first tire gave the officer probable cause to believe that the vehicle was being used to transport marijuana and therefore the officer had probable cause to search any part of the vehicle that may have contained marijuana.

Pursuant to Search of Premises

State v. Lowe, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). Although a search warrant to search a home was supported by probable cause, law enforcement exceeded the scope of the warrant when they searched a vehicle parked in the driveway but not owned or controlled by the home's resident; the trial court thus erred by denying the defendant's motion to suppress. The affidavit supporting the warrant indicated that one Terrence Turner was selling, using and storing controlled substances at a home he occupied at 529 Ashebrook Dr. No vehicles were specified in the warrant. When executing the warrant officers found Turner inside the home, as well as two overnight guests, the defendant and his girlfriend, Margaret Doctors. Parked in the driveway was a rental car, which the officers learned was being leased by Doctors and operated by both her and the defendant. Although the officers knew that Turner had no connection to the vehicle, they searched it and found controlled substances inside. As a result the defendant was charged with drug offenses. Prior to trial he unsuccessfully moved to suppress, arguing that the warrant was not supported by probable cause and alternatively that the search of his vehicle exceeded the scope of the warrant. (1) The court held that the warrant was supported by probable cause. The affidavit stated that after receiving information that Turner was involved in drug activity at the home the officer examined trash and found correspondence addressed to Turner at the home and a small amount of marijuana residue in a fast food bag. (2) The court agreed that the search of the defendant's vehicle exceed the scope of the warrant issued to search Turner's home. Noting that the officers could have searched the vehicle if it belonged to Turner, the court further noted that they knew Turner had no connection to the car. The court stated that the issue presented, "whether the search of a vehicle rented and operated by an overnight guest at a residence described in a search warrant may be validly searched under the scope of that warrant," was one of first impression. The court rejected the State's argument that a warrant to search a home permitted a search of any vehicle found within the curtilage, reasoning: "The State's proffered rule would allow officers to search any vehicle within the curtilage of a business identified in a search warrant, or any car parked at a residence when a search is executed, without regard to the connection, if any, between the vehicle and the target of the search." (3) Finally, the court rejected the State's argument that the good faith exception should apply because police department policy allowed officers to search all vehicles within the curtilage of premises specified in a warrant. The court found the good faith exception "inappropriate" where the error, as here, is attributable to the police, not a judicial official who issued the warrant.

With GPS Devices

United States v. Jones, 565 U.S. __, 132 S. Ct. 945 (Jan. 23, 2012). The government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a "search" within the meaning of the Fourth Amendment. Suspecting that the defendant was involved in drug trafficking, the government obtained a search warrant for use of a GPS device on the defendant's vehicle; the warrant authorized officers to install the device in the District of Columbia within 10 days. Officers ended up installing the device on the undercarriage of the vehicle while it was parked in a public parking lot in Maryland, 11 days after the warrant was signed. Over the next 28 days, the government used the device to track the vehicle's movements, and once had to replace the device's battery when the vehicle was parked in a different public lot in Maryland. By means of signals from multiple satellites, the device established the vehicle's location within 50 to 100 feet, and communicated that location by cellular phone to a government computer. It relayed

more than 2,000 pages of data over the 4-week period. The defendant was charged with several drug offenses. He unsuccessfully sought to suppress the evidence obtained through the GPS device. Before the U.S. Supreme Court the government conceded noncompliance with the warrant and argued only that a warrant was not required for the GPS device. Concluding that the evidence should have been suppressed, the Court characterized the government's conduct as having "physically occupied private property for the purpose of obtaining information." So characterized, the Court had "no doubt that such a physical intrusion would have been considered a 'search' within the meaning of the Fourth Amendment when it was adopted." The Court declined to address whether the defendant had a reasonable expectation of privacy in the undercarriage of his car and in the car's locations on the public roads, concluding that such an analysis was not required when the intrusion—as here—"encroached on a protected area."

Gant Search Incident to Arrest

Arizona v. Gant, 556 U.S. 332 (Apr. 21, 2009). Holding that officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle. For more complete analysis of this ruling, see the online paper here.

Davis v. United States, 564 U.S. __, 131 S. Ct. 2419 (June 16, 2011). The exclusionary rule (a deterrent sanction baring the prosecution from introducing evidence obtained by way of a Fourth Amendment violation) does not apply when the police conduct a search in compliance with binding precedent that is later overruled. Alabama officers conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens for driving while intoxicated and passenger Willie Davis for giving a false name to police. The police handcuffed both individuals and placed them in the back of separate patrol cars. The police then searched the passenger compartment of Owens's vehicle and found a revolver inside Davis's jacket pocket. The search was done in reliance on precedent in the jurisdiction that had interpreted *New York v. Belton*, 453 U.S. 454 (1981), to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. Davis was indicted on a weapons charge and unsuccessfully moved to suppress the revolver. He was convicted. While Davis's case was on appeal, the Court decided *Arizona v. Gant*, 556 U.S. 332 (2009), adopting a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. Analyzing whether to apply the exclusionary rule to the search at issue, the Court determined that "[the] acknowledged absence of police culpability dooms Davis's claim." Slip Op. at 10. It stated: "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Slip Op. at 1.

State v. Mbacke, 365 N.C. 403 (Jan. 27, 2012). The court reversed the court of appeals and determined that a search of the defendant's vehicle incident to his arrest for carrying a concealed

gun did not violate the Fourth Amendment. The defendant was indicted for, among other things, trafficking in cocaine and carrying a concealed gun. Officers were dispatched to a specific street address in response to a 911 reporting that a black male armed with a black handgun, wearing a yellow shirt, and driving a red Ford Escape was parked in his driveway and that the male had "shot up" his house the previous night. Officers Walley and Horsley arrived at the scene less than six minutes after the 911 call. They observed a black male (later identified as the defendant) wearing a yellow shirt and backing a red or maroon Ford Escape out of the driveway. The officers exited their vehicles, drew their weapons, and moved toward the defendant while ordering him to stop and put his hands in the air. Officer Woods then arrived and blocked the driveway to prevent escape. The defendant initially rested his hands on his steering wheel, but then lowered them towards his waist. Officers then began shouting at the defendant to keep his hands in sight and to exit his vehicle. The defendant raised his hands and stepped out of his car, kicking or bumping the driver's door shut as he did so. Officers ordered the defendant to lie on the ground and handcuffed him, advising him that he was being detained because they had received a report that a person matching his description was carrying a weapon. After the defendant said that he had a gun in his waistband and officers found the gun, the defendant was arrested for carrying a concealed gun. The officers secured the defendant in the back of a patrol car, returned to his vehicle, and opened the driver's side door. Officer Horsley immediately saw a white brick wrapped in green plastic protruding from beneath the driver's seat. As Officer Horsley was showing this to Officer Walley, the defendant attempted to escape from the patrol car. After re-securing the defendant, the officers searched his vehicle incident to the arrest but found no other contraband. The white brick turned out to be 993.8 grams of cocaine. The court noted that the case required it to apply *Arizona v. Gant*, 556 U.S. 332 (2009) (officers may search a vehicle incident to arrest only if (1) the arrestee is unsecured and within reaching distance of the passenger compartment when the search is conducted; or (2) it is reasonable to believe that evidence relevant to the crime of arrest might be found in the vehicle). It began its analysis by concluding that as used in the second prong of the *Gant* test, the term "reasonable to believe" establishes a threshold lower than probable cause that "parallels the objective 'reasonable suspicion' standard sufficient to justify a *Terry* stop." Thus, it held that "when investigators have a reasonable and articulable basis to believe that evidence of the offense of arrest might be found in a suspect's vehicle after the occupants have been removed and secured, the investigators are permitted to conduct a search of that vehicle." Applying that standard, the court concluded:

> [D]efendant was arrested for . . . carrying a concealed gun. The arrest was based upon defendant's disclosure that the weapon was under his shirt. Other circumstances . . . such as the report of defendant's actions the night before and defendant's furtive behavior when confronted by officers, support a finding that it was reasonable to believe additional evidence of the offense of arrest could be found in defendant's vehicle. Accordingly, the search was permissible under *Gant* . . . ."

The court ended by noting that it "[was] not holding that an arrest for carrying a concealed weapon is *ipso facto* an occasion that justifies the search of a vehicle." It expressed the belief that "the 'reasonable to believe' standard required by *Gant* will not routinely be based on the nature or type of the offense of arrest and that the circumstances of each case ordinarily will determine

the propriety of any vehicular searches conducted incident to an arrest."

State v. Fizovic, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). A search of the defendant's vehicle was properly done incident to the defendant's arrest for an open container offense, where the officer had probable cause to arrest before the search even though the formal arrest did not occur until after the search was completed. The court noted that under *Gant* "[a]n officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle." Here, the trial court's unchallenged findings of fact that it is common to find alcohol in vehicles of individuals stopped for alcohol violations; and that the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in the defendant's vehicle. The court rejected the defendant's argument that the search was an unconstitutional "search incident to citation," noting that the defendant was arrested, not issued a citation.

State v. Watkins, 220 N.C. App. 384 (May 1, 2012). The search of a vehicle driven by the defendant was valid under *Gant* as incident to the arrest of the defendant's passenger for possession of drug paraphernalia. Officers had a reasonable belief that evidence relevant to the passenger's possession of drug paraphernalia might be found in the vehicle. Additionally, the objective circumstances provided the officers with probable cause for a warrantless search of the vehicle. The drug paraphernalia found on the passenger, an anonymous tip that the vehicle would be transporting drugs, the fact that there were outstanding arrest warrants for the car's owner, the defendant's nervous behavior while driving and upon exiting the vehicle, and an alert by a drug-sniffing dog provided probable cause for the warrantless search of the vehicle.

State v. Watkins, 220 N.C. App. 384 (May 1, 2012). The search of a vehicle driven by the defendant was valid under *Gant* as incident to the arrest of the defendant's passenger for possession of drug paraphernalia. Officers had a reasonable belief that evidence relevant to the passenger's possession of drug paraphernalia might be found in the vehicle. Additionally, the objective circumstances provided the officers with probable cause for a warrantless search of the vehicle. The drug paraphernalia found on the passenger, an anonymous tip that the vehicle would be transporting drugs, the fact that there were outstanding arrest warrants for the car's owner, the defendant's nervous behavior while driving and upon exiting the vehicle, and an alert by a drug-sniffing dog provided probable cause for the warrantless search of the vehicle.

State v. Schiro, 219 N.C. App. 105 (Feb. 21, 2012). Although the search of the defendant's vehicle was not valid as one incident to arrest under *Gant*, it was a valid consent search.

State v. Foy, 208 N.C. App. 562 (Dec. 21, 2010). The trial court erred by suppressing evidence obtained pursuant to a search incident to arrest. After stopping the defendant's vehicle, an officer decided not to charge him with impaired driving but to allow the defendant to have someone pick him up. The defendant consented to the officer to retrieving a cell phone from the vehicle. While doing that, the officer saw a weapon and charged the defendant with carrying a concealed weapon. Following the arrest, officers searched the defendant's vehicle, finding addition contraband, which was suppressed by the trial court. The court noted that under *Arizona v. Gant*, 556 U.S. 332 (2009), officers may search a vehicle incident to arrest only if the arrestee is within

reaching distance of the passenger compartment at the time of the search or if it is reasonable to believe the vehicle contains evidence of the offense of arrest. When these justifications are absent, a search of the vehicle will be unreasonable unless police obtain a warrant or show that another exception to the warrant requirement applies. Citing *State v. Toledo*, 204 N.C. App. 170 (2010), the court held that having arrested the defendant for carrying a concealed weapon, it was reasonable for the officer to believe that the vehicle contained additional offense-related contraband, within the meaning of the second *Gant* exception.

State v. Carter, 200 N.C. App. 47 (Sept. 15, 2009). Applying *Gant* (discussed immediately above) and holding that the trial court erred by denying the defendant's motion to suppress evidence (papers) obtained during a warrantless search of his vehicle subsequent to his arrest for driving with an expired registration and failing to notify the DMV of an address change. Because the defendant had been removed from the vehicle, handcuffed, and was sitting on a curb when the search occurred, there was no reason to believe that he was within reaching distance or otherwise able to access the passenger compartment of the vehicle. Additionally, there was no evidence that the arresting officer believed that the papers were related to the charged offenses and furthermore, it would be unreasonable to think that papers seen on the passenger seat of the car were related to those offenses.

State v. Johnson, 204 N.C. App. 259 (June 1, 2010). The defendant's Fourth Amendment rights were violated when the police searched his vehicle incident to his arrest for driving with a revoked driver's license. Under *Gant* (discussed above), the officers could not reasonably have believed that evidence of the defendant's driving while license suspended might have been found in the car. Additionally, because the defendant was in the police car when the officers conducted the search, he could not have accessed the vehicle's passenger compartment at the time of the searched.

State v. Toledo, 204 N.C. App. 170 (May 18, 2010). A search of a tire found in the undercarriage of the defendant's vehicle was proper. An officer stopped the defendant for following too closely. The officer asked for and received consent to search the vehicle. During the consent search, the officer performed a "ping test" on a tire found inside the vehicle. When the ping test revealed a strong odor of marijuana, the officer arrested the defendant and searched the rest of the vehicle. At that point, the officer found a second tire located in the vehicle's undercarriage, which also contained marijuana. The search was justified because (1) the discovery of marijuana in the first tire gave the officer probable cause to believe that the vehicle was being used to transport marijuana and therefore the officer had probable cause to search any part of the vehicle that may have contained marijuana and (2) it was reasonable to believe that the vehicle contained evidence of the crime of arrest under *Gant*.

Other Warrantless Searches of Vehicles

State v. Armstrong, __ N.C. App. __, 762 S.E.2d. 641 (Sept. 2, 2014). Although a search of the defendant's vehicle was not proper under *Gant*, it was authorized under the automobile exception where officers had probable cause that the vehicle contained marijuana. After officers saw a vehicle execute a three-point turn in the middle of an intersection, strike a parked vehicle, and continue traveling on the left side of the road, they activated their blue lights to initiate a traffic

stop. Before the vehicle stopped, they saw a brown beer bottle thrown from the driver's side window. After the driver and passenger exited the vehicle, the officers detected an odor of alcohol and marijuana from the inside of the car and discovered a partially consumed bottle of beer in the center console. The defendant was arrested for hit and run and possession of an open container, put in handcuffs, and placed in the back of the officers' cruiser. One of the officers searched the vehicle and retrieved the beer bottle from the center console, a grocery bag containing more beer, and a plastic baggie containing several white rocks, which turned out to be cocaine, in car's glove compartment. After the defendant was charged with possession of cocaine and other offenses, he moved to suppress the evidence found pursuant to the search of his car. The court concluded that although a search of the car was not proper under *Gant,* it was proper under the automobile exception. Specifically, the fact that the officers smelled a strong odor of marijuana inside the vehicle provided probable cause to search.

State v. Mitchell, __ N.C. App. __, 735 S.E.2d 438 (Dec. 4, 2012). The discovery of marijuana on a passenger provided probable cause to search a vehicle. After stopping the defendant and determining that the defendant had a revoked license, the officer told the defendant that the officer's K-9 dog would walk around the vehicle. At that point, the defendant indicated that his passenger had a marijuana cigarette, which she removed from her pants. The officer then searched the car and found marijuana in the trunk.

Administrative Inspections

Los Angeles v. Patel, 576 U.S. ___ (June 22, 2015). (1) In this case where a group of motel owners and a lodging association challenged a provision of the Los Angeles Municipal Code (LAMC) requiring motel owners to turn over to the police hotel registry information, the Court held that facial challenges under the Fourth Amendment are not categorically barred. With respect to the relevant LAMC provisions, §41.49 requires hotel operators to record information about their guests, including: the guest's name and address; the number of people in each guest's party; the make, model, and license plate number of any guest's vehicle parked on hotel property; the guest's date and time of arrival and scheduled departure date; the room number assigned to the guest; the rate charged and amount collected for the room; and the method of payment. Guests without reservations, those who pay for their rooms with cash, and any guests who rent a room for less than 12 hours must present photographic identification at the time of check-in, and hotel operators are required to record the number and expiration date of that document. For those guests who check in using an electronic kiosk, the hotel's records must also contain the guest's credit card information. This information can be maintained in either electronic or paper form, but it must be "kept on the hotel premises in the guest reception or guest check-in area or in an office adjacent" thereto for a period of 90 days. LAMC section 41.49(3)(a) states, in pertinent part, that hotel guest records "shall be made available to any officer of the Los Angeles Police Department for inspection," provided that "[w]henever possible, the inspection shall be conducted at a time and in a manner that minimizes any interference with the operation of the business." A hotel operator's failure to make his or her guest records available for police inspection is a misdemeanor punishable by up to six months in jail and a $1,000 fine. The respondents brought a facial challenge to §41.49(3)(a) on Fourth Amendment grounds, seeking declaratory and injunctive relief. As noted, the Court held that facial challenges under the Fourth Amendment are not barred. (2) Turning to the merits of the

claim, the Court held that the challenged portion on the LAMC is facially unconstitutional because it fails to provide hotel operators with an opportunity for precompliance review. The Court reasoned, in part:

> [A]bsent consent, exigent circumstances, or the like, in order for an administrative search to be constitutional, the subject of the search must be afforded an opportunity to obtain precompliance review before a neutral decisionmaker. And, we see no reason why this minimal requirement is inapplicable here. While the Court has never attempted to prescribe the exact form an opportunity for precompliance review must take, the City does not even attempt to argue that §41.49(3)(a) affords hotel operators any opportunity whatsoever. Section 41.49(3)(a) is, therefore, facially invalid. (citations omitted)

Clarifying the scope of its holding, the Court continued, "As they often do, hotel operators remain free to consent to searches of their registries and police can compel them to turn them over if they have a proper administrative warrant—including one that was issued ex parte—or if some other exception to the warrant requirement applies, including exigent circumstances." The Court went on to reject Justice Scalia's suggestion that hotels are "closely regulated" and that the ordinance is facially valid under the more relaxed standard that applies to searches of that category of businesses.

Jail Searches

Florence v. Board of Chosen Freeholders, 566 U.S. __, 132 S. Ct. 1510 (Apr. 2, 2012). Reasonable suspicion is not required for a close visual inspection of arrestees who will be held in the general population of a detention facility. The petitioner was arrested and taken to the Burlington County Detention Center. Burlington County jail procedures required every arrestee to shower with a delousing agent. Officers would check arrestees for scars, marks, gang tattoos, and contraband as they disrobed. Petitioner claims he was also instructed to open his mouth, lift his tongue, hold out his arms, turn around, and lift his genitals. The petitioner was later transferred to the Essex County Correctional Facility. At that facility all arriving detainees passed through a metal detector and waited in a group holding cell for a more thorough search. When they left the holding cell, they were instructed to remove their clothing while an officer looked for body markings, wounds, and contraband. Without touching the detainees, an officer looked at their ears, nose, mouth, hair, scalp, fingers, hands, arms, armpits, and other body openings. Petitioner alleges he was required to lift his genitals, turn around, and cough in a squatting position. After a mandatory shower, during which his clothes were inspected, petitioner was admitted to the facility. He was released the next day. Petitioner filed suit under 42 U.S.C. §1983 arguing that persons arrested for a minor offense could not be required to remove their clothing and expose their private areas to close visual inspection as a routine part of the intake process. Rather, he contended, officials could conduct this kind of search only if they had reason to suspect a particular inmate of concealing a weapon, drugs, or other contraband. The district court granted the petitioner's motion for summary judgment. The Third Circuit reversed. The Court affirmed, stating in part:

> The question here is whether undoubted security imperatives involved in jail supervision override the assertion that some detainees must be exempt from the more invasive search procedures at issue absent reasonable suspicion of a concealed weapon or other contraband. The Court has held that deference must be

> given to the officials in charge of the jail unless there is "substantial evidence" demonstrating their response to the situation is exaggerated. Petitioner has not met this standard, and the record provides full justifications for the procedures used.

Slip op. at 9-10 (citation omitted). The Court noted that correctional officials have a significant interest in conducting a thorough search as a standard part of the intake process to identify disease, gang affiliation, and locate contraband. The Court rejected the petitioner's assertion that certain detainees, such as those arrested for minor offenses, should be exempt from this process unless they give officers a particular reason to suspect them of hiding contraband. It concluded: "It is reasonable, however, for correctional officials to conclude this standard would be unworkable. The record provides evidence that the seriousness of an offense is a poor predictor of who has contraband and that it would be difficult in practice to determine whether individual detainees fall within the proposed exemption." Slip op. at 14.

Government Employer Searches

City of Ontario v. Quon, 560 U.S. 746, 130 S. Ct. 2619 (June 17, 2010). Because a search of a government employee's text messages sent and received on a government-issued pager was reasonable, there was no violation of Fourth Amendment rights.

Standing

To Challenge Stop of Vehicle

State v. Canty, __ N.C. App. __, 736 S.E.2d 532 (Dec. 18, 2012). A passenger has standing to challenge a stop of a vehicle in which the passenger was riding.

State v. Hernandez, 208 N.C. App. 591 (Dec. 21, 2010). As a passenger in a vehicle that was stopped, the defendant had standing to challenge the stop.

State v. Jackson, 199 N.C. App. 236 (Aug. 18, 2009). A passenger in a vehicle that has been stopped by the police has standing to challenge the constitutionality of the vehicle stop.

To Challenge Search of Premises

State v. Rodelo, __ N.C. App. __, 752 S.E.2d 766 (Jan. 7, 2014). Where the defendant had no ownership or possessory interest in the warehouse that was searched, he had no standing to challenge the search on Fourth Amendment grounds.

To Challenge Search of Vehicle

State v. Mackey, 209 N.C. App. 116 (Jan. 4, 2011). The defendant had no standing to challenge a search of a vehicle when he was a passenger, did not own the vehicle, and asserted no possessory interest in it or its contents.

Regarding Telephone Records

State v. Stitt, 201 N.C. App. 233 (Dec. 8, 2009). The defendant did not have standing to assert a Fourth Amendment violation regarding cellular telephone records where there was no evidence that the defendant had an ownership interest in the telephones or had been given a possessory interest by the legal owner of the telephones. Mere possession of the telephones was insufficient to establish standing.

Waiver

State v. Hodges, 195 N.C. App. 390 (Feb. 17, 2009). By telling the officer that he had to ask the passenger for permission to search the vehicle, the defendant-driver waived any standing that he might have had to challenge the passenger's consent to the search.

State Actor Cases

State v. Weaver, __ N.C. App. __, 752 S.E.2d 240 (Dec. 17, 2013). In granting the defendant's motion to suppress in a DWI case, the trial court erred by concluding that a licensed security officer was a state actor when he stopped the defendant's vehicle. Determining whether a private citizen is a state actor requires consideration of the totality of the circumstances, with special consideration of the citizen's motivation for the search or seizure; the degree of governmental involvement, such as advice, encouragement, and knowledge about the nature of the citizen's activities; and the legality of the conduct encouraged by the police. Importantly, the court noted, once a private search or seizure has been completed, later involvement of government agents does not transform the original intrusion into a governmental search. In the alternative, the court held that even if the security officer was a state actor, reasonable suspicion existed for the stop. Separately, the court found that a number of the trial court's factual findings were not supported by the record.

State v. Verkerk, __ N.C. App. __, 747 S.E.2d 658 (Sept. 3, 2013), *rev'd*, 367 N.C. 483 (June 12, 2014). (1) A seizure occurred when the defendant stopped her vehicle after a fire truck following behind her flashed its red lights and activated its siren. The fireman took this action after observing the defendant, among other things, weave out of her lane of traffic and almost hit a passing bus. (2) The court remanded to the trial court for findings of fact and conclusions of law regarding whether the fireman was acting as a state agent or a private person when the seizure occurred. (3) Whether the fireman lacked the statutory authority to stop the defendant's vehicle is irrelevant to whether the stop violated the Fourth Amendment. The court noted that the US Supreme Court has consistently applied traditional standards of reasonableness to searches or seizures effectuated by government actors who lack state law authority to act as law enforcement officers. Thus, if on remand the trial court determines that the fireman was a government actor, it should then determine whether the stop was constitutionally permissible. (4) The trial court erred by holding that the fireman's stop was justified under G.S. 15A-404, which allows for a citizen's arrest when there is probable cause that certain crimes have been committed. Although reasonable suspicion may have supported a stop in this case, the evidence did not support a finding of probable cause. (5) If on remand the trial court finds that the stop was illegal, it should address whether evidence stemming from the defendant's later arrest by the police is admissible under the inevitable discovery and independent source doctrines. One judge concurred in part and dissented in part. This judge concurred with the conclusion that that stop was a seizure and

that the fireman was not authorized to stop the defendant under G.S. 15A-404. He dissented however because he found that the fireman was a state actor and that the stop violated the NC Constitution.

State v. Jones, 216 N.C. App. 225 (Oct. 4, 2011). The trial court's admission of photo identification evidence did not violate the defendant's right to due process. The day after a break-in at her house, one of the victims, a high school student, became upset in school. Her mother was called to school and brought along the student's sister, who was also present when the crime occurred. After the student told the Principal about the incident, the Principal took the student, her sister and her mother into his office and showed the sisters photographs from the N.C. Sex Offender Registry website to identify the perpetrator. Both youths identified the perpetrator from one of the pictures. The mother then contacted the police and the defendant was eventually arrested. At trial, both youths identified the defendant as the perpetrator in court. The court rejected the defendant's argument that the Principal acted as an agent of the State when he showed the youths the photos, finding that his actions "were more akin to that of a parent, friend, or other concerned citizen offering to help the victim of a crime." Because the Principal was not a state actor when he presented the photographs, the defendant's due process rights were not implicated in the identification. Even if the Principal was a state actor and the procedure used was unnecessarily suggestive, the procedure did not give rise to a substantial likelihood of irreparable misidentification given the circumstances of the identification. Finally, because the photo identification evidence was properly admitted, the trial court also properly admitted the in-court identifications of defendant.

Telephone Records

State v. Stitt, 201 N.C. App. 233 (Dec. 8, 2009). Even if the State did not fully comply with 18 U.S.C. § 2703(d) of the Stored Communications Act, which governs disclosure of customer communications or records, there is no suppression remedy for a violation; the statute only provides for a civil remedy.

Vienna Convention

State v. Herrera, 195 N.C. App. 181 (Feb. 3, 2009). A violation of the Vienna Convention on Consular Relations (requiring notification to arrested foreign national of right to have consul of national's country notified of arrest) does not require suppression of a confession.

Wiretapping

Wright v. Town of Zebulon, 202 N.C. App. 540 (Feb. 16, 2010). Police department did not act "willfully" within the meaning of the North Carolina Electronic Surveillance Act (NCESA) by monitoring an officer's conversations in his patrol car in response to information that the officer was engaging in misconduct. As used in the NCESA, the term requires that the act be done with a bad purpose or without justifiable excuse. Where, as here, the monitoring is done to ensure public safety, it is not done with a bad purpose or without justifiable excuse.

Criminal Offenses

States of Mind

General Intent/Specific Intent Crimes

State v. Maldonado, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). The trial court did not err by denying the defendant's request for a diminished capacity instruction with respect to a charge of discharging a firearm into occupied property that served as a felony for purposes of a felony-murder conviction. Because discharging a firearm into occupied property is a general intent crime, diminished capacity offers no defense.

Transferred Intent

State v. Goode, 197 N.C. App. 543 (June 16, 2009). An instruction on transferred intent was proper in connection with a charge of attempted first-degree murder of victim B where the evidence showed that B was injured during the defendant's attack on victim A, undertaken with a specific intent to kill A.

State v. Small, 201 N.C. App. 331 (Dec. 8, 2009). The doctrine of transferred intent permits the conviction of a defendant for discharging a weapon into occupied property when the defendant intended to shoot a person but instead shot into property that he or she knew was occupied.

State v. Crandell, 208 N.C. App. 227 (Dec. 7, 2010). There was sufficient evidence of premeditation and deliberation when, after having a confrontation with an individual named Thomas, the defendant happened upon Thomas and without provocation began firing at him, resulting in the death of the victim, an innocent bystander. Citing the doctrine of transferred intent, the court noted that "malice or intent follows the bullet."

Participants in Crime

Generally

State v. Surrett, 217 N.C. App. 89 (Nov. 15, 2011). (1) The trial court did not err by instructing the jury that it could find the defendant guilty of second-degree burglary under a theory of accessory before the fact, aiding and abetting, or acting in concert. The separate theories were not separate offenses, but rather merely different methods by which the jury could find the defendant guilty. (2) By enacting G.S. 14-5.2 the General Assembly did not abolish the theory of accessory before the fact; the statute merely abolished the distinction between an accessory before the fact and a principal, meaning that a person who is found guilty as an accessory before the fact should be convicted as a principal to the crime.

Acting in Concert

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). In a capital case involving two perpetrators, the court rejected the defendant's argument that the State should have been obligated to prove that the defendant himself had the requisite intent. The trial court properly instructed on acting in

concert with respect to the murder charge, in accordance with *State v. Barnes*, 345 N.C. 184 (1998).

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The evidence was sufficient to support convictions for murder, burglary, and armed robbery on theories of acting in concert and aiding and abetting. The court noted that neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement. The State's evidence showed that the defendant was present for the discussions and aware of the group's plan to rob the victim Wiggins; she noticed an accomplice's gun; she was sitting next to another accomplice in a van when he loaded his shotgun; she told the group that she did not want to go up to the house but remained outside the van; she walked toward the house to inform the others that two victims had fled; she told two accomplices "y'all need to come on;" she attempted to start the van when an accomplice returned but could not release the parking brake; and she assisted in unloading the goods stolen from Wiggins' house into an accomplice's apartment after the incident.

State v. Rowe, __ N.C. App. __, 752 S.E.2d 223 (Dec. 17, 2013). In an assault inflicting serious injury case, the evidence was sufficient to show that the defendant acted in concert with other assailants and thus that he was guilty of the offense even if the injuries he personally inflicted did not constitute "serious injury."

State v. Facyson, __ N.C. App. __, 743 S.E.2d 252 (June 4, 2013), *reversed on other grounds* 367 N.C. 454 (June 12 2014). The evidence was sufficient to show that the defendant committed second-degree murder either alone or in concert with others. The defendant was present with two men who borrowed a red Ford from David Andrews. The three men did not return the car to Andrews and the defendant was later seen driving the car. Two witnesses said that the men who fired the shots at the victim were in a sedan, and one said that the car was red. Two other witnesses established that the red Ford was parked in an apartment complex parking lot shortly after the shooting. The defendant and the others who borrowed the car went to the lot and one of the men was seen wiping the car. The keys to the car were found in the grass near the parking lot after one of the men fled and was seen throwing an object. A bullet casing consistent with bullets found at the murder scene was found in the car, and particles consistent with gunshot residue were found on all of the men, including one particle on the defendant's pants.

State v. Greenlee, __ N.C. App. __, 741 S.E.2d 498 (May 7, 2013). In a case involving charges of obtaining property by false pretenses arising out of sales to a pawn shop in which another person told the shop that the items were not stolen, the evidence was insufficient to show that the defendant was acting in concert. Assuming that the State sufficiently established the other elements of acting in concert, there was no evidence that the defendant was either actually present or near enough to render assistance as needed to his alleged accomplice.

State v. James, __ N.C. App. __, 738 S.E.2d 420 (Mar. 19, 2013). In a kidnapping and armed robbery case the evidence was sufficient that the defendant acted in concert with an accomplice. Although the defendant argued that the evidence established that he was merely present at the scene, the evidence showed that he aided his co-conspirator.

State v. Bowden, 216 N.C. App.275 (Oct. 4, 2011). The trial court did not err by dismissing charges of felony breaking or entering and felony larceny. The State presented evidence that an unknown man, who appeared to be concealing his identity, was seen walking around the victim's yard carrying property later determined to have been taken from the victim's home. The man fled when he saw officers and was never apprehended or identified. The defendant was also seen in the yard, but was never seen entering or leaving the home or carrying any stolen property. Although the defendant also fled from officers, no evidence linked him to the unknown man. The defendant's presence in the yard and his flight was insufficient evidence of acting in concert.

State v. Jackson, 215 N.C. App. 339 (Sept. 6, 2011). The evidence was sufficient to support a conviction of armed robbery under an acting in concert theory. Although the record did not reveal whether the defendant shared the intent or purpose to use a dangerous weapon during the robbery, this was not a necessary element under the theory of acting in concert.

State v. Hill, 210 N.C. App. 170 (Mar. 1, 2011). In a case in which there was a dissenting opinion, the court held that there was sufficient evidence that the defendant acted in concert with another to commit a robbery. The evidence showed that he was not present at the ATM where the money was taken, but was parked nearby in a getaway vehicle.

State v. Clagon, 207 N.C. App. 346 (Oct. 5, 2010). The court rejected the defendant's argument that to convict of burglary by acting in concert the State was required to show that the defendant had the specific intent that one of her accomplices would assault the victim with deadly weapon. The State's evidence, showing that the defendant forcibly entered the residence accompanied by two men carrying guns and another person, armed with an axe, who immediately asked where the victim was located, was sufficient evidence that an assault on the victim was in pursuance of a common purpose or as a natural or probable consequence thereof.

State v. Gabriel, 207 N.C. App. 440 (Oct. 19, 2010). There was sufficient evidence of acting in concert with respect to a murder and felony assault, notwithstanding the defendant's exculpatory statement that he "got caught in the middle" of the events in question. Other evidence permitted a reasonable inference that the defendant and an accomplice were shooting at the victims pursuant to a shared or common purpose.

Aiding and Abetting

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The evidence was sufficient to support convictions for murder, burglary, and armed robbery on theories of acting in concert and aiding and abetting. The court noted that neither acting in concert nor aiding and abetting require a defendant to expressly vocalize her assent to the criminal conduct; all that is required is an implied mutual understanding or agreement. The State's evidence showed that the defendant was present for the discussions and aware of the group's plan to rob the victim Wiggins; she noticed an accomplice's gun; she was sitting next to another accomplice in a van when he loaded his shotgun; she told the group that she did not want to go up to the house but remained outside the van; she walked toward the house to inform the others that two victims had fled; she told two accomplices "y'all need to come on;" she attempted to start the van when an accomplice returned

but could not release the parking brake; and she assisted in unloading the goods stolen from Wiggins' house into an accomplice's apartment after the incident.

Accessory Before the Fact

State v. Grainger, ___ N.C. ___, 766 S.E.2d 280 (Dec. 19, 2014). In this murder case, the trial court did not err by denying the defendant's request for a jury instruction on accessory before the fact. Because the defendant was convicted of first-degree murder under theories of both premeditation and deliberation and the felony murder rule and the defendant's conviction for first-degree murder under the theory of felony murder is supported by the evidence (including the defendant's own statements to the police and thus not solely based on the uncorroborated testimony of the principal), the court of appeals erred by concluding that a new trial was required.

General Crimes

Accessory After the Fact

State v. Cousin, __ N.C. App. __, 757 S.E.2d 332 (April 15, 2014). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of accessory after the fact to murder where the defendant gave eight different written statements to authorities providing a wide array of scenarios surrounding the victim's death. In his statements the defendant identified four different individuals as being the perpetrator. He also admitted that he had not been truthful to investigators. The court concluded: "The jury could rationally have concluded that his false statements were made in an effort to shield the identity of the actual shooter." The court noted that competent evidence suggested that the defendant knew the identity of the shooter and was protecting that person, including knowledge of the scene that could only have been obtained by someone who had been there and statements made by the defendant to his former girlfriend. Additionally, the defendant admitted to officers that he named one person "as a block" and acknowledged that his false statement made the police waste time. (2) No double jeopardy violation occurred when the trial court sentenced the defendant for obstruction of justice and accessory after the fact arising out of the same conduct. Comparing the elements of the offenses, the court noted that each contains an element not in the other and thus no double jeopardy violation occurred.

State v. Schiro, 219 N.C. App. 105 (Feb. 21, 2012). In an accessory after the fact case the evidence was sufficient to establish that the defendant knew that a gun he had hidden was used to commit a murder.

State v. Surrett, 217 N.C. App. 89 (Nov. 15, 2011). The trial court erred in failing to arrest judgment on the defendant's conviction for accessory after the fact to second-degree burglary. A defendant cannot be both a principal and an accessory to the same crime.

State v. Cole, 209 N.C. App. 84 (Jan. 4, 2011). (1) The State presented sufficient evidence of accessory after the fact to a second-degree murder perpetrated by Stevons. After Stevons shot the victim, the defendant drove Stevons away from the scene. The victim later died. The court rejected the defendant's argument that because he gave aid after the victim had been wounded

but before the victim died, he did not know that Stevons had committed murder. It concluded that because the defendant knew that Stevons shot the victim at close range, a jury could reasonably infer that the defendant knew that the shot was fatal. (2) The State presented sufficient evidence of accessory after the fact to armed robbery when it showed both that an armed robbery occurred and that the defendant rendered aid after the crime was completed. The court rejected the defendant's argument that the robbery was not complete until the defendant arrived at a safe place, concluding that a taking is complete once the thief succeeds in removing the stolen property from the victim's possession. (3) Although a mere presence instruction may be appropriate for aiding and abetting or accessory before the fact, such an instruction is not proper for accessory after the fact and thus the trial judge did not err by declining to give this instruction.

State v. Best, 196 N.C. App. 220 (Apr. 7, 2009). Double jeopardy prohibited convictions of both accessory after fact to first-degree murder and accessory after the fact to first-degree kidnapping when the jury could have found that accessory after fact of first-degree murder was based solely on kidnapping under the felony murder rule. The jury's verdict did not indicate whether it found first-degree murder based on premeditation and deliberation or felony murder based on first-degree kidnapping, or both. The court arrested judgment on the defendant's convictions of accessory after the fact to first-degree kidnapping, reasoning that if a defendant cannot be convicted of felony murder and the underlying felony, a defendant could not be convicted of accessory after the fact to felony murder and accessory after the fact to the underlying felony.

State v. Keller, 198 N.C. App. 639 (Aug. 4, 2009). A defendant may not be convicted of second-degree murder and accessory after the fact to first-degree murder. The offenses are mutually exclusive.

State v. McGee, 197 N.C. App. 366 (June 2, 2009). The defendant could be convicted of accessory after the fact to assault with a deadly weapon with intent to kill inflicting serious injury even if the principal pled guilty to a lesser offense of that assault.

Attempt

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). Because attempted first-degree felony murder does not exist under the laws of North Carolina, the court vacated the defendant's conviction with respect to this charge.

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014). In a child sex case, the court held that the evidence was sufficient to support a charge of attempted first-degree statutory sexual offense. On the issue of intent to commit the crime, the court stated: "The act of placing one's penis on a child's buttocks provides substantive evidence of intent to commit a first degree sexual offense, specifically anal intercourse."

State v. Primus, __ N.C. App. __, 742 S.E.2d 310 (May 21, 2013). Where the evidence showed that the defendant committed the completed crime of felony larceny, the evidence was sufficient to support a conviction of the lesser charged offense of attempted felony larceny.

State v. Norman, __ N.C. App. __, 741 S.E.2d 683 (May 7, 2013). Because evidence of vaginal penetration was clear and positive, the trial court did not err by failing to instruct the jury on attempted rape.

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of attempted first-degree murder where the defendant shot the victim in the abdomen. The defendant removed the victim's cell phone from her reach, left the room, returned with a .45 caliber pistol, and shot her in the abdomen with a hollow point bullet. He then denied her medical assistance for approximately twelve hours.

State v. Lawrence, 210 N.C. App. 73 (Mar. 1, 2011), *rev'd on other grounds*, 365 N.C. 506 (Apr. 13, 2012). (1) The evidence was sufficient to prove attempted kidnapping. To prove an overt act for that crime, the State need not prove that the defendant was in the presence of his intended victim. In this case, the defendant and his accomplices stole get-away cars and acquired cell phones, jump suits, masks, zip ties, gasoline, and guns. Additionally, the defendant hid in the woods behind the home of his intended victim, waiting for her to appear, fleeing only upon the arrival of officers and armed neighbors. (2) The court rejected the defendant's argument that the evidence of attempted kidnapping was insufficient because the restraint he intended to use on his victim was inherent to his intended robbery of her. The defendant planned to intercept the victim outside of her home and force her back into the house at gunpoint, bind her hands so that she could not move, and threaten to douse her with gasoline if she did not cooperate. These additional acts of restraint by force and threat provided substantial evidence that the defendant's intended actions would have exposed the victim to greater danger than that inherent in the armed robbery itself. (3) The court rejected the defendant's argument that to prove an overt act for attempted robbery the State had to prove that the defendant was in the presence of his intended victim. For the reasons stated in (1), above, the court found that there was sufficient evidence of an overt act. (4) The court rejected the defendant's argument that because the evidence failed to show that he and his co-conspirators entered the property in question, they could not have attempted to enter her residence.

Conspiracy

Smith v. United States, 568 U.S. __, 133 S. Ct. 714 (Jan. 9, 2013). In a case involving federal drug and RICO conspiracy charges the Court held that allocating to the defendant the burden of proving withdrawal from the conspiracy does not violate the Due Process Clause. This rule remains intact even when withdrawal is the basis of a statute of limitations defense.

State v. Davis, __ N.C. App. __, 762 S.E.2d 886 (Sept. 16, 2014). The evidence was sufficient to show a drug trafficking conspiracy where there was evidence of an implied agreement between the defendant and his accomplice. The defendant was present at the scene and aware that his accomplice was involved producing methamphetamine and there was sufficient evidence that the defendant himself was involved in the manufacturing process. The court concluded: "Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, we hold the evidence sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss."

State v. McClaude, __ N.C. App. __, 765 S.E.2d 104 (Nov. 18, 2014). Finding *State v. Euceda-Valle*, 182 N.C. App. 268, 276 (2007), controlling, the court held that there was insufficient evidence that the defendant and another person named Hall conspired to sell and deliver cocaine. The evidence showed only that the drugs were found in a car driven by Hall in which the defendant was a passenger.

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014). The evidence was insufficient to support trafficking by conspiracy convictions against both defendants. The drugs were found in secret compartments of a truck. Defendant Villalvavo was driving the vehicle, which was owned by a passenger, Velazquez-Perez, who hired Villalvavo to drive the truck. While evidence regarding the truck's log books may have been incriminating as to Velazquez-Perez, it did not apply to Villalvavo, who had not been working for Velazquez-Perez long and had no stake in the company or control over Velazquez-Perez.

State v. Fish, __ N.C. App. __, 748 S.E.2d 65 (Sept. 17, 2013). In a case in which the defendant was charged with conspiracy to commit felony larceny, the trial court did not err by denying the defendant's motion to submit a jury instruction on conspiracy to commit misdemeanor larceny. The court determined that evidence of the cumulative value of the goods taken is evidence of a conspiracy to steal goods of that value, even if the conspirators' agreement is silent as to exact quantity. Here, the evidence showed that the value of the items taken was well in excess of $1,000.

State v. Oliphant, __ N.C. App. __, 747 S.E.2d 117 (Aug. 6, 2013). There was sufficient evidence of a conspiracy to commit armed robbery. The victim was approached from behind by both defendants while walking alone. One defendant held the gun while the other reached for her cellphone. Although not showing an express agreement between defendants, these circumstances sufficiently establish an implied agreement to rob the victim with a firearm.

State v. Rogers, __ N.C. App. __, 742 S.E.2d 622 (June 4, 2013). The evidence was sufficient to show a conspiracy to commit a robbery with a dangerous weapon. The defendant argued that there was no express agreement to use a dangerous weapon. The court held, in part, that there was an implied understanding to use such a weapon.

State v. Torres-Gonzalez, __ N.C. App. __, 741 S.E.2d 502 (May 7, 2013). (1) The evidence was sufficient to support a charge of conspiracy to traffic in cocaine by possession. A detective arranged for a cocaine sale. The defendant and an individual named Blanco arrived at the preset location and both came over to the detective to look at the money. The defendant and Blanco left together, with the defendant telling Blanco to wait at a parking lot for delivery of the drugs. Later, the defendant told Blanco to come to the defendant's house to get the drugs. Blanco complied and completed the sale. (2) The court rejected the defendant's argument that verdicts finding him guilty of conspiracy to commit trafficking by possession but not guilty of trafficking by possession were legally inconsistent because both crimes required the defendant to have possession. Because conspiracy to traffic by possession does not include possession as an element, the fact that the defendant was convicted of that crime and not convicted of trafficking by possession does not present any inconsistency, legal or otherwise.

State v. Lawrence, 210 N.C. App. 73 (Mar. 1, 2011), *rev'd on other grounds*, 365 N.C. 506 (Apr. 13, 2012). (1) The evidence was insufficient to support two charges of conspiracy to commit armed robbery. Having failed to achieve the objective of the conspiracy on their first attempt, the defendant and his co-conspirators returned the next day to try again. When the State charges separate conspiracies, it must prove not only the existence of at least two agreements, but also that they were separate. There is no bright-line test for whether multiple conspiracies exist. The essential question is the nature of the agreement(s), but factors such as time intervals, participants, objectives, and number of meetings must be considered. Applying this analysis, the court concluded that only one agreement existed. In both attempts, the intended victim and participants were the same; the time interval between the two attempts was approximately 36 hours; on the second attempt the group did not agree to a new plan; and while the co-conspirators considered robbing a different victim, that only was a back-up plan. The court rejected the State's argument that because the co-conspirators met after the first attempt, acquired additional materials, made slight modifications on how to execute their plan, and briefly considered robbing a different victim, they abandoned their first conspiracy and formed a second one. (2) The trial judge committed plain error by failing to instruct the jury on all elements of conspiracy to commit armed robbery. The judge instructed the jury that armed robbery involved a taking from the person or presence of another while using or in the possession of a firearm. The judge failed to instruct on the element of use of the weapon to threaten or endanger the life of the victim.

State v. Boyd, 209 N.C. App. 418 (Feb. 1, 2011). In a conspiracy to commit robbery case, the evidence was sufficient to establish a mutual, implied understanding between the defendant and another man to rob the victim. The other man drove the defendant to intercept the victim; the defendant wore a ski mask and had a gun; after the defendant hesitated to act, the other person assaulted the victim and took his money; and the two got into the car and departed.

State v. Dubose, 208 N.C. App. 406 (Dec. 7, 2010). The trial court did not err by denying the defendant's motion to dismiss a charge of conspiracy to discharge a firearm into occupied property. The defendant, Ray, Johnson, and Phelps left a high school basketball game because of the presence of rival gang members. As they left, the defendant suggested that he was going to kill someone. A gun was retrieved from underneath the driver's side seat of Johnson's vehicle and Johnson let Ray drive and the defendant to sit in the front because the two "were about to do something." Ray and the defendant argued over who was going to shoot the victim but in the end Ray drove by the gym and the defendant fired twice at the victim, who was standing in front of the gym. The court rejected the defendant's argument that the evidence failed to show an agreement to discharge the firearm into occupied property, noting that the group understood and impliedly agreed that the defendant would shoot the victim as they drove by, the victim was standing by the gym doors, and there was a substantial likelihood that the bullets would enter or hit the gym.

State v. Sanders, 208 N.C. App. 142 (Nov. 16, 2010). Evidence of the words and actions of the defendant and others, when viewed collectively, provided sufficient evidence of an implied agreement to assault the victim. The court noted that the spontaneity of the plan did not defeat the conspiracy and that a meeting of the minds can occur when a party accepts an offer by actions.

State v. Robledo, 193 N.C. App. 521 (Nov. 4, 2008). There was sufficient evidence to support the defendant's conviction of conspiracy to traffic in marijuana; the fact that the state took a voluntary dismissal of the conspiracy charge against the co-conspirator was irrelevant to that determination.

Overbreadth and Vagueness

State v. Mello, 200 N.C. App. 561 (Nov. 3, 2009). A city ordinance prohibiting loitering for the purpose of engaging in drug-related activity is unconstitutionally overbroad. Additionally, one subsection of the ordinance is void for vagueness, and another provision violates the Fourth Amendment by allowing the police to arrest in the absence of probable cause.

First Amendment Issues

United Sates v. Alvarez, 567 U.S. __, 132 S. Ct. 2537 (June 28, 2012). The Stolen Valor Act, 18 U.S.C. § 704, is unconstitutional under the First Amendment. The Act makes it a federal crime to lie about having received a military decoration or medal.

United States v. Stevens, 559 U.S. 460 (Apr. 20, 2010). Federal statute enacted to criminalize the commercial creation, sale, or possession of certain depictions of animal cruelty was substantially overbroad and violated the First Amendment.

Snyder v. Phelps, 562 U.S. 443 (Mar. 2, 2011). The First Amendment shields members of a church from tort liability for picketing near a soldier's funeral. A jury held members of the Westboro Baptist Church liable for millions of dollars in damages for picketing near a soldier's funeral service. The picket signs reflected the church's view that the United States is overly tolerant of sin and that God kills American soldiers as punishment. The picketing occurred in Maryland. Although that state now has a criminal statute in effect restricting picketing at funerals, the statute was not in effect at the time the conduct at issue arose. Noting that statute and that other jurisdictions have enacted similar provisions, the Court stated: "To the extent these laws are content neutral, they raise very different questions from the tort verdict at issue in this case. Maryland's law, however, was not in effect at the time of the events at issue here, so we have no occasion to consider how it might apply to facts such as those before us, or whether it or other similar regulations are constitutional." Slip Op. at 11. [**Author's note**: In North Carolina, G.S. 14-288.4(a)(8), criminalizes disorderly conduct at funerals, including military funerals. In a prosecution for conduct prohibited by that statute, the issue that the U.S. Supreme Court did not have occasion to address may be presented for decision].

Homicide

Born Alive Rule

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). The trial court did not err by denying the defendant's motion to dismiss first-degree murder charges where the victim was in utero at the time of the incident but was born alive and lived for one month before dying.

State v. Chapman, 218 N.C. App. 428 (Feb. 7, 2012). Because of a procedural error by the State, the court declined to address an issue regarding the born alive rule presented in the State's appeal of a trial court's order dismissing capital murder charges. The defendant shot a woman who was pregnant with twins. Although the bullet did not strike the fetuses, the injury caused a spontaneous abortion. While both twins had heartbeats, experts said that they were pre-viable.

Drug-Related Deaths

State v. Barnes, __ N.C. App. __, 741 S.E.2d 457 (April 2, 2013). (1) In a case in which the victim died after consuming drugs provided by the defendant and the defendant was convicted of involuntary manslaughter, the trial court did not err by instructing the jury on second-degree murder and the lesser offense of involuntary manslaughter. The defendant objected to submission of the lesser offense. The evidence showed that the defendant sold the victim methadone and that the defendant had nearly died the month before from a methadone overdose. There was no evidence that the defendant intended to kill the victim by selling him the methadone. This evidence would support a finding by the jury of reckless conduct under either second-degree murder or involuntary manslaughter. (2) The court also rejected the defendant's argument that under G.S. 14-17, he only could have been convicted of second-degree murder for his conduct.

Felony-Murder

State v. Maldonado, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In this first-degree murder case, the court rejected the defendant's argument that there was an insufficient relationship between the felony supporting felony-murder (discharging a firearm into occupied property) and the death. The law requires only that the death occur "in the perpetration or attempted perpetration" of a predicate felony; there need not be a causal "causal relationship"' between the felony and the homicide. All that is required is that the events occur during a single transaction. Here, the defendant stopped shooting into the house after forcing his way through the front door; he then continued shooting inside. The defendant argued that once he was inside the victim attempted to take his gun and that this constituted a break in the chain of events that led to her death. Even if this version of the facts were true, the victim did not break the chain of events by defending herself inside her home after the defendant continued his assault indoors.

State v. Perry, __ N.C. App. __, 750 S.E.2d 521 (Aug. 20, 2013). In this child homicide case, the trial court did not err by denying the defendant's motion to dismiss a charge of felony-murder based on an underlying felony child abuse. Prior to the incident in question the victim was a normal, healthy baby. After having been left alone with the defendant, the victim was found unconscious, unresponsive, and barely breathing. The child's body had bruises and scratches, including unusual bruises on her buttocks that were not "typical" of the bruises that usually resulted from a fall and a recently inflicted blunt force injury to her ribs that did not appear to have resulted from the administration of CPR. An internal examination showed extensive bilateral retinal hemorrhages in multiple layers of the retinae, significant cerebral edema or swelling, and extensive bleeding or subdural hemorrhage in the brain indicating that her head had been subjected to a number of individual and separate blunt force injuries that were

sufficiently significant to damage her brain and to cause a leakage of blood. Her injuries, which could have been caused by human hands, did not result from medical treatment or a mere fall from a couch onto a carpeted floor.

State v. McMillan, 214 N.C. App. 320 (Aug. 2, 2011). The evidence was sufficient to support a first-degree felony-murder conviction when the underlying felony was armed robbery and where the defendant used the stolen item—a .357 Glock handgun—to commit the murder and the two crimes occurred during a continuous transaction.

State v. Freeman, 202 N.C. App. 740 (Mar. 2, 2010). The trial court properly submitted felony-murder to the jury based on underlying felony of attempted sale of a controlled substance with the use of a deadly weapon. The defendant and an accomplice delivered cocaine to the victim. Approximately one week later, they went to the victim's residence to collect the money owed for the cocaine and at this point, the victim was killed. At the time of the shooting, the defendant was engaged in an attempted sale of cocaine (although the cocaine had been delivered, the sale was not consummated because payment had not been made) and there was no break in the chain of events between the attempted sale and the murder.

Voluntary Manslaughter

State v. English, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). The trial court did not err by denying the defendant's motion to dismiss a voluntary manslaughter charge. The court rejected the defendant's argument that there was insufficient evidence that she killed the victim by an intentional and unlawful act, noting that although there was no direct evidence that the defendant was aware that she hit the victim with her car until after it occurred, there was circumstantial evidence that she intentionally struck him. Specifically, the victim had a history, while under the influence of drugs and/or alcohol (as he was on the day in question), of acting emotionally and physically abusive towards the defendant; when the victim was angry, he would tell the defendant to "[g]et her stuff and get out," so the defendant felt "trapped"; on the day in question the victim drank alcohol and allegedly smoked crack before hitting the defendant in the face, knocking her from the porch to the yard; the defendant felt scared and went "to a different state of mind" after being hit; before driving forward in her vehicle, the defendant observed the victim standing in the yard, near the patio stairs; and the defendant struck the stairs because she "wanted to be evil too." The court concluded: "From this evidence, a jury could find Defendant felt trapped in a cycle of emotional and physical abuse, and after a particularly violent physical assault, she decided it was time to break free."

Involuntary Manslaughter

State v. Hatcher, __ N.C. App. __, 750 S.E.2d 598 (Dec. 3, 2013). The trial court erred by denying the defendant's motion to dismiss a second-degree murder charge where there was insufficient evidence of malice and the evidence showed that the death resulted from a mishap with a gun. The court remanded for entry of judgment for involuntary manslaughter.

State v. Fisher, __ N.C. App. __, 745 S.E.2d 894 (Aug. 6, 2013). The trial court properly denied the defendant's motion to dismiss a charge of involuntary manslaughter. The primary issue

raised in the defendant's appeal was whether there was sufficient evidence that the defendant committed a culpably negligent act which proximately resulted in the victim's death. The evidence showed that the defendant became angry at the victim during the defendant's party and "kicked or stomped" his face, leaving the victim semiconscious; the defendant was irritated that he had to take the victim to meet the victim's parents at a church; instead of taking the victim to the church, the defendant drove him to an isolated parking area and again beat him; the defendant abandoned the victim outside knowing that the temperature was in the 20s and that the victim had been beaten, was intoxicated, and was not wearing a shirt; the defendant realized his actions put the victim in jeopardy; and even after being directly informed by his father that the victim was missing and that officers were concerned about him, the defendant lied about where he had last seen the victim, hindering efforts to find and obtain medical assistance for the victim. On these facts, the court had "no difficulty" concluding that there was sufficient evidence that the defendant's actions were culpably negligent and that he might have foreseen that some injury would result from his act or omission, or that consequences of a generally injurious nature might have been expected.

State v. Noble, __ N.C. App. __, 741 S.E.2d 473 (April 16, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of involuntary manslaughter where a person under 21 years of age died as a result of alcohol poisoning and it was alleged that the defendant aided and abetted the victim in the possession or consumption of alcohol in violation or G.S. 18B-302. The court rejected the defendant's argument that the State was required to prove that the defendant provided the victim with the specific alcohol he drank on the morning of his death. The court concluded that the evidence was sufficient, stating:

The evidence established that defendant frequently hosted parties at her home during which defendant was aware that underage people, including [the victim], consumed alcohol. On at least one occasion, defendant was seen offering alcohol to [the victim], and defendant knew the [victim] was under the age of 21. The State presented substantial evidence that defendant's actions of allowing [the victim] to consume, and providing [the victim] with, alcohol were part of a plan, scheme, system, or design that created an environment in which [the victim] could possess and consume alcohol and that her actions were to consume, and providing [the victim] with, alcohol were part of a plan, scheme, system, or design that created an environment in which [the victim] could possess and consume alcohol and that her actions were done knowingly and were not a result of mistake or accident. Viewed in the light most favorable to the State, we conclude the evidence was sufficient to allow a reasonable juror to conclude that defendant assisted and encouraged [the victim] to possess and consume the alcohol that caused his death.

State v. Elmore, __ N.C. App. __, 736 S.E.2d 568 (Dec. 18, 2012). G.S. 20-141.4(c) does not bar simultaneous prosecutions for involuntary manslaughter and death by vehicle; it only bars punishment for both offenses when they arise out of the same death.

State v. Lewis, __ N.C. App. __, 732 S.E.2d 589 (Sept. 4, 2012). The State presented sufficient evidence of involuntary manslaughter. The State proved that an unlawful killing occurred with evidence that the defendant committed the misdemeanor of improper storage of a firearm. Additionally, the State presented sufficient evidence that the improper storage was the proximate cause of the child's death.

Jury Instructions

State v. Sterling, __ N.C. App. __, 758 S.E.2d 884 (May 6, 2014). In this felony-murder case the trial court did not err by denying the defendant's request to instruct on second-degree murder. The underlying felony was armed robbery and the defendant's own testimony established all the elements of that offense.

State v. Barnes, __ N.C. App. __, 741 S.E.2d 457 (April 2, 2013). In a case in which the victim died after consuming drugs provided by the defendant and the defendant was convicted of involuntary manslaughter, the trial court did not err by instructing the jury on second-degree murder and the lesser offense of involuntary manslaughter. The defendant objected to submission of the lesser offense. The evidence showed that the defendant sold the victim methadone and that the defendant had nearly died the month before from a methadone overdose. There was no evidence that the defendant intended to kill the victim by selling him the methadone. This evidence would support a finding by the jury of reckless conduct under either second-degree murder or involuntary manslaughter.

State v. DeBiase, 211 N.C. App. 497 (May 3, 2011). In a case in which the defendant was convicted of second-degree murder, the trial court committed reversible error by denying the defendant's request for a jury instruction on involuntary manslaughter. The evidence tended to show that the defendant did not intend to kill or seriously injure the victim: the victim became angry at the defendant when the defendant offered drugs to the victim's girlfriend; after the victim punched or shoved the defendant, others separated the men; the victim then charged at the defendant, who struck him on the head or neck with a beer bottle, shattering the bottle; the defendant and the victim struggled and fell; and the defendant did not stab the victim. Cause of death was a large laceration to the neck. The court rejected the State's argument that the defendant's admission that he intentionally hit the victim with the bottle supported the trial court's refusal to instruct on involuntary manslaughter. Although the intentional use of a deadly weapon causing death creates a presumption of malice, if the defendant adduces evidence or relies on a portion of the State's evidence raising an issue on the existence of malice and unlawfulness, the presumption disappears, leaving only a permissible inference which the jury may accept or reject. Here, the defendant's evidence sufficed to so convert the presumption.

State v. Simonovich, 202 N.C. App. 49 (Jan. 19, 2010). The trial court did not err by denying the defendant's request for a voluntary manslaughter instruction. Although the defendant knew that his wife was having sex with other men and she threatened to continue this behavior, the defendant did not find her in the act of intercourse with another or under circumstances clearly indicating that the act had just been completed. Additionally, the defendant testified that he strangled his wife to quiet her.

Lying in Wait

State v. Grullon, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2015). In this first-degree murder case, the trial court did not err by instructing the jury on a theory of lying in wait. The court rejected the defendant's argument that this theory required the State to prove a "deadly purpose"

to kill, noting that the state Supreme Court has held that "lying in wait is a physical act and does not require a finding of any specific intent." (quotation omitted). The court continued:

> As the Supreme Court has previously held, [h]omicide by lying in wait is committed when: the defendant lies in wait for the victim, that is, waits and watches for the victim in ambush for a private attack on him, intentionally assaults the victim, proximately causing the victim's death. In other words, a defendant need not intend, have a purpose, or even expect that the victim would die. The only requirement is that the assault committed through lying in wait be a proximate cause of the victim's death.

(quotation and citation omitted). The court went on to find that the evidence was sufficient to support a lying in wait instruction where the defendant waited underneath a darkened staircase for the opportunity to rob the victim.

State v. Gosnell, __ N.C. App. __, 750 S.E.2d 593 (Dec. 3, 2013). The evidence supported a jury instruction for first-degree murder by lying in wait. The evidence showed that the defendant parked outside the victim's house and waited for her. All of the following events occurred 15-20 minutes after the victim exited her home: the defendant confronted the victim and an argument ensued; the defendant shot the victim; a neighbor arrived and saw the victim on the ground; the defendant shot the victim again while she was lying on the ground; the neighbor drove away and called 911; and an officer arrived on the scene. This evidence suggests that the shooting immediately followed the defendant's ambush of the victim outside the house.

Malice

State v. Posey, __ N.C. App. __, 757 S.E.2d 369 (May 6, 2014). In this murder case where the trial court submitted jury instructions on both second-degree murder and voluntary manslaughter, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the second-degree murder charge. The defendant argued that there was insufficient evidence that he acted with malice and not in self-defense. The court noted that any discrepancy between the State's evidence and the defendant's testimony was for the jury to resolve.

State v. Hatcher, __ N.C. App. __, 750 S.E.2d 598 (Dec. 3, 2013). The trial court erred by denying the defendant's motion to dismiss a second-degree murder charge where there was insufficient evidence of malice and the evidence showed that the death resulted from a mishap with a gun. The court remanded for entry of judgment for involuntary manslaughter.

State v. Grooms, __ N.C. App. __, 748 S.E.2d 162 (Oct. 1, 2013). In a second-degree murder case arising after the defendant drove impaired and hit and killed two bicyclists, there was sufficient evidence of malice. The defendant's former girlfriend previously warned him of the dangers of drinking and driving; the defendant's prior incident of drinking and driving on the same road led the girlfriend to panic and fear for her life; the defendant's blood alcohol level was .16; the defendant consumed an illegal controlled substance that he knew was impairing; the defendant swerved off the road three times prior to the collision, giving him defendant notice that he was driving dangerously; despite this, the defendant failed to watch the road and made a phone call immediately before the collision; the defendant failed to apply his brakes before or after the collision; and the defendant failed to call 911 or provide aid to the victims.

State v. Rollins, 220 N.C. App. 443 (May 15, 2012). In a second-degree murder case stemming from a vehicle accident, there was sufficient evidence of malice. The defendant knowingly drove without a license, having been cited twice for that offense in the three weeks prior to the accident. When the original driver wanted to pull over for the police, the defendant took control of the vehicle by climbing over the back seat and without stopping the vehicle. He was attempting to evade the police because of a large volume of shoplifted items in his vehicle and while traveling well in excess of the speed limit. He crossed a yellow line to pass vehicles, twice passed vehicles using a turn lane, drove through a mowed corn field and a ditch, and again crossed the center line to collide with another vehicle while traveling 66 mph and without having applied his brakes. To avoid arrest, the defendant repeatedly struck an injured passenger as he tried to get out of the vehicle and escape.

State v. Pierce, 216 N.C. App. 377 (Oct. 18, 2011). In a case in which a second officer got into a vehicular accident and died while responding to a first officer's communication about the defendant's flight from a lawful stop, the evidence was sufficient to establish malice for purposes of second-degree murder. The defendant's intentional flight from the first officer–including driving 65 mph in a residential area with a speed limit of 25 mph and throwing bags of marijuana out of the vehicle–reflected knowledge that injury or death would likely result and manifested depravity of mind and disregard of human life.

State v. Trogdon, 216 N.C. App. 15 (Sept. 20, 2011). There was sufficient evidence of malice to support a second-degree murder conviction. Based on expert testimony the jury could reasonably conclude that the child victim did not die from preexisting medical conditions or from a fall. The jury could find that while the victim was in the defendant's sole custody, he suffered non-accidental injuries to the head with acute brain injury due to blunt force trauma of the head. The evidence would permit a finding that the victim suffered a minimum of four impacts to the head, most likely due to his head being slammed into some type of soft object. Combined with evidence that the defendant bit the victim, was upset about the victim's mother's relationship with the victim's father, and that the defendant resented the victim, the jury could find that the defendant intentionally attacked the month-old child, resulting in his death.

State v. McMillan, 214 N.C. App. 320 (Aug. 2, 2011). There was sufficient evidence of malice to sustain a second-degree murder conviction. Because there was evidence that the defendant killed the victim with a deadly weapon, the jury could infer that the killing was done with malice. The court rejected the defendant's argument that his statements that he and the victim "had words or something" provided evidence of provocation sufficient to negate the malice presumed from the use of a deadly weapon or require a voluntary manslaughter instruction.

State v. Norman 213 N.C. App. 114 (July 5, 2011). There was sufficient evidence of malice in a case arising from a vehicle accident involving impairment. The defendant admitted that he drank 4 beers prior to driving. The State's expert calculated his blood alcohol level to be 0.08 at the time of the collision and other witnesses testified that the defendant was impaired. Evidence showed that he ingested cocaine and that the effects of cocaine are correlated with high-risk driving. The defendant admitted that he was speeding, and experts calculated his speed to be

approximately 15 mph over the posted speed limit. The State also introduced evidence that the defendant had 4 prior driving while impaired convictions.

State v. Carter, 212 N.C. App. 516 (June 21, 2011). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder. The defendant, after being kicked in the face in a fight inside a nightclub, became angry about his injury, retrieved a 9mm semi-automatic pistol and loaded magazine from his car, and loaded the gun, exclaiming "Fuck it. Who wants some?" He then began firing toward the crowd, killing an officer. Evidence of the intentional use of a deadly weapon — here, a semi-automatic handgun — that proximately causes death triggers a presumption that the killing was done with malice. This presumption is sufficient to withstand a motion to dismiss a second-degree murder charge. The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question.

State v. Parlee, 209 N.C. App. 144 (Jan. 4, 2011). There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. There was sufficient evidence of malice where the victim and a friend approached the defendant to purchase prescription medication, the defendant sold them an Oxymorphone pill for $20.00, telling them that it was "pretty strong pain medication[,]" and not to take a whole pill or "do anything destructive with it." The defendant also told a friend that he liked Oxymorphone because it "messe[d]" him up. The jury could have reasonably inferred that the defendant knew Oxymorphone was an inherently dangerous drug and that he acted with malice when he supplied the pill.

State v. Hunter, 208 N.C. App. 506 (Dec. 21, 2010). There was sufficient evidence of malice in a first-degree murder case. The intentional use of a deadly weapon which proximately results in death gives rise to the presumption of malice. Here, the victim was stabbed in the torso with a golf club shaft, which entered the body from the back near the base of her neck downward and forward toward the center of her chest to a depth of eight inches, where it perforated her aorta just above her heart; she was stabbed with a knife to a depth of three inches; her face sustained blunt force trauma consistent with being struck with a clothes iron; and there was evidence she was strangled. The perforation by the golf club shaft was fatal.

State v. Patterson, 209 N.C. App. 708 (Mar. 1, 2011). The trial court did not err by denying the defendant's motion to dismiss charges of second-degree murder, felony serious injury by vehicle, and impaired driving. The evidence showed that the defendant was under the influence of an impairing substance at the time of the accident. A chemical analysis of blood taken from the defendant after the accident showed a BAC of 0.14 and the State's expert estimated that his BAC was 0.19 at the time of the accident. The defendant admitted having consumed 5 or 6 beers that day. Four witnesses testified that they detected a strong odor of alcohol emanating from the defendant immediately after the accident. The defendant had bloodshot eyes and was combative with emergency personnel immediately after the accident. Finally, the defendant's speed exceeded 100 miles per hour and he failed to use his brakes or make any attempt to avoid the collision.

State v. Tellez, 200 N.C. App. 517 (Nov. 3, 2009). There was sufficient evidence of malice to sustain a second-degree murder conviction where the defendant drove recklessly, drank alcohol before and while operating a motor vehicle, had prior convictions for impaired driving and driving while license revoked, and fled and engaged in elusive behavior after the accident.

State v. Mack, 206 N.C. App. 512 (Aug. 17, 2010). There was sufficient evidence of malice in a second-degree murder case involving a vehicle accident. The defendant, whose license was revoked, drove extremely dangerously in order to evade arrest for breaking and entering and larceny. When an officer attempted to stop the defendant, he fled, driving more than 90 miles per hour, running a red light, and traveling the wrong way on a highway — all with the vehicle's trunk open and with a passenger pinned by a large television and unable to exit the vehicle.

State v. Neville, 202 N.C. App. 121 (Jan. 19, 2010). There was sufficient evidence of malice to support a second-degree murder conviction in a case where the defendant ran over a four-year-old child. When she hit the victim, the defendant was angry and not exhibiting self-control; the defendant's vehicle created "acceleration marks" and was operating properly; the defendant had an "evil look"; and the yard was dark, several small children were present, and the defendant did not know where the children were when she started her car.

Multiple Convictions/Lesser Included Offenses

State v. Marion, __ N.C. App. __, 756 S.E.2d 61 (April 1, 2014). The trial court erred by failing to arrest judgment on one of the underlying felonies supporting the defendant's felony-murder convictions. The court rejected the defendant's argument that judgment must be arrested on all of the felony convictions. The defendant asserted that because the trial court's instructions were disjunctive and permitted the jury to find her guilty of felony-murder if it found that she committed "the felony of robbery with a firearm, burglary, and/or kidnapping," the trial court should have arrested judgment on all of the felony convictions on the theory that they all could have served as the basis for the felony murder convictions. Citing prior case law the court rejected this argument, stating that "[i]n cases where the jury does not specifically determine which conviction serves as the underlying felony, we have held that the trial court may, in its discretion, select the felony judgment to arrest."

State v. Rogers, 219 N.C. App. 296 (Mar. 6, 2012). No double jeopardy violation occurred when the defendant was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based on the same events. Each offense includes an element not included in the other.

State v. Wright, 212 N.C. App. 640 (June 21, 2011). Citing *State v. Washington*, 141 N.C. App. 354 (2000), the court held that the defendant was properly charged and convicted of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct involving multiple shots from a gun.

State v. Parlee, 209 N.C. App. 144 (Jan. 4, 2011). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled

substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

State v. Davis, 198 N.C. App. 443 (Aug. 4, 2009). A defendant may not be sentenced for both involuntary manslaughter and felony death by vehicle arising out of the same death. A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

State v. Armstrong, 203 N.C. App. 399 (Apr. 20, 2010). A defendant may be convicted for both second-degree murder (for which the evidence of malice was the fact that the defendant drove while impaired and had prior convictions for impaired driving) and impaired driving.

Premeditation & Deliberation

State v. Childress, ___ N.C. ___, 766 S.E.2d 328 (Dec. 19, 2014). The defendant's actions provided sufficient evidence of premeditation and deliberation to survive a motion to dismiss an attempted murder charge. From the safety of a car, the defendant drove by the victim's home, shouted a phrase used by gang members, and then returned to shoot at her and repeatedly fire bullets into her home when she retreated from his attack. The court noted that the victim did not provoke the defendant in any way and was unarmed; the defendant drove by the victim's home before returning and shooting at her; during this initial drive-by, the defendant or a companion in his car yelled out "[W]hat's popping," a phrase associated with gang activity that a jury may interpret as a threat; the defendant had a firearm with him; and the defendant fired multiple shots toward the victim and her home. This evidence supported an inference that the defendant deliberately and with premeditation set out to kill the victim.

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In this first-degree murder case, the evidence was sufficient to go to the jury on the theory of premeditation and deliberation. Among other things, there was no provocation by the victim, who was unarmed; the defendant shot the victim at least four times; and after the shooting the defendant immediately left the scene without aiding the victim.

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this first-degree murder case there was sufficient evidence of premeditation and deliberation. Among other things, the evidence showed a lack of provocation by the victim, that just prior to the shooting the defendant told others that he was going to shoot a man over a trivial matter, that the defendant shot the victim 3 times and that the victim may have been turning away from or trying to escape at the time.

State v. Clark, __ N.C. App. __, 752 S.E.2d 709 (Dec. 17, 2013). In a first-degree murder case, there was sufficient evidence of premeditation and deliberation. The court noted that the victim did not provoke the defendant and that the evidence was inconsistent with the defendant's claim of self-defense.

State v. Horskins, __ N.C. App. __, 743 S.E.2d 704 (July 2, 2013). In this first-degree murder case, the evidence was sufficient to show premeditation and deliberation. After some words in a night club parking lot the defendant shot the victim, who was unarmed, had not reached for a weapon, had not engaged the defendant in a fight, and did nothing to provoke the defendant's violent response. After the victim fell from the defendant's first shot, the defendant shot the victim 6 more times. Instead of then trying to help the victim, the defendant left the scene and attempted to hide evidence.

State v. Rogers, __ N.C. App. __, 742 S.E.2d 622 (June 4, 2013). In a first-degree murder case there was sufficient evidence of premeditation and deliberation. There was evidence that the victim begged for his life, that the victim's body had eight gunshot wounds, primarily in the head and chest, and there was a lack of provocation.

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). The State presented sufficient evidence that the defendant acted with premeditation and deliberation where, among other things, the defendant did not want a second child and asked his wife to get an abortion, he was involved in a long-term extramarital affair with a another woman who testified that the defendant was counting down the seconds until his first child would go to college so that he could leave his wife, the defendant had made plans to move out of his martial home but reacted angrily when his wife suggested that if the couple divorced she might move out of the state and take the children with her, and shortly before he shot his wife, he placed her cell phone out of her reach.

State v. Bonilla, 209 N.C. App. 576 (Feb. 15, 2011). In a first-degree murder case, there was sufficient evidence of premeditation, deliberation, and intent to kill. After the defendant and an accomplice beat and kicked the victim, they hog-tied him so severely that his spine was fractured, and put tissue in his mouth. Due to the severe arching of his back, the victim suffered a fracture in his thoracic spine and died from a combination of suffocation and strangulation.

State v. Blue, 207 N.C. App. 267 (Oct. 5, 2010). (1) The defendant's statement that he formed the intent to kill the victim and contemplated whether he would be caught before he began the attack was sufficient evidence that he formed the intent to kill in a cool state of blood for purposes of a first-degree murder charge. (2) The court rejected the defendant's argument that his evidence of alcohol and crack cocaine induced intoxication negated the possibility of premeditation and deliberation as a matter of law.

Proximate Cause

State v. Broom, __ N.C. App. __, 736 S.E.2d 802 (Jan. 15, 2013). The defendant's shooting of the victim's mother (the defendant's wife) while the victim was in utero was a proximate cause of the victim's death after being born alive. The gunshot wound necessitated the child's early delivery, the early delivery was a cause of a complicating condition, and that complicating condition resulted in her death.

State v. Pierce, 216 N.C. App. 377 (Oct. 18, 2011). In a case in which a second officer got into a vehicular accident and died while responding to a first officer's communication about the defendant's flight from a lawful stop, the defendant's flight from the first officer was the

proximate cause of the second officer's death. The evidence was sufficient to allow a reasonable jury to conclude that the second officer's death would not have occurred had the defendant not fled and that the second officer's death was reasonably foreseeable. The court rejected the defendant's argument that the second officer's contributory negligence broke the causal chain.

State v. Norman 213 N.C. App. 114 (July 5, 2011). There was sufficient evidence that the defendant's actions were the proximate cause of death. The defendant argued that two unforeseeable events proximately caused the victims' deaths: a third-party's turn onto the road and the victims' failure to yield the right-of-way. The court found that the first event foreseeable. As to the second, it noted that the defendant's speeding and driving while impaired were concurrent proximate causes.

State v. Parlee, 209 N.C. App. 144 (Jan. 4, 2011). There was sufficient evidence to survive a motion to dismiss in a case in which the defendant was charged with second-degree murder under G.S. 14-17 for having a proximately caused a murder by the unlawful distribution and ingestion of Oxymorphone. There was sufficient evidence that the defendant's sale of the pill was a proximate cause of death where the defendant unlawfully sold the pill to the two friends, who later split it in half and consumed it; the victim was pronounced dead the next morning, and cause of death was acute Oxymorphone overdose.

Assaults

Assault

State v. Starr, 209 N.C. App. 106 (Jan. 4, 2011), *aff'd on other grounds*, 365 N.C. 314 (Dec. 9, 2011). In a case involving assault on a firefighter with a firearm, there was sufficient evidence that the defendant committed an assault. To constitute an assault, it is not necessary that the victim be placed in fear; it is enough if the act was sufficient to put a person of reasonable firmness in apprehension of immediate bodily harm. "It is an assault, without regard to the aggressor's intention, to fire a gun at another or in the direction in which he is standing." Here, the defendant shot twice at his door while firefighters were attempting to force it open and fired again in the direction of the firefighters after they forced entry. The defendant knew that people were outside the door and shot the door to send a warning.

State v. Corbett, 196 N.C. App. 508 (Apr. 21, 2009). Assault is not a lesser-included offense of sexual battery.

Attempted Assault Not a Crime

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *temporary stay allowed*, ___ N.C. ___, 768 S.E.2d 551 (Dec. 31, 2014). Because attempted assault with a deadly weapon inflicting serious injury is not a recognized offense in North Carolina, the trial court erred by denying the defendant's motion to dismiss a charge of felon in possession when it was based on a felony conviction for attempted assault. The court noted that prior cases—*State v. Currence*, 14 N.C. App. 263 (1972), and *State v. Barksdale*, 181 N.C. App. 302 (2007)—held that attempted assault is not a crime. It concluded that the trial court lacked jurisdiction to enter judgment on the attempted assault conviction and that therefore that judgment was void. The court rejected the

State's argument that a different result should obtain because the defendant plead guilty to attempted assault as part of a plea agreement, stating: "The fact that Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not . . . affect the required jurisdictional analysis." The court also rejected the State's argument that the defendant cannot collaterally attack the validity of his attempted assault conviction in an appeal on the felon in possession case; the State had argued that the appropriate procedural mechanism was a motion for appropriate relief. Finally, the court held that for the reasons noted above, the attempted assault conviction could not support a determination that the defendant attained habitual felon status.

Assault on a Female

State v. Martin, 222 N.C. App. 213 (Aug. 7, 2012). Assault on a female is not a lesser-included of first-degree sexual offense.

Assault by Pointing a Gun

In re N.T., 214 N.C. App. 136 (Aug. 2, 2011). The evidence was insufficient to support an adjudication of delinquency based on assault by pointing a gun where the weapon was an airsoft gun from which plastic pellets were fired using a "pump action" mechanism. For purposes of the assault by pointing a gun statute, the term "gun" "encompasses devices ordinarily understood to be 'firearms' and not other devices that fall outside that category." Slip op. at 12. Thus, imitation firearms are not covered. The court noted that its conclusion had no bearing on whether the juvenile might be found delinquent for assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, assault inflicting serious injury, or assault on a child under twelve.

Assault by Strangulation

State v. Lowery, __ N.C. App. __, 743 S.E.2d 696 (July 2, 2013). The evidence was sufficient to establish assault by strangulation. The victim testified that the defendant strangled her twice; the State's medical expert testified that the victim's injuries were consistent with strangulation; and photographic evidence showed bruising, abrasions, and a bite mark on and around the victim's neck. The court rejected the defendant's arguments that the statute required "proof of physical injury beyond what is inherently caused by every act of strangulation" or extensive physical injury.

State v. Lanford, __ N.C. App. __, 736 S.E.2d 619 (Jan. 15, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of assault by strangulation on the same victim. The defendant argued that because his obstruction of the victim's airway was caused by the defendant's hand over the victim's nose and mouth, rather than "external pressure" applied to the neck, it was "smothering" not "strangling". Rejecting this argument, the court concluded:

> We do not believe that the statute requires a particular method of restricting the airways in the throat. Here, defendant constricted [the victim's] airways by grabbing him under the chin, pulling his head back, covering his nose and mouth, and hyperextending his neck. Although there was no evidence that defendant restricted [the victim's] breathing by direct application of force to the trachea, he

> managed to accomplish the same effect by hyperextending [the victim's] neck and throat. The fact that defendant restricted [the victim's] airway through the application of force to the top of his neck and to his head rather than the trachea itself is immaterial.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). (1) The evidence was sufficient to establish assault by strangulation; the victim told an officer that she felt that the defendant was trying to crush her throat, that he pushed down on her neck with his foot, that she thought he was trying to "chok[e] her out" or make her go unconscious, and that she thought she was going to die. (2) Even if the offenses are not the same under the *Blockburger* test, the statutory language, "[u]nless the conduct is covered under some other provision of law providing greater punishment," prohibits sentencing a defendant for this offense and a more serious offense based on the same conduct.

Culpable Negligence

State v. Davis, 197 N.C. App. 738 (July 7, 2009), *aff'd in part, rev'd in part on other grounds*, 364 N.C. 297 (Aug. 27, 2010). Committing a violation of G.S. 20-138.1 (impaired driving) constitutes culpable negligence as a matter of law sufficient to establish the requisite intent for assault with a deadly weapon inflicting serious injury.

Deadly Weapon

State v. James, __ N.C. App. __, 735 S.E.2d 627 (Dec. 4, 2012). Given the manner of its use, there was sufficient evidence that a kitchen table chair was a deadly weapon.

State v. Mills, 221 N.C. App. 409 (June 19, 2012). There was sufficient evidence that a lawn chair was a deadly weapon for purposes of assault. The victim was knocked unconscious and suffered multiple facial fractures and injuries which required surgery; after surgery his jaw was wired shut for weeks and he missed 2-3 weeks of work; and at trial the victim testified that he still suffered from vision problems. Because the State presented evidence that the defendant assaulted the victim with the lawn chair and not his fists alone, it was not required to present evidence as to the parties' size or condition.

State v. Spencer, 218 N.C. App. 267 (Jan. 17, 2012). Based on the manner of its use, a car was a deadly weapon as a matter of law. The court based its conclusion on the vehicle's high rate of speed and the fact that the officer had to engage in affirmative action to avoid harm.

State v. Flaugher, 214 N.C. App. 370 (Aug. 16, 2011). The trial court did not err by instructing the jury that a pickaxe was a deadly weapon. The pickaxe handle was about 3 feet long, and the pickaxe weighed 9-10 pounds. The defendant swung the pickaxe approximately 8 times, causing cuts to the victim's head that required 53 staples. She also slashed his middle finger, leaving it hanging only by a piece of skin.

State v. Walker, 204 N.C. App. 431 (June 15, 2010). The evidence was sufficient to establish that the knife used in the assault was a deadly weapon where a witness testified that the knife was

three inches long and the victim sustained significant injuries.

State v. Liggons, 194 N.C. App. 734 (Jan. 6, 2009). The defendant and his accomplice discussed intentionally forcing drivers off the road in order to rob them and one of them then deliberately threw a very large rock or concrete chunk through the driver's side windshield of the victim's automobile as it was approaching at approximately 55 or 60 miles per hour. The size of the rock and the manner in which it was used establishes that it was a deadly weapon.

State v. Wallace, 197 N.C. App. 339 (June 2, 2009). The defendant and an accomplice, both female, assaulted a male with fists and tree limbs. The two females individually, but not collectively, weighed less than the male victim, and both were shorter than him. They both were convicted of assault with a deadly weapon inflicting serious injury. The court ruled that the evidence was sufficient to prove that the fists and the tree limbs were deadly weapons.

State v. Clark, 201 N.C. App. 319 (Dec. 8, 2009). The vehicle at issue was not a deadly weapon as a matter of law where there was no evidence that the vehicle was moving at a high speed and given the victim's lack of significant injury and the lack of damage to the other vehicle involved, a jury could conclude that the vehicle was not aimed directly at the victim and that the impact was more of a glancing contact.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). There was sufficient evidence that the defendant's hands were a deadly weapon as to one victim when the evidence showed that the defendant was a big, stocky man, probably larger than the victim, who was a female and a likely user of crack cocaine, and the victim sustained serious injuries. There was sufficient evidence that the defendant's hands were a deadly weapon as to another victim when the evidence showed that the victim was a small-framed, pregnant woman with a cocaine addiction and the defendant used his hands to throw her onto the concrete floor, cracking her head open, and put his hands around her neck.

Intent

State v. Maready, 205 N.C. App. 1 (July 6, 2010). The trial judge committed prejudicial error with respect to its instruction on the intent element for the charges of assault with a deadly weapon, in a case in which a vehicle was the deadly weapon. In order for a jury to convict of assault with a deadly weapon, it must find that it was the defendant's actual intent to strike the victim with his vehicle, or that the defendant acted with culpable negligence from which intent may be implied. Because the trial court's instruction erroneously could have allowed the jury to convict without a finding of either actual intent or culpable negligence, reversible error occurred.

Intent to Kill

State v. Stewart, __ N.C. App. __, 750 S.E.2d 875 (Dec. 3, 2013). The evidence was sufficient to show an assault with intent to kill an officer when, after having fatally shot eight people, the defendant ignored the officer's instructions to drop his shotgun and continued to reload it. The defendant then turned toward the officer, lowered the shotgun, and fired one shot at the officer at the same time that the officer fired at the defendant.

State v. Stokes, __ N.C. App. __, 738 S.E.2d 208 (Feb. 5, 2013). There was sufficient evidence of an intent to kill when during a robbery the defendant fired a gun beside the store clerk's head and the clerk testified that he thought the defendant was going to kill him.

State v. Wilkes, __ N.C. App. __, 736 S.E.2d 582 (Jan. 15, 2013), *aff'd per curiam*, 367 N.C. 116 (Oct. 4, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of assault with deadly weapon with intent to kill, over the defendant's argument that there was insufficient evidence of an intent to kill. This charge was based on the defendant's use of a bat to assault his wife. The court determined that the nature and manner of the attack supported a reasonable inference that the defendant intended to kill, including that he hit her even after she fell to her knees, he repeatedly struck her head with the bat until she lost consciousness, she never fought back, and the wounds could have been fatal. Also, the circumstances of the attack, including the parties' conduct, provided additional evidence of intent to kill, including that the two had a volatile relationship and the victim had recently filed for divorce

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). The trial court did not err by failing to instruct the jury on the lesser-included offense of assault with a deadly weapon inflicting serious injury to the charge of assault with a deadly weapon with intent to kill inflicting serious injury. The defendant broke into a trailer in the middle of the night and used an iron pipe to repeatedly beat in the head an unarmed, naked victim, who had just woken up.

State v. Liggons, 194 N.C. App. 734 (Jan. 6, 2009). There was sufficient evidence of an intent to kill and the weapon used was deadly as a matter of law. The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury and other offenses. There was sufficient evidence of an intent to kill where the defendant and his accomplice discussed intentionally forcing drivers off the road in order to rob them and one of them then deliberately threw a very large rock or concrete chunk through the driver's side windshield of the victim's automobile as it was approaching at approximately 55 or 60 miles per hour. The court concluded that it is easily foreseeable that such deliberate action could result in death, either from the impact of the rock on or a resulting automobile accident.

Serious Injury

State v. Anderson, 222 N.C. App. 138 (Aug. 7, 2012). In an assault with a deadly weapon inflicting serious injury case, the trial court did not err by instructing the jury that three gunshot wounds to the leg constituted serious injury. The victim was shot three times, was hospitalized for two days, had surgery to remove a bone fragment from his leg, and experienced pain from the injuries up through the time of trial. From this evidence, the court concluded, it is unlikely that reasonable minds could differ as to whether the victim's injuries were serious.

State v. McLean, 211 N.C. App. 321 (Apr. 19, 2011). (1) There was sufficient evidence that the victim suffered serious injury. The defendant shot the victim with a shotgun, causing injuries to the victim's calf and 18-20 pellets to lodge in his leg, which did not fully work themselves out for six months. One witness testified that the victim had holes in his leg from the ankle up and another observed blood on his leg and noted that the wounds looked like little holes from

birdshot from a shotgun. (2) When the trial judge used N.C.P.J.I.—Crim. 208.15 to instruct the jury on the offense of assault with a deadly weapon with intent to kill inflicting serious injury, it did not err by failing to also give instruction 120.12, defining serious injury

State v. Smith, 210 N.C. App. 439 (Mar. 15, 2011). The trial court did not commit plain error by peremptorily instructing the jury that multiple gunshot wounds to the upper body would constitute serious injury. The victim required emergency surgery, was left with scars on his chest, shoulder, back and neck, and a bullet remained in his neck, causing him continuing pain.

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). The trial court did not err by failing to instruct on the lesser-included offense of assault with a deadly weapon to the charge on assault with a deadly weapon inflicting serious injury. After a beating by the defendant, the victim received hospital treatment, had contusions and bruises on her knee, could not walk for about a week and a half, and her knee still hurt at the time of trial.

State v. Walker, 204 N.C. App. 431 (June 15, 2010). The evidence was sufficient to establish serious injury where the defendant had a three-inch knife during the assault; the victim bled "a lot" from his wounds, dripping blood throughout the bedroom, bathroom, and kitchen; the victim was on the floor in pain and spitting up blood when the officer arrived; the victim was stabbed or cut 8 or 9 times and had wounds on his lip, back, and arm; the victim was removed by stretcher to the emergency room, where he remained for 12 hours, receiving a chest tube to drain blood, stitches in his back and arm, and was placed on a ventilator because of a lung puncture; the victim received pain medication for approximately one week; and at trial the victim still had visible scars on his lip, arm, and back.

Serious Bodily Injury

State v. Jamison, __ N.C. App. __, 758 S.E.2d 666 (June 3, 2014). (1) The evidence was sufficient to establish that the defendant inflicted serious bodily injury on the victim. The beating left the victim with broken bones in her face, a broken hand, a cracked knee, and an eye so beat up and swollen that she could not see properly out of it at the time of trial. The victim testified that her hand and eye "hurt all of the time." (2) The defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female when the convictions were based on the same conduct. The court concluded that language in the assault on a female statute ("[u]nless the conduct is covered under some other provision of law providing greater punishment . . . .") reflects a legislative intent to limit a trial court's authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct (here, assault inflicting serious bodily injury).

State v. Rouse, 198 N.C. App. 378 (July 21, 2009). There was sufficient evidence that a 70-year-old victim suffered from a protracted condition causing extreme pain supporting a charge of assault inflicting serious bodily injury when the facts showed: the victim had dried blood on her lips and in her nostrils and abdominal pain; she had a bruise and swelling over her left collarbone limiting movement of her shoulder, and a broken collarbone, requiring a sling; she had cuts in her hand requiring stitches; she received morphine immediately and was prescribed additional pain medicine; she had to return to the emergency room 2 days later due to an infection in the

sutured hand, requiring re-stitching and antibiotics; a nurse was unable to use a speculum while gathering a rape kit because the victim was in too much pain.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). (1) There was sufficient evidence of serious bodily injury with respect to one victim where the victim suffered a cracked pelvic bone, a broken rib, torn ligaments in her back, a deep cut over her left eye, and was unable to have sex for seven months; the eye injury developed an infection that lasted months and was never completely cured; the incident left a scar above the victim's eye, amounting to permanent disfigurement; there was sufficient evidence of serious bodily injury as to another victim where the victim sustained a puncture wound to the back of her scalp and a parietal scalp hematoma and she went into premature labor as a result of the attack. (2) There was insufficient evidence of serious bodily injury as to another victim where the evidence showed that the victim received a vicious beating but did not show that her injuries placed her at substantial risk of death; although her ribs were "sore" five months later, there was no evidence that she experienced "extreme pain" in addition to the "protracted condition." (4) Based on the language in G.S. 14-32.4(b) providing that "[u]nless the conduct is covered under some other provision of law providing greater punishment," the court held that a defendant may not be sentenced to assault by strangulation and a more serious offense based on the same conduct. Because the statutory language in G.S. 14-32.4(a) proscribing assault inflicting serious bodily injury contains the same language, the same analysis likely would apply to that offense.

Discharging a Barreled Weapon or Firearm into Occupied Property

State v. Hicks, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). The evidence was sufficient to support a conviction for discharging a firearm into occupied property (a vehicle), an offense used to support a felony-murder conviction. The defendant argued that the evidence was conflicting as to whether he fired the shots from inside or outside the vehicle. Citing prior case law, the court noted that an individual discharges a firearm "into" an occupied vehicle even if the firearm is inside the vehicle, as long as the individual is outside the vehicle when discharging the weapon. The court continued, noting that mere contradictions in the evidence do not warrant dismissal and that here the evidence was sufficient to go to the jury.

State v. Maldonado, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). The trial court did not err by denying the defendant's request for a diminished capacity instruction with respect to a charge of discharging a firearm into occupied property that served as a felony for purposes of a felony-murder conviction. Because discharging a firearm into occupied property is a general intent crime, diminished capacity offers no defense.

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). With regard to a felony-murder charge, the evidence was sufficient to show the underlying felony of discharging a firearm into occupied property (here, a vehicle). The court rejected the defendant's argument that the evidence failed to establish that he was outside of the vehicle when he shot the victim.

State v. Kirkwood, __ N.C. App. __, 747 S.E.2d 730 (Sept. 17, 2013). No violation of double jeopardy occurred when the trial court sentenced the defendant for three counts of discharging a firearm into occupied property. Although the three gunshots were fired in quick succession, the

bullet holes were in different locations around the house's front door area. The evidence also showed that at least one shot was fired from a revolver, which, in single action mode, must be manually cocked between firings and, in double action mode, can still only fire a single bullet at a time. The other gun that may have been used was semiautomatic but it did not always function properly and many times, when the trigger was pulled, would not fire. Neither gun was a fully automatic weapon such as a machine gun. There was sufficient evidence to show that each shot was "distinct in time, and each bullet hit the [house] in a different place." In reaching this holding, the court declined to apply assault cases that require a distinct interruption in the original assault for the evidence to support a second conviction.

State v. Miles, __ N.C. App. __, 733 S.E.2d 572 (Oct. 16, 2012). In a discharging a firearm into occupied property case, a residence was occupied when the family was on the front porch when the weapon was discharged.

State v. McLean, 211 N.C. App. 321 (Apr. 19, 2011). (1) This crime is a general intent crime; it does not require the State to prove any specific intent to shoot into the vehicle but only that the defendant intentionally fire a weapon under such circumstances where he or she had reason to believe the conveyance that ended up being shot was occupied. (2) N.C.P.J.I.—Crim. 208.90D, which was used in this case, properly charged the jury as to the required mental state.

State v. Small, 201 N.C. App. 331 (Dec. 8, 2009). Only a barreled weapon must meet the velocity requirements of G.S. 14-34.1(a) (capable of discharging shot, bullets, pellets, or other missiles at a muzzle velocity of at least 600 feet per second); a firearm does not.

Assault on Government Officer

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the charge of assault causing physical injury on a law enforcement officer, which occurred at the local jail. After arresting the defendant, Captain Sumner transported the defendant to jail, escorted him to a holding cell, removed his handcuffs, and closed the door to the holding cell, believing it would lock behind him automatically. However, the door remained unlocked. When Sumner noticed the defendant standing in the holding cell doorway with the door open, he told the defendant to get back inside the cell. Instead, the defendant tackled Sumner. The defendant argued that there was insufficient evidence that the officer was discharging a duty of his office at the time. The court rejected this argument, concluding that "[b]y remaining at the jail to ensure the safety of other officers," Sumner was discharging the duties of his office. In the course of its holding, the court noted that "unlike the offense of resisting, delaying, or obstructing an officer, . . . criminal liability for the offense of assaulting an officer is not limited to situations where an officer is engaging in lawful conduct in the performance or attempted performance of his or her official duties."

Malicious Conduct By Prisoner

State v. Heavner, __ N.C. App. __, 741 S.E.2d 897 (May 7, 2013). The defendant was properly convicted of two counts of malicious conduct by a prisoner when he twice spit on an officer

while officers were attempting to secure him. The defendant had argued that only conviction was proper because his conduct occurred in a continuous transaction. The court found that each act was distinct in time and location: first the defendant spit on the officer's forehead while the defendant was still in the house; five minutes later he spit on the officer's arm after being taken out of the house.

State v. Noel, 202 N.C. App. 715 (Mar. 2, 2010). The evidence was sufficient to establish that the defendant emitted bodily fluids where it showed that he spit on an officer. The evidence was sufficient to show that the defendant acted knowingly and willfully where the defendant was uncooperative with the officers, was belligerent towards them, and immediately before the spitting, said to an approaching officer: "F--k you, n----r. I ain't got nothing. You ain't got nothing on me." The evidence was sufficient to show that the defendant was in custody when he was handcuffed and seated on a curb, numerous officers were present, and the defendant was told that he was not free to leave.

On Handicapped Person

State v. Collins, 221 N.C. App. 604 (July 17, 2012). There was a sufficient factual basis to support a plea to assault on a handicapped person where the prosecutor's summary of the facts indicated that the victim was 80 years old, crippled in her knees with arthritis, and required a crutch to walk; the defendant told the victim that he would kill her and cut her heart out, grabbed her, twice slung her across the room, and hit her with her crutch.

Habitual Misdemeanor Assault

State v. Garrison, __ N.C. App. __, 736 S.E.2d 610 (Jan. 15, 2013). In a habitual misdemeanor assault case, the trial court erred by failing to instruct the jury that the defendant's assault under G.S. 14-33 must have inflicted physical injury. However, given the uncontroverted evidence regarding the victim's injuries, the error did not rise to the level of plain error.

Malicious Castration

State v. Lanford, __ N.C. App. __, 736 S.E.2d 619 (Jan. 15, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of attempted malicious castration of a privy member. The victim was the son of the woman with whom the defendant lived; a doctor found 33 injuries on the victim's body, including a 2.5 inch laceration on his penis. The defendant argued that there was insufficient evidence that he committed an assault with malice aforethought and specific intent to maim the victim's privy member. Although the victim gave conflicting evidence as to how the defendant cut his penis, the defendant's malice and specific intent to maim could be reasonably inferred from the numerous acts of humiliation and violence experienced by the victim prior to the defendant's assault on his penis.

Multiple Convictions/Greater- and Lesser-Included Offenses

State v. Wilkes, 367 N.C. 116 (Oct. 4, 2013). The court per curiam affirmed the decision below, *State v. Wilkes*, __ N.C. App. __, 736 S.E.2d 582 (Jan. 15, 2013), in which the court of appeals

had held, over a dissent, that the State presented substantial evidence supporting two separate assaults. The defendant attacked his wife with his hands. When his child intervened with a baseball bat to protect his mother, the defendant turned to the child, grabbed the bat and then began beating his wife with the bat. The court concluded that the assaults were the result of separate thought processes, were distinct in time, and the victim sustained injuries on different parts of her body as a result of each assault.

State v. Baldwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) Under *State v. Tirado*, 358 N.C. 551, 579 (2004) (trial court did not subject the defendants to double jeopardy by convicting them of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) arising from the same conduct), no violation of double jeopardy occurred when the trial court denied the defendant's motion to require the State to elect between charges of attempted first-degree murder and AWDWIKISI. (2) Because the assault inflicting serious bodily injury statute begins with the language "Unless the conduct is covered under some other provision of law providing greater punishment," the trial court erred by sentencing the defendant to this Class F felony when it also sentenced the defendant for AWDWIKISI, a Class C felony. [Author's note: Although the court characterized this as a double jeopardy issue, it is best understood as one of legislative intent. Because each of the offenses requires proof of an element not required for the other the offenses are not the "same" for purposes of double jeopardy. Thus, double jeopardy is not implicated. However, even if offenses are not the "same offense," legislative intent expressed in statutory provisions may bar multiple convictions, as it does here with the "unless covered" language. For a more complete discussion of double jeopardy, see the chapter in my judges' Benchbook here]

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). The trial court did not err by convicting the defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discreet conduct.

State v. Coakley, ___ N.C. App. ___, 767 S.E.2d 418 (Dec. 31, 2014). The trial court erred by sentencing the defendant for both assault inflicting serious bodily injury under G.S. 14-32.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), when both charges arose from the same assault. The court reasoned that G.S. 14-32(b) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." Here, the defendant's conduct pertaining to his charge for and conviction of assault with a deadly weapon inflicting serious injury was covered by the provisions of G.S. 14-32(b), which permits a greater punishment than that provided for in G.S. 14-32.4(a).

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). The trial court erred by sentencing the defendant for both habitual misdemeanor assault and assault on a female where both convictions arose out of the same assault. The statute provides that "unless the conduct is covered under some other provision of law providing greater punishment," an assault on a female is a Class A1 misdemeanor. Here, the conduct was covered under another provision of law providing greater punishment, habitual misdemeanor assault, a Class H felony.

State v. Jamison, __ N.C. App. __, 758 S.E.2d 666 (June 3, 2014). The defendant could not be convicted and sentenced for both assault inflicting serious bodily injury and assault on a female when the convictions were based on the same conduct. The court concluded that language in the assault on a female statute ("[u]nless the conduct is covered under some other provision of law providing greater punishment . . . .") reflects a legislative intent to limit a trial court's authority to impose punishment for assault on a female when punishment is also imposed for higher class offenses that apply to the same conduct (here, assault inflicting serious bodily injury).

State v. Lanford, __ N.C. App. __, 736 S.E.2d 619 (Jan. 15, 2013). (1) A defendant may be convicted of assault by strangulation and assault with a deadly weapon inflicting serious injury where two incidents occurred. The fact that these assaults were part of a pattern of chronic child abuse does not mean that they are considered one assault. (2) The State sufficiently proved two distinct incidents of assault with a deadly weapon inflicting serious injury supporting two convictions and three instances of felony child abuse supporting three such convictions. The fact that the assaults form part of chronic and continual abuse did not alter its conclusion.

State v. Hope, __ N.C. App. __, 737 S.E.2d 108 (Nov. 20, 2012). In an assault with a deadly weapon inflicting serious injury case, the defendant is not entitled to a simple assault instruction where the deadly weapon element is left to the jury but there is uncontroverted evidence of serious injury.

State v. Rogers, 219 N.C. App. 296 (Mar. 6, 2012). No double jeopardy violation occurred when the defendant was convicted of attempted first-degree murder and assault with a deadly weapon with intent to kill inflicting serious bodily injury based on the same events. Each offense includes an element not included in the other.

State v. Wright, 212 N.C. App. 640 (June 21, 2011). Citing *State v. Washington*, 141 N.C. App. 354 (2000), the court held that the defendant was properly charged and convicted of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct involving multiple shots from a gun.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). A defendant may not be convicted of assault with a deadly weapon inflicting serious injury and assault inflicting serious bodily injury arising out of the same conduct.

Relation to Sexual Battery

State v. Corbett, 196 N.C. App. 508 (Apr. 21, 2009). Assault is not a lesser-included offense of sexual battery.

Secret Assault

State v. Wright, 210 N.C. App. 52 (Mar. 1, 2011). The evidence was insufficient to establish that a secret assault occurred. In the middle of the night, the victim heard a noise and looked up to see someone standing in the bedroom doorway. The victim jumped on the person and hit him with a chair. The victim was aware of the defendant's presence and purpose before the assault began. In

fact, he started defending himself before the defendant's assault was initiated.

State v. Holcombe, 203 N.C. App. 530 (Apr. 20, 2010). The evidence was insufficient to support a conviction where the state failed to produce evidence that the assault was done in a secret manner. To satisfy this element, the state must offer evidence showing that the victim is caught unaware.

Maiming

State v. Coakley, ___ N.C. App. ___, 767 S.E.2d 418 (Dec. 31, 2014). In this malicious maiming case, the court rejected the defendant's argument that the trial court erred by disjunctively instructing the jury that it could convict him if it found that he had "disabled or put out" the victim's eye. Relying on cases from other jurisdictions, the court held that the total loss of eyesight, without actual physical removal, is sufficient to support a finding that an eye was "put out" and, therefore, is sufficient to support a conviction for malicious maiming under G.S. 14-30. It went on to reject the defendant's argument that because the term disabled could have been interpreted as something less than complete blindness, the trial court's instructions were erroneous. The court reasoned that based on the evidence in the case—it was uncontroverted that the victim completely lost his eyesight because of the defendant's actions—the jury could not have concluded that the term disabled meant something other than complete blindness. Thus, the court concluded that it need not decide whether partial or temporary blindness constitutes malicious maiming under the statute.

State v. Flaugher, 214 N.C. App. 370 (Aug. 16, 2011). In a maiming without malice case, the evidence was sufficient to show that the defendant intended to strike the victim's finger with the intent to disable him. The intent to maim or disfigure may be inferred from an act which does in fact disfigure the victim, unless the presumption is rebutted by evidence to the contrary. Here, the near severing of the victim's finger triggered that presumption, which was not rebutted.

Abuse Offenses

State v. Harris, __ N.C. App. __, 763 S.E.2d 302 (Sept. 16, 2014). (1) Following, *State v. Stevens*, ___ N.C. App. ___, 745 S.E.2d 64, 67 (2013), the court held that the offense of contributing to a juvenile's being delinquent, undisciplined, abused or neglected (G.S. 14-316.1) does not require the defendant to be the juvenile's parent, guardian, custodian, or caretaker; the defendant need only be a person who causes a juvenile to be in a place or condition where the juvenile does not receive proper care from a caretaker or is not provided necessary medical care. (2) The evidence was sufficient to show that the defendant placed the child in a position in which she could be found to be abused or neglected. The defendant entered the child's bedroom when she was trying to sleep, tried to get her to drink alcohol, squeezed her buttocks, asked her to suck his thumb and asked to suck her chest. (3) Although the trial court's jury instructions on the G.S. 14-316.1 charge were erroneous, the error did not rise to the level of plain error.

State v. McClamb, __ N.C. App. __, 760 S.E.2d. 337 (July 1, 2014). A defendant may be convicted of child abuse by sexual act under G.S. 14-318.4(a2) when the underlying sexual act is vaginal intercourse.

State v. Stevens, __ N.C. App. __, 745 S.E.2d 64 (July 16, 2013). The evidence was sufficient to show that the defendant committed the offense of contributing to the delinquency/neglect of a minor. The court rejected the defendant's argument that the State presented no evidence that the defendant was the minor's parent, guardian, custodian, or caretaker, concluding that was not an element of the offense. The court further found that the State presented sufficient evidence that the defendant put the juvenile in a place or condition whereby the juvenile could be adjudicated neglected. Specifically, he took the juvenile away from the area near the juvenile's home, ignored the juvenile after he was injured, and then abandoned the sleeping juvenile in a parking lot. The court concluded: "Defendant put the juvenile in a place or condition where the juvenile could be adjudicated neglected because he could not receive proper supervision from his parent."

State v. Stokes, 216 N.C. App. 529 (Nov. 1, 2011). Digital penetration of the victim's vagina can constitute a sexual act sufficient to support a charge of child abuse under G.S. 14-318.4(a2) (sexual act).

Threats, Harassment, Stalking & Violation of Domestic Violence Protective Orders

Threats

State v. Hill, __ N.C. App. __, 741 S.E.2d 911 (May 21, 2013). In a communicating threats case, the State presented sufficient evidence that a detention officer believed that the defendant—an inmate—would carry out his threats against her.

State v. Wooten, 206 N.C. App. 494 (Aug. 17, 2010). The evidence was sufficient to sustain a stalking conviction where it showed that the defendant sent five facsimile messages to the victim's workplace but the first four did not contain a direct threat. In this regard, the court noted, the case "diverges from those instances in which our courts historically have applied the stalking statute." Among other things, the faxes called the victim, Danny Keel, "Mr. Keel-a-Nigger," referenced the defendant having purchased a shotgun, and mentioned his daughter, who was living away from home, by first name.

DVPO Offenses

State v. Edgerton, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). In a case where the defendant was found guilty of violation of a DVPO with a deadly weapon, the court per curiam reversed and remanded for the reasons stated in the dissenting opinion below. In the decision below, *State v. Edgerton*, ___ N.C. App. ___, 759 S.E.2d 669 (2014), the court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se. The dissenting judge did not agree with the majority that any error rose to the level of plain error.

State v. Byrd. 363 N.C. 214 (May 1, 2009). Reversing the court of appeals and holding that a temporary restraining order (TRO) entered pursuant to Rule 65(b) of the N.C. Rules of Civil Procedure on a motion alleging acts of domestic violence in an action for divorce from bed and board was not a valid domestic violence protective order as defined by Chapter 50B and was not

entered after a hearing by the court or with consent of the parties. Thus, the TRO could not support imposition of the punishment enhancement prescribed by G.S. 50B-4.1(d).

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). The trial court erred by entering judgment and sentencing the defendant on both three counts of habitual violation of a DVPO and one count of interfering with a witness based on the same conduct (sending three letters to the victim asking her not to show up for his court date). The DVPO statute states that "[u]nless covered under some other provision of law providing greater punishment," punishment for the offense at issue was a Class H felony. Here, the conduct was covered under a provision of law providing greater punishment, interfering with a witness, which is a Class G felony.

State v. Poole, __ N.C. App. __, 745 S.E.2d 26 (July 2, 2013). The trial court erred by dismissing an indictment charging the defendant with violating an ex parte domestic violence protective order (DVPO) that required him to surrender his firearms. The trial court entered an ex parte Chapter 50B DVPO prohibiting the defendant from contacting his wife and ordering him to surrender all firearms to the sheriff. The day after the sheriff served the defendant with the DVPO, officers returned to the defendant's home and discovered a shotgun. He was arrested for violating the DVPO. The trial court granted the defendant's motion to dismiss, finding that under *State v. Byrd*, 363 N.C. 214 (2009), the DVPO was not a protective order entered within the meaning of G.S. 14-269.8 and that the prosecution would violate the defendant's constitutional right to due process. The State appealed. The court concluded that *Byrd* was not controlling because of subsequent statutory amendments and that the prosecution did not violate the defendant's procedural due process rights.

State v. Williams, __ N.C. App. __, 741 S.E.2d 9 (April 2, 2013). (1) The trial court committed plain error by instructing the jury on the crime of stalking under the new stalking statute, G.S. 14-277.3A, when the charged course of conduct occurred both before and after enactment of the new statute. The new version of the stalking statute lessened the burden on the State. The court noted that where, as here, a defendant is indicted for a continuing conduct offense that began prior to a statutory modification that disadvantages the defendant and the indictment tracks the new statute's disadvantageous language, the question of whether the violation extended beyond the effective date of the statute is one that must be resolved by the jury through a special verdict. Here, the trial court's failure to give such a special verdict was plain error. (2) The evidence was insufficient to establish that the defendant knowingly violated a DVPO. The DVPO required the defendant to "stay away from" victim Smith's place of work, without identifying her workplace. The victim worked at various salons, including one at North Hills. The defendant was charged with violating the DVPO when he was seen in the North Hills Mall parking lot on a day that the victim was working at the North Hills salon. The court concluded that it need not determine the precise contours of what it means to "stay away" because it is clear that there was insufficient evidence that the defendant failed to "stay away" from the victim's place of work, and no evidence that defendant knowingly did so. It reasoned:

> The indictment alleges defendant was "outside" Ms. Smith's workplace, and although technically the area "outside" of Ms. Smith's workplace could include any place in the world outside the walls of the salon, obviously such an interpretation is absurd. Certainly the order must mean that defendant could not be so close to Ms. Smith's workplace that he would be able to observe her, speak

> to her, or intimidate her in any way, but we cannot define the exact parameters of the term "stay away." It is clear only that defendant was not seen in an area that could reasonably be described as "outside" of Ms. Smith's salon, nor was there evidence that he was in a location that would permit him to harass, communicate with, follow, or even observe Ms. Smith at her salon, which might reasonably constitute a failure to "stay away" from her place of work. There was also no evidence that he was in proximity to Ms. Smith's vehicle or that he was in a location which might be along the path she would take from the salon to her vehicle.

Additionally, there was no evidence that defendant was aware that Ms. Smith worked at the North Hills salon, or that he otherwise knew that he was supposed to stay away from North Hills. The order did not identify North Hills as one of the locations that defendant was supposed to stay away from. The order specified no distance that defendant was supposed to keep between himself and Ms. Smith or her workplace. Defendant was seen walking in the parking structure of a public mall at some unknown distance from the salon where Ms. Smith was working on the night in question.

Kenton v. Kenton, 218 N.C. App. 603 (Feb. 7, 2012). A consent DVPO that lacked any finding that the defendant committed an act of domestic violence it was void ab initio. The court reasoned: "Without a finding by the trial court that an act of domestic violence had occurred, the trial court had no authority under Chapter 50B to enter an order for the purpose of ceasing domestic violence."

Kennedy v. Morgan, 221 N.C. App. 219 (June 5, 2012). The trial judge erred by entering a domestic violence protective order. The defendant's act of hiring a private investigator service to conduct surveillance to determine if the plaintiff was cohabiting does not constitute harassment. There thus was no act of domestic violence.

Stalking

State v. Williams, __ N.C. App. __, 741 S.E.2d 9 (April 2, 2013). The trial court committed plain error by instructing the jury on the crime of stalking under the new stalking statute, G.S. 14-277.3A, when the charged course of conduct occurred both before and after enactment of the new statute. The new version of the stalking statute lessened the burden on the State. The court noted that where, as here, a defendant is indicted for a continuing conduct offense that began prior to a statutory modification that disadvantages the defendant and the indictment tracks the new statute's disadvantageous language, the question of whether the violation extended beyond the effective date of the statute is one that must be resolved by the jury through a special verdict. Here, the trial court's failure to give such a special verdict was plain error.

State v. Fox, 216 N.C. App. 144 (Oct. 4, 2011) (COA10-1485). The defendant's right to be protected from double jeopardy was violated when, after being convicted of felony stalking, he was again charged and convicted of that crime. Because the time periods of the "course of conduct" for both indictments overlapped, the same acts could result in a conviction under either indictment. Also, in the second trial the State introduced evidence that would have established stalking during the overlapping time period.

State v. Van Pelt, 206 N.C. App. 751 (Sept. 7, 2010). In a prosecution under the prior version of the stalking statute, there was sufficient evidence to sustain a conviction. The court rejected the defendant's argument that the evidence showed communications to persons other than the alleged victim on all but one occasion, concluding that all of the communications were directed to the victim. The defendant harassed the victim by written communications, pager, and phone with no legitimate purpose. The communications were directed to the victim, including those to his office staff, made with the request that they be conveyed to the victim. The harassment placed the victim in fear as evidenced by his testimony, his actions in having his staff make sure the office doors were locked and ensuring the outside lights were working along with encouraging them to walk in "twos" to their cars, his wife's testimony of his demeanor during and after his phone call with the defendant, his late night phone call to a police officer, his action in taking out a restraining order, and his visit to his children's school to speak with teachers and counselors and to have them removed from the school's website. The victim's fears were reasonable given the defendant's odd behavior exhibiting a pattern of escalation.

Harassing Phone Calls

State v. Van Pelt, 206 N.C. App. 751 (Sept. 7, 2010). The evidence was sufficient to establish that the defendant violated G.S. 14-196(a)(3) by making harassing phone calls. The defendant repeatedly called the victim at work to annoy and harass him. It was not necessary for the State to show that defendant actually spoke with the victim.

Cyberbullying

State v. Bishop, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). (1) The court upheld a provision of the cyberbullying statute, G.S. 14-458.1(a)(1)(d), rejecting the defendant's argument that the provision is an overbroad criminalization of protected speech. G.S. 14-458.1(a)(1)(d) makes it unlawful for any person to use a computer or computer network to, with the intent to intimidate or torment a minor, post or encourage others to post on the Internet private, personal, or sexual information pertaining to a minor. (2) Because the defendant failed to preserve the issue, the court declined to address the defendant's argument that the statute was unconstitutionally vague. (3) Because the defendant's motion to dismiss for insufficient evidence was made on other grounds, the court declined to consider the defendant's argument on appeal that insufficient evidence was presented to show he posted private, personal, or sexual information pertaining to the victim.

Sexual Assaults and Related Offenses

Age Difference Between Defendant and Victim for Sexual Assaults

State v. Faulk, 200 N.C. App. 118 (Sept. 15, 2009). In a case charging offenses under G.S. 14-27.7A (statutory rape or sexual offense of person who is 13, 14, or 15 years old), the court held that the trial judge misapplied the "birthday rule" (a person reaches a certain age on his or her birthday and remains that age until his or her next birthday) to the calculation of the age difference between the defendant and the victim. The defendant's and victim's ages at the time in question were 19 years, 7 months, and 5 days and 15 years, 2 months, and 8 days respectively.

Applying the birthday rule, the trial court concluded that the defendant was 19 at the time in question and that the victim was 15, making the age difference 4 years, when the relevant statute required it to be more than 4 years. The appellate court concluded that the statutory element of more than 4 years but less than 6 years means 4 years 0 days to 6 years 0 days, "or anywhere in the range of 1460 days to 2190 days."

Crime Against Nature

State v. Hunt, 365 N.C. 432 (Mar. 9, 2012). (1) Reversing a decision of the court of appeals in *State v. Hunt*, 211 N.C. App. 452 (May 3, 2011), the court held that expert testimony was not required for the State to establish that the victim had a mental disability for purposes of second-degree sexual offense. In the opinion below, the court of appeals reversed the defendant's conviction on grounds that there was insufficient evidence as to the victim's mental disability, reasoning: "where the victim's IQ falls within the range considered to be 'mental retardation[,]' but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by [G.S.] 14-27.5." The supreme court, however, found the evidence sufficient. First, it noted, there was evidence that the victim was mentally disabled. The victim had an IQ of 61, was enrolled in special education classes, a teacher assessed her to be in the middle level of intellectually disabled students, and she required assistance to function in society. Second, the victim's condition rendered her substantially incapable of resisting defendant's advances. The victim didn't know the real reason why the defendant asked her to come into another room, his initial acts of touching scared her because she didn't know what he was going to do, she was shocked when he exposed himself, she was frightened when he forced her to perform fellatio and when she raised her head to stop, he forced it back down to his penis. Finally, there was evidence that the defendant knew or reasonably should have known about the victim's disability. Specifically, his wife testified that she had discussed the victim's condition with the defendant. The court emphasized that "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with second-degree sexual offense pursuant to section 14-27.5." (2) Reversing the court of appeals, the court held that the State presented sufficient evidence of crime against nature. The defendant conceded knowing that the victim was 17 years old. For the reasons discussed above, the court concluded that there was sufficient evidence that the victim's conditions rendered her substantially incapable of resisting the defendant's advances. All of this evidence indicates that the sexual acts were not consensual. In addition, the court noted, the record suggests that the acts were coercive, specifically pointing to the defendant's conduct of forcing the victim's head to his penis. The court emphasized that "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with . . . crime against nature."

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). (1) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (2) The court rejected the juvenile's argument that to prove first-degree statutory

sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose. (3) Penetration is a required element of crime against nature and in this case insufficient evidence was presented on that issue. The victim testified that he licked but did not suck the juvenile's penis. Distinguishing *In re Heil*, 145 N.C. App. 24 (2001) (concluding that based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis into [the four-year-old victim's] mouth"), the court declined the State's invitation to infer penetration based on the surrounding circumstances.

State v. Hunt, 221 N.C. App. 489 (July 17, 2012), *aff'd per curiam*, __ N.C. __, 766 S.E.2d 288 (Dec. 19, 2014). The defendant could not be convicted of second-degree sexual offense (mentally disabled victim) and crime against nature (where lack of consent was based on the fact that the victim was mentally disabled, incapacitated or physically helpless) based on the same conduct (fellatio). The court found that "on the particular facts of Defendant's case, crime against nature was a lesser included offense of second-degree sexual offense, and entry of judgment on both convictions subjected Defendant to unconstitutional double jeopardy." [Author's note: The N.C. Supreme Court has previously held that crime against nature is not a lesser-included offense of forcible rape or sexual offense, State v. Etheridge, 319 N.C. 34, 50–51 (1987); State v. Warren, 309 N.C. 224 (1983), and that a definitional test applies when determining whether offenses are lesser-included offenses, State v. Nickerson, 316 N.C. 279 (2011).].

In Re R.N., 206 N.C. App. 537 (Aug. 17, 2010). The trial court erred by denying the juvenile's motion to dismiss a charge of crime against nature; as to a second charge alleging the same offense, defects in the transcript made appellate review impossible. The first count alleged that the juvenile licked the victim's genital area. The evidence established that the juvenile licked her private, put his mouth on her private area, and "touch[ed] . . . on her private parts." Citing, *State v. Whittemore*, 255 N.C. 583 (1961), the court held that the evidence was insufficient to establish penetration. As to the second count, alleging that the juvenile put his penis in the victim's mouth, the evidence showed that the juvenile forced the victim's head down to his private and that she saw his private area. Under *Whittemore*, this was insufficient evidence of penetration. However, when a social worker was asked whether there was penetration, she responded: "[the victim] told me there was *(Indistinct Muttering)* penetration." The court concluded that because it could not determine from this testimony whether penetration occurred, it could not meaningfully review the sufficiency of the evidence. The court vacated the adjudication and remanded for a hearing to reconstruct the social worker's testimony.

Indecent Liberties

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). The defendant was properly convicted of two counts of indecent liberties with victim Melissa in Caldwell County. The State presented evidence that the defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. The defendant argued that this evidence only supports one count of indecent liberties with a child. The court disagreed, holding that pursuant to *State v. James*, 182 N.C. App.

698 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties.

State v. Minyard, __ N.C. App. __, 753 S.E.2d 176 (Jan. 7, 2014). The evidence was sufficient to support five counts of indecent liberties with a minor where the child testified that the defendant touched the child's buttocks with his penis "four or five times." The court rejected the defendant's argument that this testimony did not support convictions on five counts or that the contact occurred during separate incidents. Acknowledging that the child's testimony showed neither that the alleged acts occurred either on the same evening or on separate occasions, the court noted that "no such requirement for discrete separate occasions is necessary when the alleged acts are more explicit than mere touchings." The court cited *State v. Williams*, 201 N.C. App. 161 (2009), for the proposition that unlike "mere touching" "multiple sexual acts, even in a single encounter, may form the basis for multiple indictments for indecent liberties."

State v. Godley, __ N.C. App. __, 760 S.E.2d. 285 (July 1, 2014). With respect to an indecent liberties charge, the State presented sufficient evidence that the defendant committed the relevant act for the purpose of arousing or gratifying sexual desire. The court noted the defendant's purpose "may be inferred from the evidence of the defendant's actions." Here, the victim stated that the defendant kissed her on the mouth, told her not to tell anyone about what happened, and continued to kiss her even after she asked him to stop. The victim told the police that the defendant made sexual advances while he was drunk, kissed her, fondled her under her clothing, and touched her breasts and vagina. This evidence, along with other instances of the defendant's alleged sexual misconduct giving rise to first-degree rape charges, is sufficient evidence to infer the defendant's purpose.

State v. Sims, 216 N.C. App. 168 (Oct. 4, 2011). In an indecent liberties case, the evidence was sufficient to establish that the defendant engaged in conduct for the purpose of arousing or gratifying sexual desire. While at a store, the defendant crouched down to look at the victim's legs, "fell into" the victim, wrapping his hands around her, and kneeled down, 6-8 inches away from her legs. Other evidence showed that he had asked another person if he could hug her legs and that he admitted to being obsessed with women's legs.

State v. Carter, 210 N.C. App. 156 (Mar. 1, 2011). The evidence was sufficient to establish indecent liberties. The child reported being touched in her genital and rectal area by a male. The victim's mother testified that she found the victim alone with the defendant on several occasions, and the victim's testimony was corroborated by her consistent statements to others.

In Re A.W., 209 N.C. App. 596 (Feb. 15, 2011). The court rejected the juvenile's argument that the evidence was insufficient to establish indecent liberties in that it failed to show that he acted with a purpose to arouse or gratify his sexual desires. The facts showed that: the juvenile was thirteen and the victim was ten years younger; the juvenile told the victim that the juvenile's private parts "taste like candy," and had the victim lick his penis; approximately eleven months prior, the juvenile admitted to having performed fellatio on a four-year-old male relative. The court concluded that the juvenile's age and maturity, the age disparity between him and the victim, coupled with the inducement he employed to convince the victim to perform the act and the suggestion of his prior sexual activity before this event, was sufficient evidence of maturity

and intent to show the required element of "for the purpose of arousing or gratifying sexual desire."

State v. Breathette, 202 N.C. App. 697 (Mar. 2, 2010). Mistake of age is not a defense to the crime of indecent liberties. The trial court did not err by instructing the jury that the term willfully meant that the act was done purposefully and without justification or excuse. This instruction "largely mirrors" the North Carolina Supreme Court's definition of willfully, which is "the wrongful doing of an act without justification or excuse, or the commission of an act purposely and deliberately in violation of law."

State v. McClary, 198 N.C. App. 169 (July 7, 2009). There was sufficient evidence to survive a motion to dismiss where it showed that the defendant gave the child a letter containing sexually graphic language for the purpose of soliciting sexual intercourse and oral sex for money. Additionally, the jury could reasonably infer that the defendant's acts of writing and delivering the letter to the child were taken for the purpose of arousing and gratifying sexual desire.

State v. Smith, 362 N.C. 583 (Dec. 12, 2008). The trial judge did not commit plain error in the jury instruction on indecent liberties. When instructing on indecent liberties, the trial judge is not required to specifically identify the acts that constitute the charge.

State v. Coleman, 200 N.C. App. 696 (Nov. 3, 2009). The court held that the (1) defendant, who had a custodial relationship with the child, committed an indecent liberty when he watched the child engage in sexual activity with another person and facilitated that activity; and (2) defendant's two acts−touching the child's breasts and watching and facilitating her sexual encounter with another person−supported two convictions.

Indecent Liberties with Student

State v. Stephens, __ N.C. App. __, 758 S.E.2d 695 (June 3, 2014). In a multi-count indecent liberties with a student case, the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss because there was insufficient evidence that the victim was a "student." The trial court instructed the jury that a "student," for purposes of G.S. 14-202.4(A), means "a person enrolled in kindergarten, or in grade one through 12 in any school." The court rejected the defendant's argument that a person is only "enrolled" during the academic year and that since the offenses occurred during the summer, the victim was not a student at the time.

Mentally Disabled Victim

State v. Hunt, 365 N.C. 432 (Mar. 9, 2012). (1) Reversing a decision of the court of appeals in *State v. Hunt*, 211 N.C. App. 452 (May 3, 2011), the court held that expert testimony was not required for the State to establish that the victim had a mental disability for purposes of second-degree sexual offense. In the opinion below, the court of appeals reversed the defendant's conviction on grounds that there was insufficient evidence as to the victim's mental disability, reasoning: "where the victim's IQ falls within the range considered to be 'mental retardation[,]' but who is highly functional in her daily activities and communication, the State must present expert testimony as to the extent of the victim's mental disability as defined by [G.S.] 14-27.5."

The supreme court, however, found the evidence sufficient. First, it noted, there was evidence that the victim was mentally disabled. The victim had an IQ of 61, was enrolled in special education classes, a teacher assessed her to be in the middle level of intellectually disabled students, and she required assistance to function in society. Second, the victim's condition rendered her substantially incapable of resisting defendant's advances. The victim didn't know the real reason why the defendant asked her to come into another room, his initial acts of touching scared her because she didn't know what he was going to do, she was shocked when he exposed himself, she was frightened when he forced her to perform fellatio and when she raised her head to stop, he forced it back down to his penis. Finally, there was evidence that the defendant knew or reasonably should have known about the victim's disability. Specifically, his wife testified that she had discussed the victim's condition with the defendant. The court emphasized that "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with second-degree sexual offense pursuant to section 14-27.5." (2) Reversing the court of appeals, the court held that the State presented sufficient evidence of crime against nature. The defendant conceded knowing that the victim was 17 years old. For the reasons discussed above, the court concluded that there was sufficient evidence that the victim's conditions rendered her substantially incapable of resisting the defendant's advances. All of this evidence indicates that the sexual acts were not consensual. In addition, the court noted, the record suggests that the acts were coercive, specifically pointing to the defendant's conduct of forcing the victim's head to his penis. The court emphasized that "expert testimony is not necessarily required to establish the extent of a victim's mental capacity to consent to sexual acts when a defendant is charged with . . . crime against nature."

In Re A.W., 209 N.C. App. 596 (Feb. 15, 2011). The evidence was insufficient to sustain an adjudication of delinquency based on a violation of G.S. 14-27.5 (second-degree sexual offense). On appeal, the State conceded that there was no evidence that the victim was mentally disabled, mentally incapacitated, or physically helpless.

State v. Williams, 207 N.C. App. 136 (Sept. 7, 2010). In a sexual offense case, there was sufficient evidence that the victim, an adult with 58 I.Q., was mentally disabled and that the defendant knew or should reasonably have known this. (1) Because the parties agreed that the victim was capable of appraising the nature of his conduct and of communicating an unwillingness to submit to a sexual act (he told the defendant he did not want to do the act), the issue on the mentally disabled element was whether the victim was substantially capable of resisting a sexual act. The victim was mildly mentally retarded. He had difficulty expressing himself verbally, was able to read very simple words and solve very simple math problems, and had difficulty answering questions about social abilities and daily tasks. He needed daily assistance with cooking and personal hygiene. Notwithstanding the victim's communication of his unwillingness to receive oral sex, the defendant completed the sexual act, allowing an inference that the victim was unable to resist. (2) There was sufficient evidence that the defendant knew or should have known that the victim was mentally disabled. An officer testified that within three minutes of talking with the victim, it was obvious that he had some deficits. By contrast, the defendant appeared normal and healthy. While the defendant had a driver's license, held regular jobs, took care of the victim's mother, could connect a VCR, and could read "somewhat," the victim could not drive, never held a regular job, could cook only in a

microwave, had to be reminded to brush his teeth, did not know how to connect a VCR, and could not read. Moreover, the defendant had sufficient opportunity to get to know the victim, having dated the victim's mother for thirteen years and having spent many nights at the mother's house, where the victim lived.

Rape

Display of Dangerous or Deadly Weapon

State v. Lawrence, 363 N.C. 118 (Mar. 20, 2009). The court, per curiam and without an opinion, affirmed the ruling of the court of appeals that there was substantial evidence that the defendant displayed an article which the victim reasonably believed to be a dangerous or deadly weapon. The evidence showed that the defendant grabbed the victim, told her that he was going to kill her and reached into his pocket to get something; although the victim did not see if the item was a knife or a gun, she saw something shiny and silver that she believed to be a knife.

By Force & Against the Will

State v. Miles, ___ N.C. App. ___, 764 S.E.2d 237 (Nov. 4, 2014). In a case where the defendant was convicted of second-degree rape, breaking or entering, and two counts of attempted second-degree
sexual offense, the trial court did not err by denying the defendant's motion to dismiss one count of attempted second-degree sexual offense. The defendant asserted that the evidence did not show an intent to commit the act by force and against the victim's will. The court disagreed:

> [W]here the request for fellatio is immediately preceded by defendant tricking the victim into letting him into her apartment, raping her, pulling her hair, choking her, flipping her upside down, jabbing at her with a screwdriver, refusing to allow her to leave, pulling her out of her car, taking her car keys, dragging her to his apartment, slapping her so hard that her braces cut the inside of her mouth, screaming at her, and immediately after her denial of his request, raping her again, we hold that this request is accompanied by a threat and a show of force and thus amounts to an attempt. Had [the victim] complied with defendant's request, thus completing the sexual act, we cannot imagine that the jury would have found that she had consented to perform fellatio. Given the violent, threatening context, defendant's request and presentation of his penis to [the victim] amounted to an attempt to engage [the victim] in a sexual act by force and against her will.

State v. Norman, __ N.C. App. __, 741 S.E.2d 683 (May 7, 2013). In a second-degree rape and sexual offense case, the evidence sufficiently established use of force. The victim repeatedly declined the defendant's advances and told him to stop and that she didn't want to engage in sexual acts. The defendant pushed her to the ground. When he was on top of her she tried to push him away.

Instructing on Lesser of Attempt

State v. Boyett, __ N.C. App. __, 747 S.E.2d 739 (Sept. 17, 2013). On remand by the NC Supreme Court for reconsideration in light of *State v. Carter*, 366 N.C. 496 (2013) (no plain

error occurred in a child sexual offense case when the trial court failed to instruct on attempted sexual offense even though the evidence of penetration was conflicting), the court held that no plain error occurred when the trial court failed to instruct the jury on attempted second-degree rape and attempted incest when the evidence of penetration was conflicting. As in *Carter*, the defendant failed to show that the jury would have disregarded any portions of the victim's testimony stating that penetration occurred in favor of instances in which she said it did not occur. Thus, the defendant failed to show a "probable impact" on the verdict.

State v. Norman, __ N.C. App. __, 741 S.E.2d 683 (May 7, 2013). Because evidence of vaginal penetration was clear and positive, the trial court did not err by failing to instruct the jury on attempted rape.

Multiple Convictions & Punishments

State v. Banks, ___ N.C. ___, 766 S.E.2d 334 (Dec. 19, 2014). Because the defendant was properly convicted and sentenced for both statutory rape and second-degree rape when the convictions were based on a single act of sexual intercourse, counsel was not ineffective by failing to make a double jeopardy objection. The defendant was convicted of statutory rape of a 15-year-old and second-degree rape of a mentally disabled person for engaging in a single act of vaginal intercourse with the victim, who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time, the defendant was 29 years old and the victim was 15. The court concluded that although based on the same act, the two offenses are separate and distinct under the *Blockburger* "same offense" test because each requires proof of an element that the other does not. Specifically, statutory rape involves an age component and second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. It continued:

> Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. . . .
>
> Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

State v. Marlow, __ N.C. App. __, 747 S.E.2d 741 (Sept. 17, 2013). The trial court did not err by sentencing the defendant for two crimes—statutory rape and incest—arising out of the same transaction. The two offenses are not the same under the *Blockburger* test; each has an element not included in the other.

Of Child By Adult

State v. Agustin, __ N.C. App. __, 747 S.E.2d 316 (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of rape of a child by an adult under G.S. 14-27.2A(a). The defendant had argued that there was insufficient evidence to establish that the offense occurred on or after December 1, 2008, the statute's effective date. (2) The trial court did not err in sentencing the defendant to 300-369 months imprisonment on this charge. The court rejected the defendant's argument that the trial court had discretion to sentence the defendant to less than 300 months.

Physically Helpless

State v. Huss, 367 N.C. 162 (Nov. 8, 2013). The court per curiam, with an equally divided court, affirmed the decision below, *State v. Huss*, __ N.C. App. __, 734 S.E.2d 612 (2012). That decision thus is left undisturbed but without precedential value. In this case, involving charges of second-degree sexual offense and second-degree rape, the court of appeals had held that the trial court erred by denying the defendant's motion to dismiss. The State proceeded on a theory that the victim was physically helpless. The facts showed that the defendant, a martial arts instructor, bound the victim's hands behind her back and engaged in sexual activity with her. The statute defines the term physically helpless to mean a victim who either is unconscious or is physically unable to resist the sexual act. Here, the victim was not unconscious. Thus, the only issue was whether she was unable to resist the sexual act. The court of appeals began by rejecting the defendant's argument that this category applies only to victims who suffer from some permanent physical disability or condition, instead concluding that factors other than physical disability could render a victim unable to resist the sexual act. However, it found that no such evidence existed in this case. The State had argued that the fact that the defendant was a skilled fighter and outweighed the victim supported the conclusion that the victim was physically helpless. The court of appeals rejected this argument, concluding that the relevant analysis focuses on "attributes unique and personal of the victim." Similarly, the court of appeals rejected the State's argument that the fact that the defendant pinned the victim in a submissive hold and tied her hands behind her back supported the conviction. It noted, however, that the evidence would have been sufficient under a theory of force. The defendant also was convicted of kidnapping the victim for the purpose of facilitating second-degree rape. The court of appeals reversed the kidnapping conviction on grounds that the State had proceeded under an improper theory of second-degree rape (the State proceeded on a theory that the victim was physically helpless when in fact force would have been the appropriate theory). The court of appeals concluded: "because the State proceeded under an improper theory of second-degree rape, we are unable to find that the State sufficiently proved the particular felonious intent alleged here."

Sexual Intercourse

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court held, over a dissent, that the trial court erred by failing to dismiss one of the rape charges. The court agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court found that the defendant's admission to three instances of "sex" with the victim was not an admission of

vaginal intercourse because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis.

State v. Combs, __ N.C. App. __, 739 S.E.2d 584 (Mar. 19, 2013). In a case in which the defendant was convicted of rape of a child under G.S. 14-27.2A, there was substantial testimony to establish that the defendant engaged in vaginal intercourse with the victim. The victim testified that the defendant put his "manhood inside her middle hole." Although the victim used potentially ambiguous terms, she explained them, noting that a middle hole is where "where babies come from," a bottom hole is where things come out of that go in the toilet, and a third hole is for urination. She also described the defendant's manhood as "down at the bottom but on the front" and not a part a woman has.

Sexual Battery

In re K.C., __ N.C. App. __, 742 S.E.2d 239 (April 16, 2013). There was insufficient evidence to support a delinquency adjudication for sexual battery. Although there was sufficient evidence of sexual contact, there was insufficient evidence of a sexual purpose. When dealing with children, sexual purpose cannot be inferred from the act itself and that there must be "evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting." It continued, "factors like age disparity, control by the juvenile, the location and secretive nature of the juvenile's actions, and the attitude of the juvenile should be taken into account." Evaluating the circumstances, the court found the evidence insufficient.

State v. Patino, 207 N.C. App. 322 (Oct. 5, 2010). In a sexual battery case, the evidence was sufficient to establish that the defendant grabbed the victim's crotch for the purpose of sexual arousal, sexual gratification, or sexual abuse. The defendant previously had asked the victim for her phone number and for a date, and had brushed against her thigh in such a manner that the victim reported the incident to her supervisor and was instructed not to be alone with the defendant.

State v. Corbett, 196 N.C. App. 508 (Apr. 21, 2009). Assault is not a lesser-included offense of sexual battery.

Sexual Offense
Deadly Weapon

State v. Bonilla, 209 N.C. App. 576 (Feb. 15, 2011). The trial court did not commit plain error by instructing the jury that it could consider whether or not the use of a bottle constituted a deadly weapon during the commission of a sexual offense. The defendant and his accomplice, after tying the victim's hands and feet, shoved a rag into his mouth, pulled his pants down, and inserted a bottle into his rectum. The victim thought that he was going to die and an emergency room nurse found a tear in the victim's anal wall accompanied by "serious drainage."

Force

State v. Henderson, __ N.C. App. __, 756 S.E.2d 860 (April 15, 2014). The court affirmed a conviction for second-degree sexual offense in a case where the defendant surprised a Target shopper by putting his hand up her skirt and penetrating her vagina. The court rejected the defendant's argument that because his action surprised the victim, he did not act by force and against her will.

State v. Norman, __ N.C. App. __, 741 S.E.2d 683 (May 7, 2013). (1) In a second-degree rape and sexual offense case, the evidence sufficiently established use of force. The victim repeatedly declined the defendant's advances and told him to stop and that she didn't want to engage in sexual acts. The defendant pushed her to the ground. When he was on top of her she tried to push him away. (2) Because evidence of vaginal penetration was clear and positive, the trial court did not err by failing to instruct the jury on attempted rape.

In Re T.W., 221 N.C. App. 193 (June 5, 2012). Because there was no evidence of threat of force or special relationship there was insufficient evidence of constructive force to support second-degree sexual offense charges. The State had argued that constructive force was shown by (a) the fact that the juvenile threatened the minor victims with exposing their innermost secrets and their participation with him in sexual activities, and (2) the power differential between the juvenile and the victims. Rejecting this argument, the court concluded: for "the concept of constructive force to apply, the threats resulting in fear, fright, or coercion must be threats of physical harm." Acknowledging that constructive force also can be inferred from a special relationship, such as parent and child, the court concluded that the relationships in the case at hand did not rise to that level. In this case the juvenile was a similar age to the victims and their relationship was one of leader and follower in school.

Greater and Lesser-Included Offenses

State v. Martin, 222 N.C. App. 213 (Aug. 7, 2012). Assault on a female is not a lesser-included of first-degree sexual offense.

State v. Hunt, 221 N.C. App. 489 (July 17, 2012), , *aff'd per curiam*, __ N.C. __, 766 S.E.2d 288 (Dec. 19, 2014). The defendant could not be convicted of second-degree sexual offense (mentally disabled victim) and crime against nature (where lack of consent was based on the fact that the victim was mentally disabled, incapacitated or physically helpless) based on the same conduct (fellatio). The court found that "on the particular facts of Defendant's case, crime against nature was a lesser included offense of second-degree sexual offense, and entry of judgment on both convictions subjected Defendant to unconstitutional double jeopardy." [Author's note: The N.C. Supreme Court has previously held that crime against nature is not a lesser-included offense of forcible rape or sexual offense, State v. Etheridge, 319 N.C. 34, 50–51 (1987); State v. Warren, 309 N.C. 224 (1983), and that a definitional test applies when determining whether offenses are lesser-included offenses, State v. Nickerson, 316 N.C. 279 (2011).].

Penetration

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). In a sexual offense case involving fellatio, proof of penetration is not required.

State v. Sprouse, 217 N.C. App. 230 (Dec. 6, 2011). There was sufficient evidence of penetration during anal intercourse to sustain convictions for statutory sex offense and sexual activity by a substitute parent. The victim testified that the defendant "inserted his penis . . . into [her] butt," that the incident was painful, and that she wiped blood from the area immediately after the incident.

State v. Carter, 216 N.C. App. 453 (Nov. 1, 2011), *rev. on other grounds*, 366 N.C. 496 (Apr. 12, 2013). There was sufficient evidence of anal penetration to support a sexual offense charge. Although the evidence was conflicting, the child victim stated that the defendant's penis penetrated her anus. Additionally, a sexual assault nurse examiner testified that the victim's anal fissure could have resulted from trauma to the anal area.

State v. Crocker, 197 N.C. App. 358 (June 2, 2009). The evidence was sufficient of a sexual offense where the child victim testified that the defendant reached beneath her shorts and touched between "the skin type area" in "[t]he area that you pee out of" and that he would rub against a pressure point causing her pain and to feel faint. A medical expert testified that because of the complaint of pain, the victim's description was "more suggestive of touching . . . on the inside."

Physically Helpless

State v. Huss, 367 N.C. 162 (Nov. 8, 2013). The court per curiam, with an equally divided court, affirmed the decision below, *State v. Huss*, __ N.C. App. __, 734 S.E.2d 612 (2012). That decision thus is left undisturbed but without precedential value. In this case, involving charges of second-degree sexual offense and second-degree rape, the court of appeals had held that the trial court erred by denying the defendant's motion to dismiss. The State proceeded on a theory that the victim was physically helpless. The facts showed that the defendant, a martial arts instructor, bound the victim's hands behind her back and engaged in sexual activity with her. The statute defines the term physically helpless to mean a victim who either is unconscious or is physically unable to resist the sexual act. Here, the victim was not unconscious. Thus, the only issue was whether she was unable to resist the sexual act. The court of appeals began by rejecting the defendant's argument that this category applies only to victims who suffer from some permanent physical disability or condition, instead concluding that factors other than physical disability could render a victim unable to resist the sexual act. However, it found that no such evidence existed in this case. The State had argued that the fact that the defendant was a skilled fighter and outweighed the victim supported the conclusion that the victim was physically helpless. The court of appeals rejected this argument, concluding that the relevant analysis focuses on "attributes unique and personal of the victim." Similarly, the court of appeals rejected the State's argument that the fact that the defendant pinned the victim in a submissive hold and tied her hands behind her back supported the conviction. It noted, however, that the evidence would have been sufficient under a theory of force. The defendant also was convicted of kidnapping the victim for the purpose of facilitating second-degree rape. The court of appeals reversed the kidnapping conviction on grounds that the State had proceeded under an improper theory of

second-degree rape (the State proceeded on a theory that the victim was physically helpless when in fact force would have been the appropriate theory). The court of appeals concluded: "because the State proceeded under an improper theory of second-degree rape, we are unable to find that the State sufficiently proved the particular felonious intent alleged here."

Sexual Purpose Is not an Element

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose.

Multiple Convictions

State v. Sweat, 216 N.C. App. 321 (Oct. 18, 2011), *aff'd in part, rev'd in part*, 366 N.C. 79 (2012). In a case in which there was a dissenting opinion, the court held that the trial court did not err with respect to instructions on two counts because the jury could properly have found either anal intercourse or fellatio and was not required to agree as to which one occurred.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). The defendant was properly convicted of two counts of sexual offense when the evidence showed that the victim awoke to find the defendant's hands in her vagina and in her rectum at the same time.

"Sexual Activity"

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). With respect to a sexual offense charge allegedly committed on Melissa in Burke County, the court held that the State failed to present substantial evidence that a sexual act occurred. The only evidence presented by the State regarding a sexual act that occurred was Melissa's testimony that the defendant placed his finger inside her vagina. However, this evidence was not admitted as substantive evidence. The State presented specific evidence that the defendant performed oral sex on Melissa—a sexual act under the statute--but that act occurred in Caldwell County, not Burke. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of G.S. 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. Thus, the court concluded the evidence is insufficient to support the Burke County sexual offense conviction

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). (1) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (2) The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose.

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In this child sexual abuse case, the trial court erred by denying the defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act; the evidence indicated only vaginal penetration, which cannot support a conviction of sexual offense.

State v. Green, __ N.C. App. __, 746 S.E.2d 457 (Aug. 20, 2013). Deciding an issue of first impression, the court held that the defendant's act of forcing the victim at gunpoint to penetrate her own vagina with her own fingers constitutes a sexual act supporting a conviction for first-degree sexual offense.

Sexual Activity by a Substitute Parent

State v. Sprouse, 217 N.C. App. 230 (Dec. 6, 2011). There was sufficient evidence of penetration during anal intercourse to sustain convictions for statutory sex offense and sexual activity by a substitute parent. The victim testified that the defendant "inserted his penis . . . into [her] butt," that the incident was painful, and that she wiped blood from the area immediately after the incident.

Sexual Activity by a Custodian

State v. Coleman, 200 N.C. App. 696 (Nov. 3, 2009). The court held that (1) the defendant, who was employed by a corporation at its boys' group home location was a custodian of the victim, who lived at the corporation's girls' group home location; and (2) the State need not prove that the defendant knew that he was the victim's custodian.

Solicitation of a Child by Computer

State v. Fraley, 202 N.C. App. 457 (Feb. 16, 2010). The defendant advised or enticed an officer posing as a child to meet the defendant, on the facts presented. The court noted that since the terms advise and entice were not defined by the statute, the General Assembly is presumed to have used the words to convey their natural and ordinary meaning.

Incest

State v. Marlow, __ N.C. App. __, 747 S.E.2d 741 (Sept. 17, 2013). The trial court did not err by sentencing the defendant for two crimes—statutory rape and incest—arising out of the same transaction. The two offenses are not the same under the *Blockburger* test; each has an element not included in the other.

Sex Offender Crimes

Being At Any Place Where Minors Gather

State v. Simpson, __ N.C. App. __, 763 S.E.2d 1 (Aug. 5, 2014). The trial court erred by denying the defendant's motion to dismiss a charge that the defendant was a registered sex offender unlawfully on premises used by minors in violation of G.S. 14-208.18(a). The statute prohibits registered sex offenders from being "[w]ithin 300 feet of any location intended primarily for the

use, care, or supervision of minors when the place is located on premises that are not intended primarily for the use, care, or supervision of minors[.]" The charges arose out of the defendant's presence at a public park, specifically, sitting on a bench within the premises of the park and in close proximity to the park's batting cage and ball field. The court agreed with the defendant that the State failed to present substantial evidence that the batting cages and ball fields constituted locations that were primarily intended for use by minors. At most, the State's evidence established that these places were sometimes used by minors.

State v. Daniels, __ N.C. App. __, 741 S.E.2d 354 (Dec. 31, 2012). (1) G.S. 14-208.18(a)(1)-(3) creates three separate and distinct criminal offenses. (2) Although the defendant did not have standing to assert that G.S. 14-208.18(a)(3) was facially invalid, he had standing to raise an as applied challenge. (3) G.S. 14-208.18(a)(3), which prohibits a sex offender from being "at any place" where minors gather for regularly scheduled programs, was unconstitutionally vague as applied to the defendant. The defendant's two charges arose from his presence at two public parks. The State alleged that on one occasion he was "out kind of close to the parking lot area or that little dirt road area[,]" between the ballpark and the road and on the second was at an "adult softball field" adjacent to a "tee ball" field. The court found that on these facts, the portion of G.S. 14-208.18(a)(3), prohibiting presence "at any place," was unconstitutionally vague as applied to the defendant because it fails to give the person of ordinary intelligence a reasonable opportunity to know what is prohibited, and it fails to provide explicit standards for those who apply the law. (4) The trial court lacked jurisdiction to rule that G.S. 14-208.18(a)(2) was unconstitutional where the defendant only was charged with a violation of G.S. 14-208.18(a)(3) and those provisions were severable.

Accessing Social Networking Site

State v. Packingham, __ N.C. App. __, 748 S.E.2d 146 (Aug. 20, 2013), *review allowed*, __ N.C. __, 749 S.E.2d 842 (Nov. 7, 2013). The court held that G.S. 14-202.5, proscribing the crime of accessing a commercial social networking Web site by a sex offender, is unconstitutional. The court held that the statute violated the defendant's First Amendment Rights, finding that the content-neutral regulation of speech was not narrowly tailored, and that it is unconstitutionally vague on its face and overbroad as applied.

Failure to Register & Related Offenses

State v. Abshire, 363 N.C. 322 (June 18, 2009). Rejecting an interpretation of the term "address" as meaning where a person resides and receives mail or other communication, the North Carolina Supreme Court held that the term carries the "ordinary meaning of describing or indicating the location where someone lives"; as such, the court concluded, the word indicates a person's residence, whether permanent or temporary. The court went on to hold that the state presented sufficient evidence to establish that the defendant changed her address, thus triggering the reporting requirement.

State v. Surratt, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). (1) The State presented sufficient evidence to support a conviction for failure to register as a sex offender. The court rejected the defendant's argument that he was not required to register in connection with a 1994 indecent liberties conviction. The court took judicial notice of the fact that the defendant's prison

release date for that conviction was Sept. 24, 1995 but that he was not actually released until Jan. 24, 1999 because he was serving a consecutive term for crime against nature. Viewing the later date as the date of the defendant's release from prison, the court held that the registration requirements were applicable to him because they took effect in January 1996 and applied to offenders then serving time for a reportable sexual offense. The court further held that because the defendant was a person required to register when the 2008 amendments to the sex offender registration statute took effect, those amendments applied to him as well. (2) Where there was no evidence that the defendant willfully gave an address he knew to be false, the evidence was insufficient to support a conviction for submitting information under false pretenses to the sex offender registry in violation of G.S. 14-208.9A(a)(1). The State's theory of the case was that the defendant willfully made a false statement to an officer, stating that he continued to reside at his father's residence. Citing prior case law, the court held that the statute only applies to providing false or misleading information on forms submitted pursuant to the sex offender law. Here, the defendant never filled out any verification form listing the address in question. It ruled: "An executed verification form is required before one can be charged with falsifying or forging the document."

State v. Moore (No. 14-1033), ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In this failure to register case based on willful failure to return a verification form as required by G.S. 14-208.9A, the trial court erred by denying the defendant's motion to dismiss. To prove its case, the State must prove that the defendant actually received the letter containing the verification form. It noted: "actual receipt could have been easily shown by the State if it simply checked the box marked "Restricted Delivery?" and paid the extra fee to restrict delivery of the … letter to the addressee, the sex offender." The court also found that there was insufficient evidence that the sheriff's office made a reasonable attempt to verify the defendant's address, another element of the offense. The evidence indicated that the only attempt the Deputy made to verify that the defendant still resided at his last registered address was to confirm with the local jail that the defendant was not incarcerated. Finally, the court found that State failed to show any evidence that the defendant willfully failed to return the verification form.

State v. Barnett, ___ N.C. App. ___, 768 S.E.2d 327 (Jan. 20, 2015), *temporary stay allowed*, __ N.C. __, 767 S.E.2d 856 (Feb. 6, 2015). In a failure to register case, there was insufficient evidence that the defendant changed his address. The indictment alleged that the defendant failed to notify the sheriff's office within three business days of his change of address; it did not allege that he failed to update his registration information upon release from a penal institution. The court rejected the State's argument that when the defendant was incarcerated after his initial registration, his subsequent release from incarceration required him to register a change of address, concluding that the statutory provisions regarding registration upon release from a penal institution applied to such situations.

State v. Crockett, ___ N.C. App. ___, 767 S.E.2d 78 (Dec. 16, 2014). There was sufficient evidence that the defendant violated the sex offender registration statutes by failing to notify authorities of a change of address. The defendant listed his address as 945 North College Street, the address of the Urban Ministry Center, a non-profit organization that provides services to the homeless community. The found that "Urban Ministry is not a valid address at which Defendant could register . . . because Defendant could not live there." It explained:

> Critical to our holding . . . that Defendant did not "live" at Urban Ministry is the fact that he was not permitted to keep any personal belongings there, nor could he sleep at Urban Ministry. In addition, Urban Ministry did not permit people to "reside" at the facility, as it closes each day. The activities which Defendant, and many other homeless people, are permitted to perform at the Urban Ministry facility does not make it his "residence" because he cannot "live" there.
>
> Urban Ministry's operational hours are similar to those of a business. It is open from 8:30 a.m. to 4:00 p.m. during the week and from 9:00 a.m. to 12:30 p.m. on weekends. Visitors at Urban Ministry may use the facility for activities such as showering, napping, and changing clothes, but no one is permitted to sleep there and there are no beds. The purpose of the sex offender registration program is "to assist law enforcement agencies and the public in knowing the whereabouts of sex offenders and in locating them when necessary." Allowing Defendant to register Urban Ministry as a valid address would run contrary to the legislative intent behind the sex offender registration statute. (citation omitted).

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). In a failing to register case there was sufficient evidence that the defendant changed his address from Burke to Wilkes County. Among other things, a witness testified that the defendant was at his ex-wife Joann's home in Wilkes County all week, including the evenings. The court concluded: "the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address in Wilkes County." (quotation omitted). It explained:

> [T]he evidence . . . showed that defendant still received mail, maintained a presence, and engaged in some "core necessities of daily living," at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann's in Wilkes County. Specifically, [witnesses] testified that defendant was often at Joann's all week. Furthermore, [a witness] testified that defendant engaged in activities that only someone living at Joann's would do. Thus . . . the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann's in Wilkes County. Although defendant may have considered the house in Burke County his "home," . . . his subjective belief and even the fact that he was "in and out" of the Burke County house does not prevent him from having a second, temporary residence. (citations omitted).

State v. Pressley, __ N.C. App. __, 762 S.E.2d 374 (Aug. 19, 2014). Falsely stating an address on any verification form required by the sex offender registration program supports a conviction for failing to register as a sex offender. The court rejected the defendant's argument that the only verification forms that count are the initial verification form and those required to be filed every 6 months thereafter, noting that under G.S. 14-208.9A(b) additional verification may be required. (2) The court rejected the defendant's argument that his false reporting of his address on two separate verification forms constituted a continuing offense and could support only one conviction. The court concluded that the submission of each form was a distinct violation of the statute.

State v. McFarland, __ N.C. App. __, 758 S.E.2d 457 (June 3, 2014). (1) The court rejected the defendant's argument that G.S. 14-208.11 (2011) (failure to notify of a change in address) is void for vagueness as applied to him. He argued that because he is homeless, a person of ordinary intelligence person could not know what "address" means in his case. The court noted that in *State v. Abshire*, 363 N.C. 322 (2009), the N.C. Supreme Court clearly and unambiguously defined the term "address" as used in the statute well before the defendant was released from prison. It further noted that in *State v. Worley*, 198 N.C. App. 329 (2009), it rejected the defendant's argument that homeless sex offenders have no address for purposes of the registration statutes. It concluded:

> Even assuming that the language of the statute is ambiguous, defendant had full notice of what was required of him, given the judicial gloss that the appellate courts have put on it. Certainly after *Abshire* and *Worley*, if not before, a person of reasonable intelligence would understand that a sex offender is required to inform the local sheriff's office of the physical location where he resides within three business days of a change, even if that location changes from one bridge to another, or one couch to another. Although this obligation undoubtedly places a large burden on homeless sex offenders, it is clear that they bear such a burden under [G.S.] 14-208.9 and that under [G.S.] 14-208.11(a)(2) they may be punished for willfully failing to meet the obligation. Moreover, the fact that it may sometimes be difficult to discern when a homeless sex offender changes addresses does not make the statute unconstitutionally vague or relieve him of the obligation to inform the relevant sheriff's office when he changes addresses.

(Citations omitted) (2) The evidence was sufficient to convict the defendant for failing to notify of a change in address. Conceding that the State presented evidence that he was not residing at his registered address, the defendant argued that the State failed to presented evidence of where he was actually residing. The court rejected this argument, reasoning that the State is not required to prove the defendant's new address, only that he failed to register a change of address. It stated: "proof that [the] defendant was not living at his registered address is proof that his address had changed."

State v. Fox, 216 N.C. App. 144 (Oct. 4, 2011) (COA11-273). In a case involving a sex offender's failure to give notice of an address change, the court held that the evidence was sufficient to establish that the defendant changed his address. Among other things, a neighbor at the new address testified that the defendant stayed in an upstairs apartment every day and evening. Although the defendant claimed that he had not moved from his father's address, his father told an officer that the defendant did not live there any longer.

State v. Worley, 198 N.C. App. 329 (July 21, 2009). The trial court did not err in denying the defendant's motion to dismiss a charge of failure to notify of a change of address within 10 days where the evidence showed, at a minimum, that the defendant ceased to reside at his last listed reported address on or before August 10th, but did not submit a change of address form until September 16th. The court noted that individuals required to notify the sheriff of a change address must do so, even if the change of address is temporary; it rejected the defendant's contention that there may be times when a registered sex offender lacks a reportable address, such as when the person has no permanent abode.

State v. Braswell, 203 N.C. App. 736 (May 4, 2010). The trial court erred by denying the defendant's motion to dismiss the charge of failing to register as a sex offender by failing to verify his address. In order to be convicted for failure to return the verification form, a defendant must actually have received the form. In this case, the evidence was uncontroverted that the defendant never received the form.

Kidnapping & Related Offenses

Kidnapping

Without Consent

State v. Phillips, 365 N.C. 103 (June 16, 2011). In a multiple homicide case in which the defendant also was charged with kidnapping a victim who was a minor, there was sufficient circumstantial evidence that the minor's parents did not consent to her kidnapping. Because the victim's parents did not testify, there was no direct evidence of lack of parental consent. However, the State presented evidence that, having shot and repeatedly stabbed the victim while she was at the murder scene, the defendant and his accomplices found her after she crawled outside and removed her from the yard for the stated purpose of killing her while she was incapable of escaping. They loaded her into the bed of the defendant's truck and drove to a trash pile, only to abandon her there when they heard sirens.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). The removal of the victim was without her consent when the defendant induced the victim to enter his car on the pretext of paying her money in exchange for sex, but his real intent was to assault her; a reasonable mind could conclude that had the victim known of such intent, she would not have consented to have been moved by the defendant.

Confinement

State v. Yarborough, 198 N.C. App. 22 (July 7, 2009). There was sufficient evidence of confinement where the defendant entered a trailer, brandished a loaded shotgun, and ordered everyone to lie down. It was immaterial that the victim did not comply with the defendant's order to lie down.

Removal

State v. Boyd, 214 N.C. App. 294 (Aug. 2, 2011). In a kidnapping case, the trial court erred by submitting the theory of removal to the jury. Although evidence supported confinement and restraint, no evidence suggested that the defendant removed the victim in a case where the crime occurred entirely in the victim's living room. The court stated: "where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not 'removed' within the meaning of our kidnapping statute."

For Purpose of Terrorizing

State v. Bonilla, 209 N.C. App. 576 (Feb. 15, 2011). (1) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and strangulation, with a contributing factor being the fracture of the thoracic spine. (2) The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering."

State v. Boozer, 210 N.C. App. 371 (Mar. 15, 2011). The evidence was sufficient to establish an intent to cause bodily harm or terrorize where the facts showed that after severely beating the victim, the defendants first attempted to stuff him into a garbage can and then threw him into a 10 or 12-foot-deep ditch filled with rocks and water; one defendant had been to the location several times and could have seen the ditch; and the victim could not recall anything after the assault began and was not struggling or moving during this process. This evidence supports a reasonable inference that the defendants intended to cause the victim serious bodily injury if they believed he was unconscious and unable to protect himself as he was thrown into the ditch, landing on rocks and possibly drowning. Alternatively, it supports a reasonable inference that the defendants intended to terrorize the victim if they believed him to be conscious and aware of being stuffed into a garbage can and then flung into a deep, rocky, water-filled ditch.

For Purpose of Doing Serious Bodily Harm

State v. Bonilla, 209 N.C. App. 576 (Feb. 15, 2011). (1) The evidence was sufficient to establish that the defendant confined and restrained Victims Alvarez and Cortes for the purpose of terrorizing them and doing them serious bodily harm. The evidence was sufficient to establish a purpose of terrorizing Alvarez when the defendant beat and kicked Alvarez repeatedly while wrestling him to the floor; the defendant bound Alvarez's hands and feet and placed a rag in his mouth; the defendant and an accomplice threatened to kill Alvarez; the defendant pulled Alvarez's pants down, and the accomplice forced a bottle into his rectum; and Alvarez testified that he thought he was going to die. There was sufficient evidence as to the purpose of doing serious bodily harm to Alvarez given the sexual assault. As to Cortes, the defendant and the accomplice knocked him to the floor, and kicked him in the stomach repeatedly; Cortes was hog-tied so severely that his spine was fractured; he had lacerations to the lips and abrasions on his face, neck, chest, and abdomen; tissue paper was in his mouth; the spine fracture would have paralyzed the lower part of his body; and cause of death was a combination of suffocation and

strangulation, with a contributing factor being the fracture of the thoracic spine. (2) The trial court's instruction clearly and appropriately defined "terrorizing" and "serious bodily harm" as required for kidnapping. The trial court instructed that: "Terrorizing means more than just putting another in fear. It means putting that person in some high degree of fear, a state of intense fright or apprehension, or doing serious bodily injury to that person. Serious bodily injury may be defined as such physical injury as causes great pain or suffering."

State v. Boozer, 210 N.C. App. 371 (Mar. 15, 2011). The evidence was sufficient to establish an intent to cause bodily harm or terrorize where the facts showed that after severely beating the victim, the defendants first attempted to stuff him into a garbage can and then threw him into a 10 or 12-foot-deep ditch filled with rocks and water; one defendant had been to the location several times and could have seen the ditch; and the victim could not recall anything after the assault began and was not struggling or moving during this process. This evidence supports a reasonable inference that the defendants intended to cause the victim serious bodily injury if they believed he was unconscious and unable to protect himself as he was thrown into the ditch, landing on rocks and possibly drowning. Alternatively, it supports a reasonable inference that the defendants intended to terrorize the victim if they believed him to be conscious and aware of being stuffed into a garbage can and then flung into a deep, rocky, water-filled ditch.

For Purpose of Facilitating a Felony

State v. Huss, 367 N.C. 162 (Nov. 8, 2013). The court per curiam, with an equally divided court, affirmed the decision below, *State v. Huss*, __ N.C. App. __, 734 S.E.2d 612 (2012). That decision thus is left undisturbed but without precedential value. In this case, involving charges of second-degree sexual offense and second-degree rape, the court of appeals had held that the trial court erred by denying the defendant's motion to dismiss. The State proceeded on a theory that the victim was physically helpless. The facts showed that the defendant, a martial arts instructor, bound the victim's hands behind her back and engaged in sexual activity with her. The statute defines the term physically helpless to mean a victim who either is unconscious or is physically unable to resist the sexual act. Here, the victim was not unconscious. Thus, the only issue was whether she was unable to resist the sexual act. The court of appeals began by rejecting the defendant's argument that this category applies only to victims who suffer from some permanent physical disability or condition, instead concluding that factors other than physical disability could render a victim unable to resist the sexual act. However, it found that no such evidence existed in this case. The State had argued that the fact that the defendant was a skilled fighter and outweighed the victim supported the conclusion that the victim was physically helpless. The court of appeals rejected this argument, concluding that the relevant analysis focuses on "attributes unique and personal of the victim." Similarly, the court of appeals rejected the State's argument that the fact that the defendant pinned the victim in a submissive hold and tied her hands behind her back supported the conviction. It noted, however, that the evidence would have been sufficient under a theory of force. The defendant also was convicted of kidnapping the victim for the purpose of facilitating second-degree rape. The court of appeals reversed the kidnapping conviction on grounds that the State had proceeded under an improper theory of second-degree rape (the State proceeded on a theory that the victim was physically helpless when in fact force would have been the appropriate theory). The court of appeals concluded: "because

the State proceeded under an improper theory of second-degree rape, we are unable to find that the State sufficiently proved the particular felonious intent alleged here."

Live Victim

State v. Keller, 198 N.C. App. 639 (Aug. 4, 2009). Kidnapping requires a live victim.

Multiple Convictions
Restraint, etc., Inherent In/Separate From Other Offense

State v. Stokes, 367 N.C. 474 (April 11, 2014). The court reversed and remanded the decision below, *State v. Stokes*, __ N.C. App. __, 745 S.E.2d 375 (Jun. 4, 2013) (vacating the defendant's conviction for second-degree kidnapping on grounds that the evidence was insufficient to establish removal when during a robbery the defendant ordered the clerk to the back of the store but the clerk refused). The court rejected the defendant's argument that his removal of the victim was inherent in the robbery and thus could not support a separate kidnapping conviction. It explained:

> Defendant ordered [the victim] at gunpoint to the back of the store and then into an awaiting automobile outside the store after stealing the cigarettes and money, the only two items defendant demanded during the robbery. At this point defendant was attempting to flee the scene of the crime. The armed robbery was complete, and defendant's attempted removal of [the victim] therefore cannot be considered inherent to that crime. By ordering [the victim] into an awaiting automobile after completing the armed robbery, defendant attempted to place [the victim] in danger greater than that inherent in the underlying felony.

State v. Parker, __ N.C. App. __, 768 S.E.2d 1 (Dec. 2, 2014), *temporary stay allowed*, __ N.C. __, 768 S.E.2d 851 (Dec. 19, 2014). In a case in which the defendant was convicted of kidnapping, rape and sexual assault, because the restraint supporting the kidnapping charge was inherent in the rape and sexual assault, the kidnapping conviction cannot stand. The court explained:

> Defendant grabbed Kelly from behind and forced her to the ground. Defendant put his knee to her chest. He grabbed her hair in order to turn her around after penetrating her vaginally from behind, and he put his hands around her throat as he penetrated her vaginally again and forced her to engage him in oral sex. Though the amount of force used by Defendant in restraining Kelly may have been more than necessary to accomplish the rapes and sexual assault, the restraint was inherent "in the actual commission" of those acts. Unlike in *Fulcher*, where the victims' hands were bound before any sexual offense was committed, Defendant's acts of restraint occurred as part of the commission of the sexual offenses. (citation omitted).

State v. Martin, 222 N.C. App. 213 (Aug. 7, 2012). The defendant's conviction for kidnapping was improper where the restraint involved was inherent in two sexual assaults and an assault by strangulation for which the defendant was also convicted.

State v. Bell, 221 N.C. App. 535 (July 17, 2012). (1) The defendant's confinement of the victims was not inherent in related charges of armed robbery and sexual offense and thus could support the kidnapping charges. The defendant robbed the victims of a camera and forced them to perform sexual acts. He then continued to hold them at gunpoint while he talked to them about what had happened to him, grilled one about Bible verses, and made them pray with him. The additional confinement after the robbery and sex offenses were finished was sufficient evidence of kidnapping separate from the other offenses. (2) With respect to a charge of kidnapping a child under 16, there was sufficient evidence that the defendant confined the child. While threatening the child and his mother with a gun, the defendant told the mother to put her son in his room and she complied. After that, whenever her son called out, the victim called back to keep him in his bedroom.

State v. Boozer, 210 N.C. App. 371 (Mar. 15, 2011). The trial court erred by instructing the jury that it need only find that the restraint or removal aspect of the kidnapping "was a separate, complete act independent of and apart from the injury or terror to the victim." As such, it did not distinguish between the restraint as a part of the kidnapping and any restraint or removal that was part of the assault or robbery of the victim. However, because the evidence indicates that the assault stopped before the victim's removal, the court determined that this error was not prejudicial.

State v. Cole, 199 N.C. App. 151 (Aug. 18, 2009). Because the restraint of the victim did not go beyond that inherent in the accompanying robbery, the kidnapping conviction could not stand. The victim was not moved to another location or injured and was held for only 30 minutes.

State v. Payton, 198 N.C. App. 320 (July 21, 2009). The trial court erred in denying the defendant's motion to dismiss kidnapping charges where the removal and restraint of the victims was inherent in a charged robbery. Distinguishing cases where the victims were bound and physically harmed, the court noted that in this case, the victims only were moved from a bathroom area to the bathroom (a movement deemed merely a technical asportation), and were asked to lie on the bathroom floor until the robbery was complete. The removal and restraint did not expose the victims to greater danger than the robbery itself and thus were inherent in the robbery.

State v. Thomas, 196 N.C. App. 523 (May 5, 2009). In a case in which the defendant was convicted of kidnapping and rape, the kidnapping conviction could stand where the confinement and restraint of the victim went beyond the restraint inherent in the commission of the rape. The defendant threatened the victim with a gun while she was in his car. When she tried to escape, he pulled her back into the car and sprayed her with mace. He drove her away from her car and children. When she jumped out, he forced her back into the car at gunpoint. He then drove her to a secluded wooded area, where he raped her.

State v. Gayton-Barbosa, 197 N.C. App. 129 (May 19, 2009). The evidence was sufficient to support a charge of kidnapping where the restraint used against the victim was not inherent in the assaults committed. The defendant kept the victim from leaving her house by repeatedly striking her with a bat. When she was able to escape, he chased her, grabbed her, and shot her. Detaining the victim in her home and again outside was not necessary to effectuate the assaults.

Other Multiple Conviction Issues

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). The State conceded and the court held that by sentencing the defendant for both first-degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge a violation of double jeopardy occurred.

State v. Holloman, __ N.C. App. __, 751 S.E.2d 638 (Dec. 17, 2013). The trial court erred by convicting the defendant of both first-degree kidnapping and the sexual assault that raised the kidnapping to first-degree. The trial court instructed the jury that to convict defendant of first-degree kidnapping, it had to find that the victim was not released in a safe place, had been sexually assaulted, or had been seriously injured. The jury returned guilty verdicts for both first-degree kidnapping and second-degree sexual offense but did not specify the factor that elevated kidnapping to first-degree. The court concluded that it must construe the ambiguous verdict in favor of the defendant and assume that the jury relied on the sexual assault in finding the defendant guilty of first-degree kidnapping.

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). A defendant may be convicted of assault inflicting serious bodily injury and first-degree kidnapping when serious injury elevates the kidnapping conviction to first-degree.

Release in a Safe Place

State v. Bonilla, 209 N.C. App. 576 (Feb. 15, 2011). A person who is killed in the course of a kidnapping is not left in a safe place. Alternatively, if the victim still was alive when left by the defendant and his accomplice, he was not left in a safe place given that he was bound so tightly that he suffered a fracture to his spine and ultimately suffocated.

State v. Smith, 194 N.C. App. 120 (Dec. 2, 2008). The fact that the state proceeded on a theory of acting in concert does not require the conclusion that the defendants released the victim in a safe place simply because one of the other perpetrators arguably did so. The record contained substantial evidence that defendants did not undertake conscious, willful action to assure that the victim was released in a safe place.

Felonious Restraint

State v. Lalinde, __ N.C. App. __, 750 S.E.2d 868 (Dec. 3, 2013), *review allowed*, 367 N.C. 503 (June 11, 2014). In a felonious restraint case, the evidence was sufficient to show that the defendant restrained the victim by defrauding her into entering his car and driving to Florida with him. The defendant, a man in this thirties, formed an inappropriate relationship with the nine-year-old female victim. He gained her trust and strengthened the secret relationship over a five-year period. The victim confided to him that she had been sexually abused by her brother and that she feared he would rape her again when he moved back to North Carolina. When her brother tried to break into her room, the victim called the defendant, and he offered to get her and bring her to Florida to live with him. The court viewed this action as an offer to rescue the victim

from her brother. When the victim met the defendant at the end of her street, he did not greet her in a sexual way, but rather gave her a "deceptively innocent kiss on the cheek." Then, shortly after arriving in Florida, he took away her clothes, pinned her to the bed, and had non-consensual sex with her. On these facts, a reasonable juror could conclude that the defendant duped the victim into getting into his car and traveling to Florida by assuring her that his intent was to rescue her from further sexual assaults by her brother when instead his intent was to isolate her so that he could sexually assault her himself. Furthermore, a reasonable juror could conclude that the defendant's failure to tell the victim that he intended to have sex with her and his kiss on her cheek were each intended to conceal from her his true intentions and that she would not have gone with him had he been honest with her. The court rejected the defendant's argument that there is no evidence of fraud because his promise to help the victim escape from her brother was not false, reasoning that fraud may be based upon an omission.

Larceny, Embezzlement & Related Offenses

Larceny

Value of Item Stolen

State v. Fish, __ N.C. App. __, 748 S.E.2d 65 (Sept. 17, 2013). The State presented sufficient evidence that the fair market value of the stolen boat batteries was more than $1,000 and thus supported a conviction of felony larceny.

State v. Redman, __ N.C. App. __, 736 S.E.2d 545 (Dec. 18, 2012). In a felony larceny case, there was sufficient evidence that a stolen vehicle was worth more than $1,000. The value of a stolen item is measured by fair market value and a witness need not be an expert to give an opinion as to value. A witness who has knowledge of value gained from experience, information and observation may give his or her opinion of the value of the stolen item. Here, the vehicle owner's testimony regarding its value constituted sufficient evidence on this element.

State v. Sergakis, __ N.C. App. __, 735 S.E.2d 224 (Nov. 20, 2012). In a felony larceny case, there was sufficient evidence that the goods were valued at more than $1,000 where the victim testified that $500 in cash and a laptop computer valued at least at $600 were taken.

State v. Rahaman, 202 N.C. App. 36 (Jan. 19, 2010). There was sufficient evidence that a stolen truck was worth more than $1,000. The sole owner purchased the truck new 20 years ago for $9,000.00. The truck was in "good shape"; the tires were in good condition, the radio and air conditioning worked, and the truck was undamaged, had never been in an accident and had been driven approximately 75,000 miles. The owner later had an accident that resulted in a "total loss" for which he received $1,700 from insurance; he would have received $2,100 had he given up title. An officer testified that the vehicle had a value of approximately $3,000. The State is not required to produce direct evidence of value, provided that the jury is not left to speculate as to value.

From the Person

State v. Hull, __ N.C. App. __, 762 S.E.2d 915 (Sept. 16, 2014). The evidence was sufficient to show that a larceny of a laptop was from the victim's person. At the time the laptop was taken,

the victim took a momentary break from doing her homework on the laptop and she was about three feet away from it. Thus, the court found that the laptop was within her protection and presence at the time it was taken.

State v. Sheppard, __ N.C. App. __, 744 S.E.2d 149 (July 2, 2013). A larceny was from the person when the defendant stole the victim's purse, which was in the child's seat of her grocery store shopping cart. At the time, the victim was looking at a store product and was within hand's reach of her cart; additionally she realized that the larceny was occurring as it happened, not some time later.

Of a Chose in Action

State v. Grier, __ N.C. App. __, 735 S.E.2d 434 (Dec. 4, 2012). (1) Forgery and larceny of a chose in action are not mutually exclusive offenses. The defendant argued that both forgery and uttering a forged check require a counterfeit instrument while larceny of a chose in action requires a "valid instrument." The court concluded that larceny of a chose in action does not require that the bank note, etc. be valid. (2) A blank check is not a chose in action.

Doctrine of Recent Possession

State v. Larkin, __ N.C. App. __, 764 S.E.2d 681 (Nov. 18, 2014). Shoeprint evidence and evidence that the defendant possessed the victim's Bose CD changer and radio five months after they were stolen was sufficient to sustain the defendant's convictions for burglary and larceny.

State v. Patterson, 194 N.C. App. 608 (Jan. 6, 2009). The doctrine of recent possession applied to a video camera and a DVD player found in the defendant's exclusive possession 21 days after the break-in.

Jury Instructions

State v. Whitley, 213 N.C. App. 630 (July 19, 2011). The trial court did not err by failing to define the term "larceny" for the jury. The court noted that it has previously determined that "larceny" is a word of "common usage and meaning to the general public[,]" and thus it is not error to not define it in the jury instructions. It further noted: "While we disagree that the legal term "larceny" is commonly understood by the general public, we are bound by precedent . . . and thus this issue is overruled."

Greater & Lesser-Included Offenses

State v. Hole, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). Following *State v. Ross*, 46 N.C. App. 338 (1980), the court held that unauthorized use of a motor vehicle "may be a lesser included offense of larceny where there is evidence to support the charge." Here, while unauthorized use may have been a lesser included of the charged larceny, the trial court did not commit plain error by failing to instruct on the lesser where the jury rejected the defendant's voluntary intoxication defense.

Multiple Convictions & Punishments

State v. Hardy, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). The trial court erred by sentencing the defendant for both felony larceny and felony possession of stolen goods when both convictions were based on the same items.

State v. Sheppard, __ N.C. App. __, 744 S.E.2d 149 (July 2, 2013). The trial court erred by sentencing the defendant for both larceny from the person and larceny of goods worth more than $1,000 based on a single larceny. Larceny from the person and larceny of goods worth more than $1,000 are not separate offenses, but alternative ways to establish that a larceny is a Class H felony. While it is proper to indict a defendant on alternative theories of felony larceny and allow the jury to determine guilt as to each theory, where there is only one larceny, judgment may only be entered for one larceny.

State v. Szucs, 207 N.C. App. 694 (Nov. 2, 2010). A defendant may not be convicted of both felony larceny and felonious possession of the same goods.

Unauthorized Use
Sufficiency of Evidence

In re A.N.C., __ N.C. App. __, 750 S.E.2d 835 (Feb. 5, 2013). The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for unauthorized use of a motor vehicle. Although the evidence showed that the juvenile was operating a motor vehicle registered to his mother, there was no evidence that he was using the vehicle without his mother's consent.

Greater & Lesser-Included Offenses

State v. Nickerson, 365 N.C. 279 (Oct 7, 2011). Reversing *State v. Nickerson*, 208 N.C. App. 136 (2010), the court held that unauthorized use of a motor vehicle is not a lesser included offense of possession of stolen goods. The court applied the definitional test and concluded that unauthorized use of a motor vehicle contains at least one element not present in the crime of possession of stolen goods and that therefore the former offense is not a lesser included offense of the latter offense.

State v. Hole, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). Following *State v. Ross*, 46 N.C. App. 338 (1980), the court held that unauthorized use of a motor vehicle "may be a lesser included offense of larceny where there is evidence to support the charge." Here, while unauthorized use may have been a lesser included of the charged larceny, the trial court did not commit plain error by failing to instruct on the lesser where the jury rejected the defendant's voluntary intoxication defense.

State v. Oliver, 217 N.C. App. 369 (Dec. 6, 2011). Following *State v. Nickerson*, 365 N.C. 279 (2011), the court held that unauthorized use is not a lesser included offense of possession of stolen property.

State v. Robinson, __ N.C. App. __, 763 S.E.2d 178 (Sept. 16, 2014), *review allowed*, __ N.C. __, 766 S.E.2d 633 (Dec. 18, 2014). Following *State v. Oliver*, 217 N.C. App. 369 (2011), the court determined that unauthorized use of a stolen vehicle is not a lesser-included offense of possession of a stolen vehicle. However, the court found that *Oliver* had mistakenly relied on *State v. Nickerson*, 365 N.C. 279 (2011), "for a proposition not addressed, nor a holding reached, in that case." Concluding that it was bound by *Oliver*, the court expressed the hope that "the Supreme Court may take this opportunity to clarify our case law" and decide whether unauthorized use of a motor vehicle is a lesser-included offense of possession of a stolen motor vehicle.

Embezzlement

State v. Parker, __ N.C. App. __, 756 S.E.2d 122 (April 15, 2014). The evidence was sufficient to establish that the defendant embezzled funds from a school. The defendant contended that the State failed to offer substantial evidence that she used the school system's property for a wrongful purpose. The defendant's responsibilities included purchasing food and non-food items for school meetings and related events. The State's evidence showed numerous questionable purchases made by the defendant, consisting of items that would not be purchased by or served at school system events. Also, evidence showed that the defendant had forged her supervisors' signatures and/or changed budget code information on credit card authorization forms and reimbursement forms at least 29 times, and submitted forms for reimbursement with unauthorized signatures totaling $6,641.02. This evidence showed an intent to use the school's property for a wrongful purpose, even if the forged signatures did not constitute embezzlement.

State v. Renkosiak, __ N.C. App. __, 740 S.E.2d 920 (April 2, 2013). There was sufficient evidence of embezzlement where the defendant, a bookkeeper controller for the victim company, was instructed to close the company's credit cards but failed to do so, instead incurring personal charges on the cards and paying the card bills from company funds. The court rejected the defendant's argument that the evidence was insufficient because it did not show that she had been physically entrusted with the credit cards. The evidence also showed that the defendant embezzlement funds by paying for her personal insurance with company funds without making a required corresponding deduction from her personal paycheck.

State v. Smalley, 220 N.C. App. 142 (Apr. 17, 2012). (1) In an embezzlement case in which the defendant was alleged to have improperly written company checks to herself, there was sufficient evidence that the defendant was an agent of the company and not an independent contractor. Two essential elements of an agency relationship are the authority of the agent to act on behalf of the principal and the principal's control over the agent. Here, the defendant had authority to act on behalf of the corporation because she had full access to the company's checking accounts, could write checks on her own, and delegated the company's funds. Evidence of the company's control over the defendant included that she was expected to meet several responsibilities and that a member of the company communicated with her several times a week. (2) There was sufficient evidence that the defendant had constructive possession of the corporation's money when she was given complete access to the corporation's accounts and was able to write checks on behalf of the corporation and to delegate where the corporation's money went.

Possession of Stolen Goods
Possession

State v. Privette, 218 N.C. App. 459 (Feb. 7, 2012). In a possession of stolen property case, the evidence was insufficient to establish that the defendant constructively possessed the jewelry at issue. The necessary "other incriminating circumstances" for constructive possession could not be inferred from the fact that the defendant was a high-ranking member of a gang to which the others involved in a robbery and subsequent transfer of the stolen goods belonged; the defendant accompanied a person in possession of stolen property to an enterprise at which a legitimate transaction occurred; and the defendant and his wife made ambiguous references to "more scrap gold" and "rings" unaccompanied by any indication that these items were stolen. At most the State established that the defendant had been in an area where he could have committed the crimes.

State v. Szucs, 207 N.C. App. 694 (Nov. 2, 2010). In a case involving felonious breaking or entering, larceny, and possession of stolen goods, there was sufficient evidence of possession. The defendant's truck was parked at the residence with its engine running; items found in the truck included electronic equipment from the residence; a man fitting the defendant's description was seen holding items later identified as stolen; items reported as missing included electronic equipment and a large quantity of loose change; the police dog's handler observed evidence that someone recently had been in a muddy area behind the residence; the side door of the residence showed pry marks; the defendant was found wearing muddy clothing and shoes and in possession of a Leatherman tool and a large quantity of loose change. A reasonable juror could conclude that the defendant possessed goods stolen from the residence, either as the person standing in the yard holding electronic equipment, through constructive possession of the items in his truck, or through actual possession of the loose change.

State v. Marshall, 206 N.C. App. 580 (Aug. 17, 2010). In a possession of stolen property case, the trial court committed reversible error by instructing the jury on constructive possession. The property, a vehicle stolen from a gas station, was found parked on the street outside of the defendant's residence. The defendant claimed that unknown to him, someone else drove the vehicle there. The State argued that evidence of a surveillance tape showing the defendant at the station when the vehicle was taken, the defendant's opportunity to observe the running, unoccupied vehicle, the fact that the vehicle was not stolen until defendant left the station, and the later discovery of the vehicle near the defendant's residence was sufficient to establish constructive possession. The court concluded that although this evidence showed opportunity, it did not show that the defendant was aware of the vehicle's location outside his residence, was at home when it arrived, that he regularly used that location for his personal use, or that the public street was any more likely to be under his control than the control of other residents. The court concluded that the vehicle's location on a public street not under the defendant's exclusive control and the additional circumstances recounted by the State did not support an inference that defendant had "the intent and capability to maintain control and dominion over" the vehicle. Based on the same analysis, the court also agreed with the defendant's argument that the trial court erred by denying his motions to dismiss as there was insufficient evidence that he actually or constructively possessed the stolen vehicle and by accepting the jury verdict as to possession

of stolen goods because it was fatally inconsistent with its verdict of not guilty of larceny of the same vehicle.

Knew/Reason to Believe Item Was Stolen

State v. Oliver, 217 N.C. App. 369 (Dec. 6, 2011). There was sufficient evidence to sustain the defendant's conviction for possession of a stolen vehicle. The court rejected the defendant's argument that he did not have reason to believe the vehicle was stolen, in part because the defendant's own statements indicated otherwise.

State v. Cannon, 216 N.C. App. 507 (Nov. 1, 2011). In a possession of stolen goods case, the court held that the evidence was insufficient to establish that the defendant knew that the item at issue, a four-wheeler, was stolen. Distinguishing *State v. Lofton*, 66 N.C. App. 79 (1984), the court noted, among other things, that the cosmetic changes to the four-wheeler were minimal, the defendant openly drove the four-wheeler, and the defendant did not flee from police. Additionally, there was no evidence regarding how the defendant got possession of the four-wheeler.

State v. Wilson, 203 N.C. App. 547 (Apr. 20, 2010). The evidence was insufficient to establish that the defendant knew a gun was stolen. Case law establishes that guilty knowledge can be inferred from the act of throwing away a stolen weapon. In this case, shortly after a robbery, the defendant and an accomplice went to the home of the accomplice's mother, put the gun in her bedroom, and left the house. These actions were not analogous to throwing an item away for purposes of inferring knowledge that an item was stolen.

Greater & Lesser-Included Offenses

State v. Nickerson, 365 N.C. 279 (Oct 7, 2011). Reversing *State v. Nickerson*, 208 N.C. App. 136 (2010), the court held that unauthorized use of a motor vehicle is not a lesser included offense of possession of stolen goods. The court applied the definitional test and concluded that unauthorized use of a motor vehicle contains at least one element not present in the crime of possession of stolen goods and that therefore the former offense is not a lesser included offense of the latter offense.

State v. Oliver, 217 N.C. App. 369 (Dec. 6, 2011). Following *State v. Nickerson*, 365 N.C. 279 (2011), the court held that unauthorized use is not a lesser included offense of possession of stolen property.

Multiple Convictions and Punishments

State v. Hardy, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). The trial court erred by sentencing the defendant for both felony larceny and felony possession of stolen goods when both convictions were based on the same items.

State v. Surrett, 217 N.C. App. 89 (Nov. 15, 2011). The trial court erred in convicting the defendant of two counts of possession of a stolen firearm under G.S. 14-71.1. It stated: "While defendant did possess the two separate stolen firearms, we hold that defendant may not be convicted on separate counts for each firearm possessed.

State v. Szucs, 207 N.C. App. 694 (Nov. 2, 2010). A defendant may not be convicted of both felony larceny and felonious possession of the same goods.

State v. Moses, 205 N.C. App. 629 (July 20, 2010). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

Miscellaneous Cases

State v. Tanner, 364 N.C. 229 (June 17, 2010). Reversing the Court of Appeals and overruling *State v. Marsh*, 187 N.C. App. 235 (2007), and *State v. Goblet*, 173 N.C. App. 112 (2005), the Supreme Court held that a defendant who is acquitted of underlying breaking or entering and larceny charges may be convicted of felonious possession of stolen goods on a theory that the defendant knew or had reasonable grounds to believe that the goods were stolen.

Receiving Stolen Goods

State v. Louali, 215 N.C. App. 176 (Aug. 16, 2011). The evidence was sufficient to sustain a conviction for receiving goods explicitly represented as stolen by a law enforcement officer. No specific words are required to be spoken to fulfill the "explicitly represented" element of the offense. Rather the statute "merely requires that a person knowingly receives or possesses property that was clearly expressed, either by words or conduct, as constituting stolen property." Here, the officer said that he was told that the business bought "stolen property, stolen laptops" and twice reminded the defendant that "this stupid guy kept leaving the door open, [and] I kept running in the back of it and taking laptops." After the exchange of money for the laptops, the officer told the defendant that he could get more laptops.

Robbery

Generally

State v. Harris, 222 N.C. App. 585 (Aug. 21, 2012). In an armed robbery case, the trial court did not commit plain error by failing instruct the jury on a lesser-included offense of "aggravated common law robbery." The court rejected the defendant's argument that *Apprendi* and *Blakely* created a North Carolina crime of aggravated common law robbery.

Attempt

State v. Calderon, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) The evidence was sufficient to support charges of attempted armed robbery against both defendants. The defendants and a third person, Moore, planned to rob Bobbie Yates of marijuana. However, once they learned there was a poker game going on in the apartment, they retrieved another weapon and returned to the apartment to rob those present. Upon entering the apartment, Moore took

money off the kitchen table where several of the people were playing poker, and proceeded to search their pockets for more money. The robbery lasted between two and four minutes, during which time the defendants continuously pointed their weapons at the people present. After Moore took money from those seated around the kitchen table, he—with shotgun in hand—approached Mr. Allen, who was "passed out" or asleep in the living room. One witness saw Moore search Allen's pockets, but no one saw Moore take money from Allen. This evidence was sufficient to show that the defendants, acting in concert with Moore, had the specific intent to deprive Allen of his personal property by endangering or threatening his life with a dangerous weapon and took overt acts to bring about this result. (2) The court rejected the defendants argument that the trial court erred by failing to instruct the jury on attempted larceny and attempted common law robbery as lesser-included offenses of attempted armed robbery of Allen. The defendant argued that because Allen was "passed out" or asleep, his life was not endangered or threatened. The court found that where, as here, the defendants were convicted of attempted robbery, their argument failed.

Taking Property of Another

State v. Evans, __ N.C. App. __, 747 S.E.2d 151 (Aug. 6, 2013). Rejecting the defendant's argument that the State failed to present evidence of an attempted taking, the court held that there was sufficient evidence of attempted robbery. The defendant's accomplice testified that the defendant planned the robbery with her; the defendant waited in a vehicle until the accomplice went into the residence and sent him a message with the location of each individual inside; the defendant entered the apartment and went directly to the victim's bedroom; and the defendant proceeded to wield his firearm in a threatening manner towards the victim. The court noted that while there was no testimony that the defendant made a specific demand for money, an actual demand for the victim's property is not required.

State v. Mason, 222 N.C. App. 223 (Aug. 7, 2012). A taking occurred when the defendant grabbed the victim's cell phone from his pocket and threw it away. The fact that the taking was for a relatively short period of time is insignificant

State v. Watkins, 218 N.C. App. 94 (Jan. 17, 2012). The evidence was sufficient to establish that the defendant took the victim's car when the defendant forced the victim at gunpoint to take the defendant as a passenger in the vehicle. The fact that the victim was "still physically present in the car cannot negate the reasonable inference that defendant's actions were sufficient to bring the car under his sole control."

State v. Johnson, 208 N.C. App. 443 (Dec. 7, 2010). The trial court erred by denying the defendant's motion to dismiss a charge of attempted armed robbery when there was no evidence that the defendant attempted to take the victim's personal property. Because the defendant's conviction for felony breaking or entering was based on an intent to commit armed robbery, the trial court also erred by failing to dismiss that charge.

Taking by Violence or Fear of Violence

State v. Jones, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2015). In a multi-count robbery case, there was sufficient evidence of common law robbery against victim Adrienne. Although Adrienne herself did not testify, the evidence showed that she was a resident of the mobile home where the robbery occurred, that another victim heard her screaming during the intrusion, her face was injured, two witnesses testified that Adrienne had been beaten, and there was evidence that her personal belongings were taken from on, in, or near a nightstand next to her bed.

State v. Speight, 213 N.C. App. 38 (June 21, 2011). In an armed robbery case, there was sufficient evidence that the defendant took the victim's personal property by the use or threatened use of a knife. The victim awoke to find the defendant on top of her holding a knife to her throat. After struggling with him, she pleaded and negotiated with him for almost 90 minutes. The defendant acknowledged that he had already taken money from the victim's purse. However, when the defendant fled, he took a knife from her kitchen and the victim's sports bra and the victim never saw her purse again.

State v. Elkins, 210 N.C. App. 110 (Mar. 1, 2011). The evidence was sufficient to establish that the defendant took money from a store clerk by means of violence or fear. The defendant hid his arm underneath his jacket in a manner suggesting that he had a gun; the clerk knew the defendant was "serious" because his eyes were "evil looking"; and the clerk was afraid and therefore gave the defendant the money. The court distinguished *State v. Parker*, 322 N.C. 559 (1988), on grounds that in that case, there was no weapon in sight and the victim was not afraid. Instead, the court found the case analogous to *State v. White*, 142 N.C. App. 201 (2001), which concluded that there was sufficient evidence of violence or fear when the defendant handed a threatening note to the store clerks implying the he had a gun, even though none of them saw a firearm in his possession.

Dangerous Weapon Endangering or Threatening Life

State v. Hill, 365 N.C. 273 (Oct. 7, 2011). Affirming the court of appeals, the court held the State presented substantial evidence that the victim's money was taken through the use or threatened use of a dangerous weapon. The court noted that the investigating officer had testified that the victim reported being robbed by a man with a knife. The court also held that the evidence was sufficient to establish that the victim's life was endangered or threatened by the assailant's possession, use, or threatened use of a dangerous weapon, relying on the testimony noted above and the victim's injuries. The court rejected the defendant's argument that the evidence failed to support this element because the victim never indicated that he was afraid or felt threatened, concluding that the question is whether a person's life was in fact endangered or threatened by the weapon, not whether the victim was scared or in fear of his or her life.

State v. Holt, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery. One of the victims testified that all three perpetrators had handguns. A BB pistol and a pellet gun were found near the scene of the robbery. The defendant argued that the State failed to produce any evidence that these items were dangerous weapons capable of inflicting serious injury or death. Distinguishing *State v. Fleming*, 148 N.C. App. 16 (2001) (trial court erred in denying the defendant's motion to dismiss charge of armed robbery when the evidence showed that he committed two robberies

using a BB gun and the State failed to introduce any evidence that the BB gun was capable of inflicting death or great bodily injury), the court held:

> [U]nlike in *Fleming*, where the weapon used to perpetrate the robbery was recovered from the defendant's direct physical possession, here there is no evidence that conclusively links either the BB pistol or the pellet gun to the robbery. Neither Defendant nor his co-conspirators were carrying any weapons when they were apprehended by police. Further, no evidence was offered regarding any fingerprints on, or ownership of, either gun, and neither the victims nor Defendant identified either of the guns as having been used during the robbery. Moreover, even assuming arguendo that both the BB pistol and the pellet gun could be conclusively linked to the robbery, [one of the victims] testified that all three of the men who robbed his home were armed with handguns. Although Defendant's counsel attempted to impeach [the victim] on this point, the trial court properly left the credibility of [his] testimony as a matter for the jury to resolve, and as such, it would have been permissible for a reasonable juror to infer that not all, if any, of the weapons used during the robbery had been recovered or accounted for. Indeed, if taken as true, Defendant's second post-arrest statement to Detective Snipes suggests that Defendant had the motivation and opportunity to "dump" the third weapon just like he claimed to have dumped the ounce of marijuana he purported to have stolen from the residence that investigators never recovered.

Thus, although the mandatory presumption that the weapons were dangerous did not apply, there was sufficient evidence for the case to go to the jury on the armed robbery charge.

State v. Mills, 221 N.C. App. 409 (June 19, 2012). There was sufficient evidence that a lawn chair was a dangerous weapon for purposes of armed robbery. The victim was knocked unconscious and suffered multiple facial fractures and injuries which required surgery; after surgery his jaw was wired shut for weeks and he missed 2-3 weeks of work; and at trial the victim testified that he still suffered from vision problems.

State v. Rivera, 216 N.C. App. 566 (Nov. 1, 2011). (1) The State presented sufficient evidence to establish that a stun gun was a dangerous weapon for purposes of armed robbery. The court concluded, in part, that although the victim did not die or come close to death, she was seriously injured. Given that serious injury "a permissive inference existed sufficient to support a jury determination that the stun gun was a dangerous weapon." (2) The State presented sufficient evidence that the stun gun was used in a way that endangered or threatened the victim's life. The court noted that the victim was tased, suffered significant pain, fell, injured her rotator cuff, endured two surgeries and extensive physical therapy, and two years later still experienced pain and a limited range of motion in her arm.

Continuous Transaction

State v. Rogers, __ N.C. App. __, 742 S.E.2d 622 (June 4, 2013). There was sufficient evidence that a theft and use of force were part of a continuous transaction. A witness testified that the defendant went to the victim's mobile home with the intent to rob him, shot and killed the victim, and left with money and drugs.

State v. James, __ N.C. App. __, 738 S.E.2d 420 (Mar. 19, 2013). The evidence was sufficient to show that either the defendant or his accomplice used a firearm to induce the victim to part with her purse.

State v. Flaugher, 214 N.C. App. 370 (Aug. 16, 2011). Where the evidence showed that the defendant's attack on the victim and the taking of his wallets constituted a single, continuous transaction, the evidence was sufficient to support an armed robbery charge. The court rejected the defendant's argument that she took the victim's wallets only as an afterthought. The court also rejected the defendant's argument that the evidence was insufficient because it was not positive that she possessed the weapon when she demanded the victim's money. The court noted that the defendant held the pickaxe when she assaulted the victim and had already overcome and injured him when she demanded his wallets and took his money; the pickaxe had already served its purpose in subduing the victim.

State v. McMillan, 214 N.C. App. 320 (Aug. 2, 2011). The evidence was sufficient to sustain an armed robbery conviction when the item stolen—a handgun—was also the item used to threaten or endanger the victim's life.

State v. Maness, 363 N.C. 261 (June 18, 2009). If the events constitute a continuous transaction, a defendant may be convicted of armed robbery when the dangerous weapon taken during the robbery also is the weapon used to perpetrate the offense. In this case, the defendant fought with a law enforcement officer and "emerged from the fight" with the officer's gun.

State v. Porter, 198 N.C. App. 183 (July 7, 2009). The defendant's use of violence was concomitant with and inseparable from the theft of the property from a store where the store manager confronted the defendant in the parking lot and attempted to retrieve the stolen property, at which point the defendant struck the store manager. This constituted a continuous transaction.

State v. Blue, 207 N.C. App. 267 (Oct. 5, 2010). There was sufficient evidence that the theft and the use of force were part of one continuous transaction when the defendant formed an intent to rob the victim, attacked her, and then took her money. The court rejected the defendant's argument that his rape of the victim constituted a break in the continuous transaction.

Doctrine of Recent Possession

State v. Lee, 213 N.C. App. 392 (July 19, 2011). In a robbery case, the court held that the trial judge properly instructed the jury on the doctrine of recent possession as to non-unique goods (cigarettes).

Greater & Lesser Offenses

State v. Wright, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Applying a definitional rather than a factual test, the court held that extortion is not a lesser included offense of armed robbery.

Evidence of Defendant As Perpetrator

State v. Williams, 201 N.C. App. 161 (Dec. 8, 2009). Distinguishing *State v. Holland*, 234 N.C. 354 (1951), and *State v. Murphy*, 225 N.C. 115 (1945), in which the victims were rendered unconscious by the defendants and regained consciousness bereft of their property, the court held that there was sufficient evidence that the defendant was the perpetrator of the robbery. Shoe prints placed the defendant at the scene, he admitted that he was with the victim on the morning in question, a receipt found at the scene bearing the defendant's name indicated that he was in the area at the time, a crack pipe with the victim's DNA was found in the defendant's vehicle, the defendant matched the description given by the victim to investigators, a third party encountered the defendant at the scene not long after the events occurred, and the defendant told conflicting stories to investigators.

Multiple Convictions

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). The trial court did not err by convicting the defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discreet conduct.

State v. Jastrow, __ N.C. App. __, 764 S.E.2d 663 (Nov. 18, 2014). (1) Where the defendant and his accomplices attempted to rob two victims inside a residence, the trial court properly denied the defendant's motion to dismiss one of the charges. The defendant argued that because only one residence was involved, only one charge was proper. Distinguishing cases holding that only one robbery occurs when the defendant robs a business of its property by taking it from multiple employees, the court noted that here the defendant and his accomplices demanded that both victims turn over their own personal property. (2) Although the group initially planned to rob just one person, the defendant properly was convicted of attempting to rob a second person they found at the residence. The attempted robbery of the second person was in pursuit of the group's common plan.

State v. Moses, 205 N.C. App. 629 (July 20, 2010). A defendant may not be sentenced for both robbery and possession of stolen property taken during the robbery.

Presumption of Dangerous Weapon

State v. Bell, __ N.C. App. __, 741 S.E.2d 919 (May 21, 2013). (1) Notwithstanding the defendant's testimony that the gun used in a robbery was unloaded, the trial court properly denied the defendant's motion to dismiss an armed robbery charge. The victim testified that the defendant entered her business, pointed a gun at her and demanded money. The defendant testified that he unloaded the gun before entering. He also testified that upon leaving he saw the police and ran into the woods where he left his hoodie and gun and jumped off of an embankment. On appeal, the defendant argued that the evidence was insufficient because it showed that the gun was unloaded. Because of the defendant's testimony, the mandatory presumption of danger or threat to life arising from the defendant's use of what appeared to the victim to be firearm disappeared. However, a permissive inference to that effect remained. Given

the defendant's flight and attempt to hide evidence, the use of the permissive inference was not inappropriate. (2) The trial court did not err by declining to give a jury instruction regarding the mere possession of a firearm. The defendant argued that the trial court should have given the instruction in footnote six to element seven of N.C.P.I.—Crim. 217.20. That footnote instructs that where use of a firearm is in issue, the trial court should instruct that mere possession of the firearm does not, in itself, constitute endangering or threating the life of the victim. Here, however, the evidence showed that the defendant displayed and threatened to use the weapon by pointing it at the victim; the mere possession instruction therefore was not required.

State v. Williamson, 220 N.C. App. 512 (May 15, 2012). In an armed robbery case, the trial court did not err by failing to instruct the jury on common law robbery and by denying the defendant's motion to dismiss armed robbery charges. Because there was no evidence that the gun was inoperable or unloaded, there was no evidence to rebut the presumption that the firearm was functioning properly.

State v. Ford, 194 N.C. App. 468 (Dec. 16, 2008). There was sufficient evidence to establish that the defendant used a firearm in an armed robbery case. The evidence showed that the defendant and an accomplice entered a store and that one of them pointed what appeared to be a silver handgun at the clerk. When later arresting the accomplice at a residence, an officer saw what appeared to be a silver gun on the ground. However, the item turned out to be some type of lighter that appeared to be a gun. Neither the state nor the defendant presented evidence at trial that the item found was the one used during the robbery. When a person perpetrates a robbery by brandishing an instrument that appears to be a firearm or other dangerous weapon, in the absence of any evidence to the contrary, the law will presume the instrument to be what the person's conduct represents it to be.

State v. Bettis, 206 N.C. App. 721 (Sept. 7, 2010). Where witness testimony indicated that the defendant used a gun in an armed robbery and there was no evidence that the gun was inoperable, the State was not required to affirmatively demonstrate operability and the trial court was not required to instruct on common law robbery.

Extortion

State v. Wright, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Applying a definitional rather than a factual test, the court held that extortion is not a lesser included offense of armed robbery.

State v. Privette, 218 N.C. App. 459 (Feb. 7, 2012). The trial judge properly instructed the jury on extortion using the pattern jury instruction. The court rejected the notion that North Carolina recognizes a "claim of right" defense to extortion. Instead, it construed the statute to require proof that the defendant intentionally utilized unjust or unlawful means in attempting to obtain the property or other acquittance, advantage, or immunity; the statute does not require proof that the defendant sought to achieve an end to which he had no entitlement.

Frauds

Identity Theft

State v. Jones, 367 N.C. 299 (Mar. 7, 2014). Affirming the decision below in *State v. Jones*, __ N.C. App. __, 734 S.E.2d 617 (Nov. 20, 2012), the court held that the evidence was sufficient to establish identity theft. The case arose out of a scheme whereby one of the defendants, who worked at a hotel, obtained the four victim's credit card information when they checked into the premises. The defendant argued the evidence was insufficient on his intent to fraudulently use the victim's cards. However, the court found that based on evidence that the defendant had fraudulently used other individuals' credit card numbers, a reasonable juror could infer that he possessed the four victim's credit card numbers with the intent to fraudulently represent that he was those individuals for the purpose of making financial transactions in their names. The defendant argued further that the transactions involving other individuals' credit cards actually negated the required intent because when he made them, he used false names that did not match the credit cards used. He continued, asserting that this negates the suggestion that he intended to represent himself as the person named on the cards. The court rejected that argument, stating: "We cannot conclude that the Legislature intended for individuals to escape criminal liability simply by stating or signing a name that differs from the cardholder's name. Such a result would be absurd and contravene the manifest purpose of the Legislature to criminalize fraudulent use of identifying information."

State v. Sexton, __ N.C. App. __, 734 S.E.2d 295 (Nov. 6, 2012). In an identity theft case, the evidence was sufficient to establish that the defendant "used" or "possessed" another person's social security number to avoid legal consequences. After being detained and questioned for shoplifting, the defendant falsely gave the officer his name as Roy Lamar Ward and provided the officer with the name of an employer, date of birth, and possible address. The officer then obtained Ward's social security number, wrote it on the citation, and issued the citation to the defendant. The defendant neither signed the citation nor confirmed the listed social security number.

State v. Barron, 202 N.C. App. 686 (Mar. 2, 2010). The defendant's active (and false) acknowledgement to an officer that the last four digits of his social security number were "2301" constituted the use of identifying information of another within the meaning of G.S. 14-113.20(a).

Exploitation of Elder Adult

State v. Forte, 206 N.C. App. 699 (Sept. 7, 2010). The defendant was charged with offenses under the current (G.S. 14-112.2) and prior (G.S. 14-32.3) statutes proscribing the crime of exploitation of an elder adult. (1) There was sufficient evidence that the victim was an elder adult. The victim was either 99 or 109 years old and had not driven a vehicle for years. Individuals helped him by paying his bills, driving him, bringing him meals and groceries, maintaining his vehicles, cashing his checks, helping him with personal hygiene, and making medical appointments for him. (2) There was sufficient evidence that the defendant was the victim's caretaker. The defendant assisted the victim by, among other things, performing odd jobs, running errands, serving as a driver, taking him shopping, purchasing items, doing projects on the victim's property, writing checks, visiting with him, taking him to file his will, making

doctor appointments, and cutting his toenails. Additionally, the two had a close relationship, the defendant was frequently at the victim's residence, and was intricately involved in the victim's financial affairs. The court rejected the defendant's argument that these activities were not sufficient to transform the "friendly relationship" into that of caretaker and charge.

Forgery

State v. Grier, __ N.C. App. __, 735 S.E.2d 434 (Dec. 4, 2012). Forgery and larceny of a chose in action are not mutually exclusive offenses. The defendant argued that both forgery and uttering a forged check require a counterfeit instrument while larceny of a chose in action requires a "valid instrument." The court concluded that larceny of a chose in action does not require that the bank note, etc. be valid.

State v. Conley, 220 N.C. App. 50 (Apr. 17, 2012). The evidence was sufficient to sustain the defendant's convictions for uttering a forged instrument and attempting to obtain property by false pretenses. Both offenses involved a fraudulent check. The court rejected the defendant's argument that there was insufficient evidence to establish that the check was falsely made. An employee of the company that allegedly issued the check testified that she had in her possession a genuine check bearing the relevant check number at the time the defendant presented another check bearing the same number. The employee testified the defendant's check bore a font that was "way off" and "really different" from the font used by the company in printing checks. She identified the company name on the defendant's check but stated "it's not our check."

State v. Brown, 217 N.C. App. 380 (Dec. 6, 2011). (1) The evidence was insufficient to support a charge of uttering a forged check. For forgery, the "false writing must purport to be the writing of a party other than the one who makes it and it must indicate an attempted deception of similarity." Here, the State presented no evidence that the check was not in fact a check from the issuer. (2) For the same reason the court held that the evidence was insufficient to support a conviction for obtaining property by false pretenses.

State v. Guarascio, 205 N.C. App. 548 (July 20, 2010). There was sufficient evidence of forgery under G.S. 14-119 when the evidence showed that the defendant signed a law enforcement officer's name on five North Carolina Uniform Citations.

Impersonating An Officer

State v. Guarascio, 205 N.C. App. 548 (July 20, 2010). The trial court erred in its jury instructions for the crime of impersonating an officer under G.S. 14-277(b). The court noted that while G.S. 14-277(a) makes it a crime for an individual to make a false representation to another person that he is a sworn law enforcement officer, G.S. 14-277(b) makes it a crime for an individual, while falsely representing to another that he is a sworn law enforcement officer, to carry out any act in accordance with the authority granted to a law enforcement officer. Accordingly, the court concluded, a charge under G.S. 14-277(b) includes all of the elements of a charge under G.S. 14-277(a). The court further concluded that while NCPJI – Crim. 230.70 correctly charges an offense under G.S. 14-277(a), NCPJI – Criminal 230.75 "inadequately guides the trial court regarding the elements of [an offense under G.S. 14-277(b)] . . . by omitting

from the instruction the ways enumerated in [G.S. 14-277(a)] and N.C.P.I. – Crim. 230-70 by which an individual may falsely represent to another that he is a sworn law enforcement officer." The trial court's instructions based on this pattern instruction were error, however the error was harmless.

Obtaining Property by False Pretenses

State v. Holanek, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 18, 2015). (1) In a case arising out of insurance fraud, the trial court did not err by denying the defendant's motion to dismiss three counts of obtaining property by false pretenses. Two of the counts arose out of payments the defendant received based on false moving company invoices submitted to her insurance company. The defendant submitted the invoices, indicating that they were paid in full. The court rejected the defendant's argument that the State failed to prove that the invoices contained a false representation noting that the evidence showed that investigators were unable to discover any indication that either of the purported moving companies existing in North Carolina. (2) The trial court did not commit plain error by failing to instruct the jury that under G.S. 14-100(b) that "[e]vidence of nonfulfillment of a contract obligation standing alone shall not establish the essential element of intent to defraud." Because the jury was instructed that it was required to determine whether the defendant intended to defraud the insurance company through her submission of documents containing false representations in order to return a guilty verdict, no reasonable juror could have been left with the mistaken belief that she could be found guilty based solely on her failure to comply with contractual obligations under her insurance policy.

State v. Barker, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). In an obtaining property by false pretenses case, the evidence was sufficient to support a conviction. The charges arose out of the defendant's acts of approaching two individuals (Ms. Hoenig and Ms. Harward), falsely telling them their roofs needed repair, taking payment for the work and then performing shoddy work or not completing the job. The court rejected the defendant's argument that the evidence showed only that he "charged a lot for poor quality work" and not that he "obtained the property alleged by means of a misrepresentation," finding that "[the] evidence demonstrates that defendant deliberately targeted Ms. Harward and Ms. Hoenig, two elderly women, for the purpose of defrauding each of them by claiming their roofs needed significant repairs when, as the State's evidence showed, neither woman's roof needed repair at all."

State v. Pendergraft, ___ N.C. App. ___, 767 S.E.2d 674 (Dec. 31, 2014). The evidence was sufficient to establish obtaining property by false pretenses. After the defendant filed false documents purporting to give him a property interest in a home, he was found to be occupying the premises and arrested. The court rejected the defendant's argument that the evidence shows that he honestly, albeit mistakenly, believed that he could obtain title to the property by adverse possession and that such a showing precluded the jury from convicting him of obtaining property by false pretenses. The court rejected the assertion that anyone who attempts to adversely possess a tract of property does not possess the intent necessary for a finding of guilt, a position it described as tantamount to making an intention to adversely possess a tract of property an affirmative defense to a false pretenses charge.

State v. Greenlee, __ N.C. App. __, 741 S.E.2d 498 (May 7, 2013). In an obtaining property by false pretenses case based on the defendant having falsely represented to a pawn shop that items sold to the shop were not stolen, there was sufficient evidence that the items were stolen. As to the first count, the serial number of the item sold as shown on the shop's records matched the serial number reported by the theft victim; any variance between the model number reported by the victim and the model number reported on the shop's records was immaterial. With respect to the second count, the model number of a recorder sold as shown on the shop's records matched the model number of the item reported stolen by the victim, the item was uncommon and the victim identified it; any difference in the reported serial numbers was immaterial. As to a watch that was stolen with the recorder and described by the victim as a "Seiko dive watch with steel band," the fact that the defendant sold the watch along with the recorder was sufficient to establish that it was stolen.

State v. Seelig, __ N.C. App. __, 738 S.E.2d 427 (Mar. 19, 2013). The evidence was sufficient to establish that the defendant obtained property by false pretenses where she sold products alleged to be gluten free but in fact contained gluten. The defendant argued that the evidence was insufficient as to one victim because he returned the check she gave him in exchange for his products after the victim became ill from consuming them. Noting that this offense covers attempts, the court found the evidence sufficient.

State v. Braswell, __ N.C. App. __, 738 S.E.2d 229 (Mar. 5, 2013). The trial court erred by denying the defendant's motion to dismiss false pretenses charges. The State failed to offer sufficient evidence to establish that the defendant made a false representation with the intent to deceive when he told the victims that he intended to invest the money that they loaned him in legitimate financial institutions and would repay it with interest at the specified time. The evidence, taken in the light most favorable to the State, simply tends to show that the defendant, after seriously overestimating his own investing skills, made a promise that he was unable to keep.

State v. Conley, 220 N.C. App. 50 (Apr. 17, 2012). The evidence was sufficient to sustain the defendant's convictions for uttering a forged instrument and attempting to obtain property by false pretenses. Both offenses involved a fraudulent check. The court rejected the defendant's argument that there was insufficient evidence to establish that the check was falsely made. An employee of the company that allegedly issued the check testified that she had in her possession a genuine check bearing the relevant check number at the time the defendant presented another check bearing the same number. The employee testified the defendant's check bore a font that was "way off" and "really different" from the font used by the company in printing checks. She identified the company name on the defendant's check but stated "it's not our check."

State v. Twitty, 212 N.C. App. 100 (May 17, 2011). There was sufficient evidence to support a false pretenses conviction when the defendant falsely told a church congregation that his wife had died and that he was broke to elicit sympathy and obtain property.

State v. Moore, 209 N.C. App. 551 (Feb. 15, 2011), *rev'd in part on other grounds*, 365 N.C. 283 (2011).. There was sufficient evidence of obtaining property by false pretenses when the

defendant received money for rental of a house that the defendant did not own or have the right to rent.

Computer Fraud

State v. Barr, 218 N.C. App. 329 (Feb. 7, 2012). (1) The evidence was sufficient to sustain a conviction under G.S. 14-454.1(a)(2) (unlawful to "willfully . . . access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by means of false or fraudulent pretenses, representations, or promises"). The State alleged that the defendant, who worked for a private license plate agency, submitted false information into the State Title and Registration System (STARS) so that a car dealer whose dealer number was invalid could transfer title. The defendant admitted that she personally accessed STARS to make three transfers for the dealer, that she told a co-worker to run a fourth transaction in a similar fashion, and that she received payment for doing so. The court also found the evidence sufficient to support a conclusion that the defendant acted willfully. (2) In a case in which the defendant was charged with violations of G.S. 14-454.1(a)(2) and G.S. 14-454.1(b) (unlawful to "willfully and without authorization . . . accesses or causes to be accessed any government computer for any purpose other than those set forth in subsection (a)") as to the same transaction, the indictment charging a violation of G.S. 14-454.1(b) was defective when it stated a purpose covered by G.S. 14-454.1(a)(2). The court concluded that the plain language of G.S. 14-454.1(b) requires that the purpose for accessing the computer must be one "other than those set forth" in subsection (a).

Conversion by Bailee

State v. Minton, __ N.C. App. __, 734 S.E.2d 608 (Nov. 6, 2012). There was sufficient evidence to establish the offense of conversion of property by a bailee in violation of G.S. 14-168.1. The court rejected the defendant's argument that because "[e]vidence of nonfulfillment of a contract obligation" is not enough to establish intent for obtaining property by false pretenses under G.S. 14-100(b), this evidence should not be sufficient to establish the intent to defraud for conversion. The court also rejected the defendant's argument that there was insufficient evidence of an intent to defraud where the underlying contract between himself and the victim was unenforceable; the court found no prohibition on using unenforceable contracts to support a conversion charge.

Food Stamp Fraud

State v. Davis, __ N.C. App. __, 748 S.E.2d 189 (Oct. 1, 2013). In this food stamp fraud case, the trial court did not err by denying the defendant's motion to dismiss where the evidence showed that the defendant knowingly submitted a fraudulent wage verification form to obtain food benefits to which he was not entitled.

Burglary, Breaking or Entering, and Related Offenses

Burglary

Nighttime

State v. Brown, 221 N.C. App. 383 (June 19, 2012). (1) There was sufficient evidence that a burglary occurred at nighttime. The defendant left his girlfriend's apartment after 10 pm and did

not return until 6 am the next day. The burglary occurred during that time period. After taking judicial notice of the time of civil twilight (5:47 am) and the driving distance between the victim's residence and the apartment, the court concluded that it would have been impossible for the defendant to commit the crime after 5:47 am and be back at the apartment by 6 am. (2) When the victim's laptop and other items were found in the defendant's possession hours after the burglary, the doctrine of recent possession provided sufficient evidence that the defendant was the perpetrator.

State v. Reavis, 207 N.C. App. 218 (Sept. 21, 2010). Although the victim's testimony tended to show that the crime did not occur at nighttime, there was sufficient evidence of this element where the victim called 911 at 5:42 am; she told police the attack occurred between 5:00 and 5:30 am; a crime scene technician testified that "it was still pretty dark" when she arrived, and she used a flashlight to take photographs; and the defendant stipulated to a record from the U.S. Naval Observatory showing that on the relevant date the sun did not rise until 6:44 am.

Entering

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). In this burglary case, the evidence was insufficient to establish that the defendants entered the premises where it showed that the defendants used landscaping bricks and a fire pit bowl to break a back window of the home but no evidence showed that any part of their bodies entered the home (no items inside the home were missing or had been tampered with) or that the instruments of breaking were used to commit an offense inside.

State v. Watkins, 218 N.C. App. 94 (Jan. 17, 2012). An entering did not occur for purposes of burglary when the defendant used a shotgun to break a window, causing the end of the shotgun to enter the premises. The court reiterated that to constitute an entry some part of the defendant's body must enter the premises or the defendant must insert into the premises some tool that is intended to be used to commit the felony or larceny therein (such as a hook to grab an item).

Consent to Enter

State v. Rawlinson, 198 N.C. App. 600 (Aug. 4, 2009). The defendant did not have implied consent to enter an office within a video store. Even if the defendant had implied consent to enter the office, his act of theft therein rendered that implied consent void ab initio.

Intent to Commit Felony/Larceny Therein

State v. Campbell, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). Reversing the decision below, *State v. Campbell*, __ N.C. App. __, 759 S.E.2d. 380 (2014), the court held that the State presented sufficient evidence of the defendant's intent to commit larceny in a place of worship to support his conviction for felonious breaking or entering that facility. The evidence showed that the defendant unlawfully broke and entered the church; he did not have permission to be there and could not remember what he did while there; and the church's Pastor found the defendant's wallet near the place where some of the missing items previously had been stored.

State v. Mims, ___ N.C. App. ___, ___ S.E.2d ___ (June 16, 2015). (1) The evidence was sufficient to support a conviction for attempted first-degree burglary. In this case, which involved an attempted entry into a home in the wee hours of the morning, the defendant argued that the State presented insufficient evidence of his intent to commit a larceny in the premises. The court concluded that the case was controlled by *State v. McBryde*, 97 N.C. 393 (1887), and that because there was no evidence that the defendant's attempt to break into the home was for a purpose other than to commit larceny, it could be inferred that the defendant intended to enter to commit a larceny inside. The court rejected the defendant's argument that the evidence suggested that he was trying to enter the residence to seek assistance or was searching for someone. (2) Applying the *McBryde* inference to an attempted breaking or entering that occurred during daylights hours, the court held that the evidence was sufficient to support a conviction for that offense.

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). In this burglary case, the evidence was sufficient to establish that the defendants intended to commit a felony or larceny in the home. Among other things, an eyewitness testified that the defendants were "casing" the neighborhood at night. Additionally, absent evidence of other intent or explanation for a breaking and entering at night, the jury may infer that the defendant intended to steal.

State v. Allah, __ N.C. App. __, 750 S.E.2d 903 (Dec. 3, 2013). In a first-degree burglary case, the evidence was insufficient to establish that the defendant broke and entered an apartment with the intent to commit a felonious restraint inside. Felonious restraint requires that the defendant transport the person by motor vehicle or other conveyance. The evidence showed that the defendant left his car running when he entered the apartment, found the victim, pulled her to the vehicle and drove off. The court reasoned: "In view of the fact that the only vehicle in which Defendant could have intended to transport [the victim] was outside in a parking lot, the record provides no indication Defendant could have possibly intended to commit the offense of felonious restraint against [the victim] within the confines of [the] apartment structure . . . ." The court rejected the State's argument that the intent to commit a felony within the premises exists as long as the defendant commits any element of the intended offense inside.

State v. Northington, __ N.C. App. __, 749 S.E.2d 925 (Nov. 19, 2013). Evidence of missing items after a breaking or entering can be sufficient to prove the defendant's intent to commit a larceny therein, raising the offense to a felony. When such evidence is presented, the trial court need not instruct on the lesser offense of misdemeanor breaking or entering.

State v. Chillo, 208 N.C. App. 541 (Dec. 21, 2010). The evidence was insufficient to establish that the defendant intended to commit a larceny in the vehicle. The evidence suggested that the defendant's only intent was to show another how to break glass using a spark plug and that the two left without taking anything once the vehicle's glass was broken.

State v. Clagon, 207 N.C. App. 346 (Oct. 5, 2010). The evidence was sufficient to establish that the defendant intended to commit a felony assault inside the dwelling. Upon entering the residence, carrying an axe, the defendant asked where the victim was and upon locating her, assaulted her with the axe.

Breaking or Entering Offenses

State v. Owens, 205 N.C. App. 260 (July 6, 2010). First-degree trespass is a lesser included offense of felony breaking or entering.

Breaking or Entering a Vehicle, Etc.

State v. Mitchell, __ N.C. App. __, 759 S.E.2d 335 (June 17, 2014). (1) When an indictment charging breaking or entering into a motor vehicle alleged that the defendant broke *and* entered the vehicle, the trial court did not err by instructing the jury that it could find the defendant guilty if he broke *or* entered the vehicle. The statute required only a breaking or entering, not both. (2) There was sufficient evidence to establish that either the defendant or his accomplice entered the vehicle where among other things, the defendant was caught standing near the vehicle with its door open, there was no pollen inside the vehicle although the outside of the car was covered in pollen, the owner testified that the door was not opened the previous day, and the defendant and his accomplice each testified that the other opened the door. (3) There was sufficient evidence that the defendant broke into the vehicle "with intent to commit any felony or larceny therein." Citing prior case law, the court held that the intent to steal the motor vehicle itself may satisfy the intent element.

State v. Fish, __ N.C. App. __, 748 S.E.2d 65 (Sept. 17, 2013). The trial court erred by denying the defendant's motion to dismiss charges of breaking or entering a boat where the State failed to present evidence that the boats contained items of value. Although even trivial items can satisfy this element, here the record was devoid of any evidence of items of value. The batteries did not count because they were part of the boats.

State v. McDowell, 217 N.C. App. 634 (Dec. 20, 2011). Citing *State v. Jackson*, 162 N.C. App. 695 (2004), in this breaking or entering a motor vehicle case, the court held that the evidence was insufficient where it failed to show that that the vehicle contained any items of value apart from objects installed in the vehicle.

State v. Clark, 208 N.C. App. 388 (Dec. 7, 2010). An indictment properly alleges the fifth element of breaking and entering a motor vehicle—with intent to commit a felony or larceny therein—by alleging that the defendant intended to steal the same motor vehicle.

Greaters and Lessers

State v. Lucas, __ N.C. App. __, 758 S.E.2d 672 (June 3, 2014). Although first-degree trespass is a lesser-included offense of felonious breaking or entering, the trial court did not err by failing to instruct the jury on the trespass offense when the evidence did not permit a reasonable inference that would dispute the State's contention that the defendants intended to commit a felony.

Trespass & Injury to Property

State v. Hardy, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). In this injury to real property case, the court held that an air conditioning unit that was attached to the exterior of a mobile

home was real property. The defendant dismantled and destroyed the unit, causing extensive water damage to the home. The trial court instructed the jury that "[a]n air conditioner affixed to a house is real property" and the jury found the defendant guilty of this offense. On appeal the defendant argued that the air conditioning unit was properly classified as personal property. The court rejected the argument that *State v. Primus*, 742 S.E.2d 310 (2013), controlled, finding that case did not resolve the precise issue at hand. After reviewing other case law the court determined that the air-conditioner would be real property if it was affixed to the mobile home such that it "became an irremovable part of the [mobile home]." Applying this test, the court concluded:

> The air-conditioner at issue … comprised two separate units: an inside unit, referred to as the A-coil, which sat on top of the home's heater, and an outside condensing unit, which had a compressor inside of it. The two units were connected by copper piping that ran from the condenser underneath the mobile home into the home. [A witness] testified that the compressor, which was located inside the condensing unit, had been totally "destroyed," and that although the condensing unit itself remained in place, it was rendered inoperable. Thus, . . . the entire air-conditioner could not be removed but had to be "gutted" and removed in pieces. Moreover, when defendant cut the copper piping underneath the home, he caused significant damage to the water pipes that were also located in the crawlspace. Thus, here, not only could the air-conditioner not be easily removed from the mobile home but it also could not be easily removed from other systems of the home given the level of enmeshment and entanglement with the home's water pipes and heater.

The court went on to note that while the mobile home could serve its "contemplated purpose" of providing a basic dwelling without the air-conditioner, the purpose for which the air-conditioner was annexed to the home supports a conclusion that it had become part of the real property: the use and enjoyment of the tenant.

In re S.M.S., 196 N.C. App. 170 (Apr. 7, 2009). A male juvenile's entry into a school's female locker room with a door marked "Girl's Locker Room" was sufficient evidence to support the juvenile's adjudication of second-degree trespass. The sign was reasonably likely to give the juvenile notice that he was not authorized to go into the locker room.

State v. Owens, 205 N.C. App. 260 (July 6, 2010). First-degree trespass is a lesser included offense of felony breaking or entering.

Arson

State v. Burton, __ N.C. App. __, 735 S.E.2d 400 (Dec. 4, 2012). In an arson case, there was sufficient evidence of malice where, among other things, the defendant was enraged at the property owner.

Disorderly Conduct

Snyder v. Phelps, 562 U.S. 443 (Mar. 2, 2011). The First Amendment shields members of a church from tort liability for picketing near a soldier's funeral. A jury held members of the

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

In re M.J.G., __ N.C. App. __, 759 S.E.2d 361 (June 17, 2014). The evidence was sufficient to establish that a juvenile engaged in disorderly conduct by disrupting students (G.S. 14-288.4(a)(6)), where the juvenile's conduct caused a substantial interference with, disruption of, and confusion of the operation of the school. The juvenile's conduct "merited intervention by several teachers, the assistant principal, as well as the school resource officer" and "caused such disruption and disorder . . . that a group of special needs students missed their buses."

Bombing, Terrorism, and Related Offenses

Hoax With False Bomb

State v. Golden, __ N.C. App. __, 735 S.E.2d 425 (Dec. 4, 2012). There was sufficient evidence in a case where the defendant was convicted of perpetrating a hoax on law enforcement officers by use of a false bomb or other device in violation of G.S. 14-69.2(a). Specifically, there was sufficient evidence that the defendant concealed, placed or displayed the fake bomb in his vehicle and of his intent to perpetrate a hoax.

Manufacture, Possession, Etc. of a Machine Gun, Sawed-Off Shotgun, or Weapon of Mass Destruction

State v. Lee, 213 N.C. App. 392 (July 19, 2011). The evidence was sufficient to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon. The defendant had argued that the evidence was insufficient to support multiple charges because it showed that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession. The court distinguished *State v. Wiggins*, 210 N.C. App. 128 (Mar. 1, 2011), on grounds that in that case, the offenses were committed in close geographic and temporal proximity. Here, the court determined, the offenses occurred in nine different locations on ten different days over the course of a month. It concluded: "While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, . . . the trial court did not err in denying defendant's motion to dismiss the multiple weapons possession charges."

State v. Billinger, 213 N.C. App. 249 (July 5, 2011). There was sufficient evidence to establish that the defendant constructively possessed a weapon of mass death and destruction. Following law from other jurisdictions, the court held that "constructive possession may be established by evidence showing the defendant's ownership of the contraband." Because the evidence showed that the defendant owned the sawed-off shotgun at issue, it was sufficient to show possession of a weapon of mass death and destruction.

State v. Watterson, 198 N.C. App. 500 (Aug. 4, 2009). In a prosecution under G.S. 14-288.8, the State is not required to prove that the defendant knew of the physical characteristics of the weapon that made it unlawful.

Weapons Offenses

Constitutional Issues

McDonald v. City of Chicago, 561 U.S. 742 (June 28, 2010). The Second Amendment right to keep and bear arms applies to the states. For a more detailed discussion of this case see the blog post, *McDonald's* Impact in North Carolina.

Britt v. North Carolina, 363 N.C. 546 (Aug. 28, 2009). The court held that G.S. 14-415.1 (felon in possession), as applied to the plaintiff, was unconstitutional. In 1979, the plaintiff was convicted of possession of a controlled substance with intent to sell and deliver, a nonviolent crime that did not involve the use of a firearm. He completed his sentence in 1982 and in 1987, his civil rights were fully restored, including his right to possess a firearm. The then-existing felon in possession statute did not bar the plaintiff from possessing a firearm. In 2004, G.S. 14-415.1 was amended to extend the prohibition to all firearms by anyone convicted of a felony and to remove the exceptions for possession within the felon's own home and place of business. Thereafter, the plaintiff spoke with his local sheriff about whether he could lawfully possess a firearm and divested himself of all firearms, including sporting rifles and shotguns that he used for game hunting on his land. Plaintiff, who had never been charged with another crime, filed a civil action against the State, alleging that G.S. 14-415.1 violated his constitutional rights. The North Carolina Supreme Court held that as applied to him, G.S. 14-415.1, which contains no exceptions, violated the plaintiff's right to keep and bear arms protected by Article I, Section 30 of the North Carolina Constitution. Specifically, the court held that as applied, G.S. 14-451.1 was not a reasonable regulation. The court held: "Plaintiff, through his uncontested lifelong nonviolence towards other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety." It concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."

State v. Whitaker, 364 N.C. 404 (Oct. 8, 2010). Affirming *State v. Whitaker*, 201 N.C. App. 190 (Dec. 8, 2009), the court held that G.S. 14-415.1, the felon in possession statute, was not an impermissible ex post facto law or bill of attainder.

Kelly v. Riley, __ N.C. App. __, 733 S.E.2d 194 (Nov. 6, 2012). (1) G.S. 14-415.12 (criteria to qualify for a concealed handgun permit) was not unconstitutional as applied to the petitioner. Relying on case law from the federal circuit courts, the court adopted a two-part analysis to address Second Amendment challenges. First, the court asks whether the challenged law applies to conduct protected by the Second Amendment. If not, the law is valid and the inquiry is complete. If the law applies to protected conduct, it then must be evaluated under the appropriate form of "means-end scrutiny." Applying this analysis, the court held that the petitioner's right to carry a concealed handgun did not fall within the scope of the Second Amendment. Having determined that G.S. 14-415.12 does not impose a burden on conduct protected by the Second Amendment, the court found no need to engage in the second step of the analysis. (2) The sheriff properly denied the petitioner's application to renew his concealed handgun permit where the petitioner did not meet the requirements of G.S. 14-415.12. The court rejected the petitioner's argument that G.S. 14-415.18 (revocation or suspension of permit) applied.

State v. Sullivan, 202 N.C. App. 553 (Feb. 16, 2010). The court rejected the defendant's argument that as applied to him, G.S. 14-269.4 (carrying weapon in a courthouse) violated his right to bear arms under Article I, Section 30 of the North Carolina Constitution. The defendant had argued that the General Assembly had no authority to enact any legislation regulating or infringing on his right to bear arms. The court rejected this argument, noting that the state may regulate the right to bear arms, within proscribed limits. The court also held that the trial judge did not err by refusing to instruct the jury that it must consider whether the defendant knowingly or willfully violated the statute. The court concluded that an offender's intent is not an element of the offense.

State v. Buddington, 210 N.C. App. 252 (Mar. 1, 2011). The trial court erred by granting the defendant's motion to dismiss an indictment charging felon in possession of a firearm on grounds that the statute was unconstitutional as applied to him. The defendant's motion was unverified, trial court heard no evidence, and there were no clear stipulations to the facts. To prevail in a motion to dismiss on an as applied challenge to the statute, the defense must present evidence that would allow the trial court to make findings of fact regarding the type of felony convictions and whether they involved violence or threat of violence; the remoteness of the convictions; the felon's history of law abiding conduct since the crime; the felon's history of responsible, lawful firearm possession during a period when possession was not prohibited; and the felon's assiduous and proactive compliance with amendments to the statute.

Felon in Possession
Possession

State v. Bailey, __ N.C. App. __, 757 S.E.2d 491 (May 6, 2014). In a possession of a firearm by a felon case, the State failed to produce sufficient evidence that the defendant had constructive possession of the rifle. The rifle, which was registered to the defendant's girlfriend was found in a car registered to the defendant but driven by the girlfriend. The defendant was a passenger in the car at the time. The rifle was found in a place where both the girlfriend and the defendant had equal access. There was no physical evidence tying the defendant to the rifle; his fingerprints were not found on the rifle, the magazine, or the spent casing. Although the gun was warm and appeared to have been recently fired, there was no evidence that the defendant had discharged

the rifle because the gunshot residue test was inconclusive. Although the defendant admitted to an officer that he knew that the rifle was in the car, awareness of the weapon is not enough to establish constructive possession. In sum, the court concluded, the only evidence linking the defendant to the rifle was his presence in the vehicle and his knowledge that the gun was in the backseat.

State v. Mitchell, __ N.C. App. __, 735 S.E.2d 438 (Dec. 4, 2012). In a felon in possession case, there was sufficient evidence that the defendant had constructive possession of the firearm. The defendant was driving a rental vehicle and had a female passenger. The gun was in a purse in the car's glove container. The defendant was driving the car and his interactions with the police showed that he was aware of the vehicle's contents. Specifically, he told the officer that the passenger had a marijuana cigarette and that there was a gun in the glove container.

State v. Perry, __ N.C. App. __, 731 S.E.2d 714 (Sept. 18, 2012). (1) In a felon in possession case, evidence that the defendant was "playing with" the guns in question "likely" constituted sufficient evidence to support an instruction on actual possession of the guns. (2) The trial court erred by instructing the jury on constructive possession of the guns. The defendant did not have exclusive control of the apartment where the guns were found (the apartment was not his and he was not staying there; numerous people were at the apartment when the gun was found but the defendant himself was not present at that time). Thus, the State was required to show evidence of "other incriminating circumstances" to establish constructive possession. The court rejected the State's argument that the fact that the defendant said he had played with the gun and that his fingerprints were on it constituted other incriminating circumstances, reasoning that showed actual not constructive possession. The court also found evidence that the defendant saw the gun in the apartment when another person brought it there insufficient to establish constructive possession.

Inapplicable to Pardoned Defendants

Booth v. North Carolina, __ N.C. App. __, 742 S.E.2d 637 (June 4, 2013). G.S. 14-415.1(a), proscribing the offense of felon in possession of a firearm, does not apply to the plaintiff, who had received a Pardon of Forgiveness from the NC Governor for his prior NC felony. The court relied on G.S. 14-415.1(d), which provides in part that the section does not apply to a person who "pursuant to the law of the jurisdiction in which the conviction occurred, has been pardoned."

Constitutionality

Johnston v. State, 367 N.C. 164 (Nov. 8, 2013). The court per curiam affirmed the decision below, *Johnston v. State*, __ N.C. App. __, 735 S.E.2d 859 (Dec. 18, 2012), which reversed the trial court's ruling that G.S. 14-415.1 (proscribing the offense of felon in possession of a firearm) violated the plaintiff's substantive due process rights under the U.S. and N.C. constitutions and remanded to the trial court for additional proceedings. The court of appeals also reversed the trial court's ruling that the statute was facially invalid on procedural due process grounds, under both the U.S. and N.C. constitutions.

Baysden v. State, 366 N.C. 370 (Jan. 25, 2013). With one justice taking no part in consideration of the case, an equally divided court left undisturbed the following opinion below, which stands without precedential value:

> *Baysden v. North Carolina*, 217 N.C. App. 20 (Nov. 15, 2011). Over a dissent, the court of appeals applied the analysis of *Britt* and *Whitaker* and held that the felon in possession of a firearm statute was unconstitutional as applied to the plaintiff. The plaintiff was convicted of two felony offenses, neither of which involved violent conduct, between three and four decades ago. Since that time he has been a law-abiding citizen. After his firearms rights were restored, the plaintiff used firearms in a safe and lawful manner. When he again became subject to the firearms prohibition because of a 2004 amendment, he took action to ensure that he did not unlawfully possess any firearms and has "assiduously and proactively" complied with the statute since that time. Additionally, the plaintiff was before the court not on a criminal charge for weapons possession but rather on his declaratory judgment action. The court of appeals concluded: "[W]e are unable to see any material distinction between the facts at issue in . . . *Britt* and the facts at issue here." The court rejected the argument that the plaintiff's claim should fail because 2010 amendments to the statute expressly exclude him from the class of individuals eligible to seek restoration of firearms rights; the court found this fact irrelevant to the *Britt/Whitaker* analysis. The court also rejected the notion that the determination as to whether the plaintiff's prior convictions were nonviolent should be made with reference to statutory definitions of nonviolent felonies, concluding that such statutory definitions did not apply in its constitutional analysis. Finally, the court rejected the argument that the plaintiff's challenge must fail because unlike the plaintiff in *Britt*, the plaintiff here had two prior felony convictions. The court refused to adopt a bright line rule, instead concluding that the relevant factor is the number, age, and severity of the offenses for which the litigant has been convicted; while the number of convictions is relevant, it is not dispositive.

Britt v. North Carolina, 363 N.C. 546 (Aug. 28, 2009). The court held that G.S. 14-415.1 (felon in possession), as applied to the plaintiff, was unconstitutional. In 1979, the plaintiff was convicted of possession of a controlled substance with intent to sell and deliver, a nonviolent crime that did not involve the use of a firearm. He completed his sentence in 1982 and in 1987, his civil rights were fully restored, including his right to possess a firearm. The then-existing felon in possession statute did not bar the plaintiff from possessing a firearm. In 2004, G.S. 14-415.1 was amended to extend the prohibition to all firearms by anyone convicted of a felony and to remove the exceptions for possession within the felon's own home and place of business. Thereafter, the plaintiff spoke with his local sheriff about whether he could lawfully possess a firearm and divested himself of all firearms, including sporting rifles and shotguns that he used for game hunting on his land. Plaintiff, who had never been charged with another crime, filed a civil action against the State, alleging that G.S. 14-415.1 violated his constitutional rights. The North Carolina Supreme Court held that as applied to him, G.S. 14-415.1, which contains no exceptions, violated the plaintiff's right to keep and bear arms protected by Article I, Section 30 of the North Carolina Constitution. Specifically, the court held that as applied, G.S. 14-451.1 was not a reasonable regulation. The court held: "Plaintiff, through his uncontested lifelong

nonviolence towards other citizens, his thirty years of law-abiding conduct since his crime, his seventeen years of responsible, lawful firearm possession between 1987 and 2004, and his assiduous and proactive compliance with the 2004 amendment, has affirmatively demonstrated that he is not among the class of citizens who pose a threat to public peace and safety." It concluded: "[I]t is unreasonable to assert that a nonviolent citizen who has responsibly, safely, and legally owned and used firearms for seventeen years is in reality so dangerous that any possession at all of a firearm would pose a significant threat to public safety."

State v. Whitaker, 364 N.C. 404 (Oct. 8, 2010). Affirming *State v. Whitaker*, 201 N.C. App. 190 (Dec. 8, 2009), the court held that G.S. 14-415.1, the felon in possession statute, was not an impermissible ex post facto law or bill of attainder.

State v. Price, __ N.C. App. __, 757 S.E.2d 309 (April 1, 2014). The trial court erred by dismissing a charge of felon in possession of a firearm on the basis that the statute was unconstitutional as applied to the defendant under a *Britt* analysis. Here, the defendant had two felony convictions for selling a controlled substance and one for felony attempted assault with a deadly weapon. While the defendant was convicted of the drug offenses in 1989, he was more recently convicted of the attempted assault with a deadly weapon in 2003. Although there was no evidence to suggest that the defendant misused firearms, there also was no evidence that the defendant attempted to comply with the 2004 amendment to the felon in possession statute. The court noted that the defendant completed his sentence for the assault in 2005, after the 2004 amendment to the statute was enacted. Thus, he was on notice of the changes in the legislation, yet took no action to relinquish his hunting rifle on his own accord.

Pleading Issues

State v. Alston, __ N.C. App. __, 756 S.E.2d 70 (April 1, 2014). Following *State v. Jeffers*, 48 N.C. App. 663, 665-66 (1980), the court held that G.S. 15A-928 (allegation and proof of previous convictions in superior court) does not apply to the crime of felon in possession of a firearm.

Sufficiency of Evidence

State v. Bradshaw, 366 N.C. 90 (June 14, 2012). Affirming an unpublished opinion below, the court held that the trial court properly denied the defendant's motion to dismiss charges of trafficking by possession and possession of a firearm by a felon. The State presented sufficient evidence to support the jury's determination that the defendant constructively possessed drugs and a rifle found in a bedroom that was not under the defendant's exclusive control. Among other things, photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub were found in the bedroom and all linked the defendant to the contraband. Some of the evidence placed the defendant in the bedroom within two days of when the contraband was found.

State v. Pierce, 216 N.C. App. 377 (Oct. 18, 2011). (1) For purposes of a felon in possession charge, the evidence was insufficient to establish that the defendant possessed a firearm found along the route of his flight by vehicle from an officer. The defendant fled from an officer

attempting to make a lawful stop. The officer did not see a firearm thrown from the defendant's vehicle; the firearm was found along the defendant's flight route several hours after the chase; the firearm was traced to a dealer in Winston-Salem, where the other two occupants of the defendant's vehicle lived; and during the investigation a detective came to believe that one of the vehicle's other occupants owned the firearm. (2) The evidence was sufficient to show that the defendant possessed a shotgun found at his residence. The shotgun was found in the defendant's closet along with a lockbox containing ammunition that could be used in the shotgun, paychecks with the defendant's name on them, and the defendant's parole papers. Also, the defendant's wife said that the defendant was holding the shotgun for his brother.

State v. Best, 214 N.C. App. 39 (Aug. 2, 2011). There was sufficient evidence that the defendant constructively possessed a gun found in a van to support charges of carrying a concealed weapon and possession of a firearm by a felon. The fact that the defendant was the driver of the van gave rise to an inference of possession. Additionally, other evidence showed possession: the firearm was found on the floor next to the driver's seat, in close proximity to the defendant; the defendant admitted that he owned the gun; and this admission was corroborated by a passenger in the van who had seen the defendant in possession of the weapon that afternoon, and remembered that the defendant had been carrying the gun in his pants pocket and later placed it on the van floor.

State v. McNeil, 209 N.C. App. 654 (Mar. 1, 2011). There was sufficient evidence that the defendant constructively possessed the firearm. The defendant was identified as having broken into a house from which a gun was stolen. The gun was found in a clothes hamper at the home of the defendant's ex-girlfriend's mother. The defendant had arrived at the home shortly after the breaking and entering, entering through the back door and walking past the hamper. When the defendant was told that police were "around the house," he fled to the front porch, where officers found him. A vehicle matching the description of the getaway car was parked outside.

State v. Fuller, 196 N.C. App. 412 (Apr. 21, 2009). There was sufficient evidence of constructive possession to sustain conviction for possession of a firearm by a felon.

State v. Taylor, 203 N.C. App. 448 (Apr. 20, 2010). There was sufficient evidence of constructive possession. When a probation officer went to the defendant's cabin, the defendant ran away; a frisk of the defendant revealed spent .45 caliber shells that smelled like they had been recently fired; the defendant told the officer that he had been shooting and showed the officer boxes of ammunition close to the cabin, of the same type found during the frisk; a search revealed a .45 caliber handgun in the undergrowth close to the cabin, near where the defendant had run.

State v. Mewborn, 200 N.C. App. 731 (Nov. 3, 2009). The evidence was sufficient to establish possession supporting convictions of felon in possession and carrying concealed where the defendant ran through a field in a high traffic area, appeared to have something heavy in his back pocket and to make throwing motions from that pocket, and a clean dry gun was found on the wet grass.

Effect of Defendant's Stipulation to Prior Conviction

State v. Fortney, 201 N.C. App. 662 (Jan. 5, 2010). Following *State v. Little,* 191 N.C. App. 655 (2008), and *State v. Jackson,* 139 N.C. App. 721 (2000), and holding that the trial court did not abuse its discretion by allowing the State to introduce evidence of the defendant's prior conviction in a felon in possession case where the defendant had offered to stipulate to the prior felony. The prior conviction, first-degree rape, was not substantially similar to the charged offenses so as to create a danger that the jury might generalize the defendant's earlier bad act into a bad character and raise the odds that he perpetrated the charged offenses of drug possession, possession of a firearm by a felon, and carrying a concealed weapon.

Multiple Convictions

State v. Wiggins, 210 N.C. App. 128 (Mar. 1, 2011). The felon in possession statute does not authorize multiple convictions and sentences for possession of a firearm by a convicted felon predicated on evidence that the defendant simultaneously obtained and possessed one or more firearms, which he or she used during the commission of multiple substantive criminal offenses during the course of the same transaction or series of transactions. The court clarified that the extent to which a defendant is guilty of single or multiple offenses hinges upon the extent to which the weapons in question were acquired and possessed at different times. In the case at hand, the weapons came into the defendant's possession simultaneously and were used over a two-hour period within a relatively limited part of town in connection with the commission of a series of similar offenses. Based on these facts, only one felon in possession conviction could stand.

State v. Lee, 213 N.C. App. 392 (July 19, 2011). The evidence was sufficient to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon. The defendant had argued that the evidence was insufficient to support multiple charges because it showed that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession. The court distinguished *State v. Wiggins*, 210 N.C. App. 128 (Mar. 1, 2011), on grounds that in that case, the offenses were committed in close geographic and temporal proximity. Here, the court determined, the offenses occurred in nine different locations on ten different days over the course of a month. It concluded: "While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, . . . the trial court did not err in denying defendant's motion to dismiss the multiple weapons possession charges."

Improper Storage

State v. Lewis, __ N.C. App. __, 732 S.E.2d 589 (Sept. 4, 2012). The evidence was sufficient on a charge of improper storage of a firearm under G.S. 14-315.1. The defendant argued that the evidence failed to show that he stored or left the handgun in a condition and manner accessible to the victim. The court found sufficient circumstantial evidence on this issue.

Carrying Concealed

State v. Hill, __ N.C. App. __, 741 S.E.2d 911 (May 21, 2013). In a case where an inmate was charged with carrying a concealed weapon, there was sufficient evidence that the weapon was "concealed about his person." Officers found one razor blade stuck to the underside of a table top in the day room adjoining the defendant's cell, where the defendant had been seated earlier in the day. They found another on the ledge below the window in the defendant's darkened cell, moments after he held such a blade in his hand while threatening an officer.

State v. Mather, 221 N.C. App. 593 (July 17, 2012). In this carrying a concealed gun case, the court addressed the issue of whether the provisions in G.S. 14-269(a1) were elements or defenses. Following *State v. Trimble*, 44 N.C. App. 659 (1980) (dealing with the statute on poisonous foodstuffs in public places), it explained:

> The State has no initial burden of producing evidence to show that Defendant's action of carrying a concealed weapon does not fall within an exception to N.C. Gen. Stat. § 14-269(a1); however, once Defendant puts forth evidence to show that his conduct is within an exception – that he had a concealed handgun permit [under G.S. 14-269(a1)(2) for example] – the burden of persuading the trier of fact that Defendant's action was outside the scope of the exception falls upon the State. Based on the Court's holding in *Trimble*, we conclude that the exception in N.C. Gen. Stat. § 14-269(a1)(2) is a defense, not an essential element of the crime of carrying a concealed weapon . . . .

State v. Best, 214 N.C. App. 39 (Aug. 2, 2011). There was sufficient evidence that the defendant constructively possessed a gun found in a van to support charges of carrying a concealed weapon and possession of a firearm by a felon. The fact that the defendant was the driver of the van gave rise to an inference of possession. Additionally, other evidence showed possession: the firearm was found on the floor next to the driver's seat, in close proximity to the defendant; the defendant admitted that he owned the gun; and this admission was corroborated by a passenger in the van who had seen the defendant in possession of the weapon that afternoon, and remembered that the defendant had been carrying the gun in his pants pocket and later placed it on the van floor.

State v. Mewborn, 200 N.C. App. 731 (Nov. 3, 2009). The evidence was sufficient to establish possession supporting convictions of felon in possession and carrying concealed where the defendant ran through a field in a high traffic area, appeared to have something heavy in his back pocket and to make throwing motions from that pocket, and a clean dry gun was found on the wet grass.

Possession on Educational Property

State v. Huckelba, ___ N.C. App. ___, ___ S.E.2d ___ (April 21, 2015). Deciding an issue of first impression, the court held that to be guilty of possessing or carrying weapons on educational property under G.S. 14-269.2(b) the State must prove that the defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon." With regard to proving that the defendant knowingly entered educational property, the court explained:

> [T]he State is not saddled with an unduly heavy burden of proving a defendant's subjective knowledge of the boundaries of educational property. Rather, the State need only prove a defendant's knowledge of her presence on educational property "by reference to the facts and circumstances surrounding the case." If, for example, the evidence shows that a defendant entered a school building and interacted with children while knowingly possessing a gun, the State would have little difficulty proving to the jury that the defendant had knowledge of her presence on educational property. If, however, the evidence shows that a defendant drove into an empty parking lot that is open to the public while knowingly possessing a gun—as in this case—the jury will likely need more evidence of the circumstances in order to find that the defendant knowingly entered educational property.

The court went on to hold that to the extent *State v. Haskins*, 160 N.C. App. 349 (2003), "conflicts with this opinion, it is now overruled." It also held, over a dissent, that in light of the above, the trial court committed plain error by failing to instruct the jury that it must find that the defendant knowingly possessed the weapon on educational property. [Author's note: This holding will require modification of the relevant pattern jury instructions, here N.C.P.I.—Crim 235.17.]

In Re J.C., 205 N.C. App. 301 (July 6, 2010). The evidence was sufficient to support the court's adjudication of a juvenile as delinquent for possession of a weapon on school grounds in violation of G.S. 14-269.2(d). The evidence showed that while on school grounds the juvenile possessed a 3/8-inch thick steel bar forming a C-shaped "link" about 3 inches long and 1½ inches wide. The link closed by tightening a ½-inch thick bolt and the object weighed at least 1 pound. The juvenile could slide several fingers through the link so that 3-4 inches of the 3/8-inch thick bar could be held securely across his knuckles and used as a weapon.

Obscenity and Related Offenses

State v. Anderson, 194 N.C. App. 292 (Dec. 16, 2008). Double jeopardy did not bar conviction and punishment for both second-degree and third-degree sexual exploitation offenses where the third-degree charges were based on the defendant's possession of the images of minors, and the second-degree charges were based on the defendant's receipt of those images.

State v. Ligon, 206 N.C. App. 458 (Aug. 17, 2010). The evidence was insufficient to sustain a conviction for first-degree sexual exploitation of a minor. The State's evidence consisted of photographs of the five-year-old victim but did not depict any sexual activity. The court rejected the State's arguments that a picture depicting the child pulling up the leg of her shorts while her fingers were in her pubic area depicted masturbation; the court concluded that the photograph merely showed her hand in proximity to her crotch. It also rejected the State's argument that this picture, along with other evidence supported an inference that the defendant coerced or encouraged the child to touch herself for the purpose of producing a photograph depicting masturbation, concluding that no statutorily prohibited sexual activity took place. Finally, it rejected the State's argument that a photograph of the defendant pulling aside the child's shorts depicted prohibited touching constituting sexual activity on grounds that the picture depicted the defendant touching the child's shorts not her body.

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). (1) Deciding an issue of first impression the court held that the act of downloading an image from the Internet constitutes a duplication for purposes of second-degree sexual exploitation of a minor under G.S. 14-190.17. (2) The court rejected the defendant's argument that in third-degree sexual exploitation of a minor cases, the General Assembly did not intend to punish criminal defendants for both receiving and possessing the same images.

State v. Martin, 195 N.C. App. 43 (Jan. 20, 2009). No double jeopardy violation when the defendant was convicted and punished for indecent liberties and using a minor in obscenity based on the same photograph depicting the child and defendant. Each offense has at least one element that is not included in the other offense.

Obstruction of Justice and Related Offenses

Resist, Delay & Obstruct Officer

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). The trial court properly denied the defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer where the evidence showed that the defendant refused to provide the officer with his identification so that the officer could issue a citation for a seatbelt violation. The court held: "failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of [G.S.] 14-223." It reasoned that unlike failing to provide a social security number, the "Defendant's refusal to provide identifying information did hinder [the] Officer . . . from completing the seatbelt citation." It continued:

> There are, of course, circumstances where one would be excused from providing his or her identity to an officer, and, therefore, not subject to prosecution under N.C. Gen. Stat. §14-223. For instance, the Fifth Amendment's protection against compelled self-incrimination might justify a refusal to provide such information; however, as the United States Supreme Court has observed, "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances." Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed.2d 292, 306 (2004). In the present case, Defendant has not made any showing that he was justified in refusing to provide his identity to Officer Benton.

State v. Carter, __ N.C. App. __, 765 S.E.2d 56 (Nov. 18, 2014). There was insufficient evidence to support a conviction of resisting an officer in a case that arose out of the defendant's refusal to allow the officer to search him pursuant to a search warrant. Because the arresting officer did not read or produce a copy of the warrant to the defendant prior to seeking to search the defendant's person as required by G.S. 15A-252, the officer was not engaged in lawful conduct and therefore the evidence was insufficient to support a conviction.

State v. Smith, __ N.C. App. __, 736 S.E.2d 847 (Feb. 5, 2013). (1) In a resisting, delaying, obstructing case, the trial court did not err by instructing the jury that an arrest for indecent exposure would be a lawful arrest where the defendant never claimed at trial that he was acting in response to an unlawful arrest, nor did the evidence support a reasonable inference that he did

so. Although the defendant argued on appeal that the arrest was not in compliance with G.S. 15A-401, the evidence indicated otherwise. (2) The court rejected the defendant's argument that the evidence was insufficient to establish that he willfully resisted arrest. Responding to a call about indecent exposure, the officer found the defendant in his car with his shorts at his thighs and his genitals exposed. When the defendant exited his vehicle his shorts fell to the ground. The defendant refused to give the officer his arm or put his arm behind his back. According to the defendant he was merely trying to pull up his pants.

State v. Cornell, 222 N.C. App. 184 (Aug. 7, 2012). (1) The evidence was sufficient to support a conviction for resisting, delaying and obstructing an officer during a 10-15 second incident. Officers observed members of the Latin Kings gang yelling gang slogans and signaling gang signs to a group of rival gang members. To prevent conflict, the officers approached the Latin Kings. The defendant stepped between the officer and the gang members, saying, "[t]hey was (sic) waving at me[,]" and "you wanna arrest me 'cuz I'm running for City Council." The officer told the defendant to "get away" and that he was "talking to them, not talking to you." The defendant responded, "[y]ou don't gotta talk to them! They (sic) fine!" Because the defendant refused the officer's instructions to step away, there was sufficient evidence that he obstructed and delayed the officers. Furthermore, there was sufficient evidence of willfulness. Finally, the court rejected the defendant's argument that his conduct was justified on grounds that he acted out of concern for a minor in his care. The court found no precedent for the argument that an individual's willful delay or obstruction of an officer's lawful investigation is justified because a minor is involved. In fact, case law suggest otherwise. (2) The trial court did not err by denying the defendant's request for a jury instruction stating that merely remonstrating an officer does not amount to obstructing. The defendant's conduct went beyond mere remonstrating.

State v. White, 214 N.C. App. 471 (Aug. 16, 2011). The defendant's flight from a consensual encounter with the police did not constitute probable cause to arrest him for resisting an officer.

State v. Joe, 213 N.C. App. 148 (July 5, 2011), *vacated on other grounds by*, 365 N.C. 538 (Apr. 13, 2012). There was insufficient evidence of resisting an officer when the defendant fled from a consensual encounter. When the officer approached an apartment complex on a rainy, chilly day, the defendant was standing outside, dressed appropriately in a jacket with the hood on his head. Although the officer described the complex as a known drug area, he had no specific information about drug activity on that day. When the defendant saw the officer's van approach, "his eyes got big" and he walked behind the building. The officer followed to engage in a consensual conversation with him. When the officer rounded the corner, he saw the defendant run. The officer chased, yelling several times that he was a police officer. The officer eventually found the defendant squatting beside an air conditioning unit and arrested him for resisting.

In re A.J.M-B, 212 N.C. App. 586 (June 21, 2011). The trial court erred by denying the juvenile's motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An anonymous caller reported to law enforcement "two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle" in "an open field behind a residence." A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two

juveniles "pop their heads out of the wood line" and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

State v. Richardson, 202 N.C. App. 570 (Feb. 16, 2010). There was insufficient evidence of resisting an officer. The State argued that the defendant resisted by exiting a home through the back door after officers announced their presence with a search warrant. "We find no authority for the State's presumption that a person whose property is not the subject of a search warrant may not peacefully leave the premises after the police knock and announce if the police have not asked him to stay."

Failure to Appear

State v. Goble, 205 N.C. App. 310 (July 6, 2010). The trial court did not err by denying the defendant's motion to dismiss a charge of felony failure to appear. To survive a motion to dismiss a charge of felonious failure to appear, the State must present substantial evidence that (1) the defendant was released on bail pursuant to G.S. Article 26 in connection with a felony charge or, pursuant to section G.S. 15A-536, after conviction in the superior court; (2) the defendant was required to appear before a court or judicial official; (3) the defendant did not appear as required; and (4) the defendant's failure to appear was willful. In this case, the defendant signed an Appearance Bond for Pretrial Release which included the condition that the defendant appear in the action whenever required. The defendant subsequently failed to appear on the second day of trial. The court further held that the defendant, who failed to appear on felony charges, was not entitled to an instruction on misdemeanor failure to appear even though the felony charges resulted in misdemeanor convictions.

Obstruction of Justice

State v. Cousin, __ N.C. App. __, 757 S.E.2d 332 (April 15, 2014). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of felonious obstruction of justice where the defendant gave eight written contradictory statements to law enforcement officers concerning a murder. In his first statements, the defendant denied being at the scene but identified individuals who may have been involved. In his next statements he admitted being present and identified various alternating persons as the killer. At the end of one interview, he was asked if he was telling the truth and he responded "nope." A SBI agent testified to the significant burden imposed on the investigation because of the defendant's conflicting statements. He explained that each lead was pursued and that the SBI ultimately determined that each person identified by the defendant had an alibi. (2) No double jeopardy violation occurred when the trial court sentenced the defendant for obstruction of justice and accessory after the fact arising out of the same conduct. Comparing the elements of the offenses, the court noted that each contains an element not in the other and thus no double jeopardy violation occurred.

State v. Taylor, 212 N.C. App. 238 (June 7, 2011). (1) By enacting G.S. 14-223 (resist, delay, obstruct an officer), the General Assembly did not deprive the State of the ability to prosecute a defendant for common law obstruction of justice, even when the defendant's conduct could have been charged under G.S. 14-223. (2) In a case in which the defendant, a sheriff's chief deputy, was alleged to have obstructed justice by interfering with police processing duties in connection

with a DWI charge against a third-person, the trial judge did not err by failing to instruct the jury on the lack of legal authority to require the processing with which the defendant allegedly interfered.

State v. Wright, 206 N.C. App. 239 (Aug. 3, 2010). The trial court did not err by denying the defendant's motion to dismiss a charge of felony obstruction of justice. The State argued that the defendant knowingly filed with the State Board of Elections (Board) campaign finance reports with the intent of misleading the Board and the voting public about the sources and uses of his campaign contributions. The defendant was a member of the House of Representatives and a candidate for re-election. He was required to file regular campaign finance disclosure reports with the Board to provide the Board and the public with accurate information about his compliance with campaign finance laws, the sources of his contributions, and the nature of his expenditures. His reports were made under oath or penalty of perjury. The defendant's sworn false reports deliberately hindered the ability of the Board and the public to investigate and uncover information to which they were entitled by law: whether defendant was complying with campaign finance laws, the sources of his contributions, and the nature of his expenditures. Further, his false reports concealed illegal campaign activity from public exposure and possible investigation. The lack of any pending judicial proceeding or a specific investigation into whether the defendant had violated campaign finance laws was immaterial. The court also rejected the defendant's argument that the trial court's jury instructions deviated from the indictment. The defendant argued that the indictment alleged that he obstructed public access to the information but that the jury instructions focused on obstructing the Board's access to information. The court found this to be a distinction without a difference.

Intimidating a Witness

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). In an interfering with a witness case, the trial court properly instructed the jury that the first element of the offense was that "a person was summoned as a witness in a court of this state. You are instructed that it is immaterial that the victim was regularly summoned or legally bound to attend." The second sentence properly informed the jury that the victim need only be a "prospective witness" for this element to be satisfied.

State v. Shannon, __ N.C. App. __, 750 S.E.2d 571 (Nov. 19, 2013). Over a dissent, the court extended G.S. 14-226(a) (intimidating witnesses) to apply to a person who was merely a prospective witness. The local DSS filed a juvenile petition against the defendant and obtained custody of his daughter. As part of that case, the defendant was referred to the victim for counseling. The defendant appeared at the victim's office, upset about a letter she had written to DSS about his treatment. The defendant grabbed the victim's forearm to stop her and stated, in a loud and aggravated tone, that he needed to speak with her. The defendant asked the victim to write a new letter stating that he did not require the recommended treatment; when the victim declined to do so, the defendant "became very loud." The victim testified, among other things, that every time she wrote a letter to DSS, she was "opening [her]self up to have to testify" in court. The court found the evidence sufficient to establish that the victim was a prospective witness and thus covered by the statute.

Gambling

Hest Technologies, Inc. v. North Carolina, 366 N.C. 289 (Dec. 14, 2012). The court reversed *Hest Technologies, Inc. v. North Carolina*, 219 N.C. App. 308 (Mar. 6, 2012), and held that G.S. 14-306.4 does not violate the First Amendment because it regulates conduct, not protected speech. The court also concluded that even if the statute incidentally burdens speech, it passes muster under the test of *United States v. O'Brien* and that the statute was not overbroad.

Sandhill Amusements v. North Carolina, 366 N.C. 323 (Dec. 14, 2012). For the reasons stated in *Hest*, the court reversed *Sandhill Amusements v. North Carolina*, 219 N.C. App. 362 (Mar. 6, 2012) (G.S. 14-306.4 is unconstitutional).

State v. Spruill, __ N.C. App. __, 765 S.E.2d 84 (Nov. 18, 2014). There was sufficient evidence that the defendants conducted a sweepstakes through the use of an entertaining display, including the entry process or the revealing of a prize in violation of G.S. 14-306.4. The court rejected the defendants' argument that because the prize was revealed to the patron prior to an opportunity to play a game, they did not run afoul of the statute.

McCracken v. Perdue, 201 N.C. App. 480 (Dec. 22, 2009). Reversing the trial court's ruling that federal Indian gaming law prohibits the State from granting the Eastern Band of Cherokee Indians of North Carolina ("the Tribe") exclusive rights to conduct certain gaming on tribal land while prohibiting such gaming, in G.S. 14-306.1A, throughout the rest of the State. The court held that state law providing the Tribe with exclusive gaming rights does not violate federal Indian gaming law.

Drug Offenses

State of Mind

State v. Galaviz-Torres, ___ N.C. ___, ___ S.E.2d ___ (June 11, 2015). Reversing an unpublished opinion below in this drug trafficking case, the supreme court held that the trial court did not err in its jury instructions regarding the defendant's knowledge. The court noted that "[a] presumption that the defendant has the required guilty knowledge exists" when "the State makes a prima facie showing that the defendant has committed a crime, such as trafficking by possession, trafficking by transportation, or possession with the intent to sell or deliver, that lacks a specific intent element." However, the court continued: "when the defendant denies having knowledge of the controlled substance that he has been charged with possessing or transporting, the existence of the requisite guilty knowledge becomes 'a determinative issue of fact' about which the trial court must instruct the jury." As a result of these rules, footnote 4 to N.C.P.I. Crim. 260.17 (and parallel footnotes in related instructions) states that, "[i]f the defendant contends that he did not know the true identity of what he possessed," the italicized language must be added to the jury instructions:

> For you to find the defendant guilty of this offense the State must prove two things beyond a reasonable
> doubt:
>
> First, that the defendant knowingly possessed cocaine *and the defendant knew that what he possessed was cocaine*. A person possesses cocaine if he is aware

> of its presence and has (either by himself or together with others) both the power and intent to control the disposition or use of that substance.

The defendant argued that the trial court erred by failing to add the "footnote four" language to the jury instructions. The supreme court disagreed, reasoning:

> In this case, defendant did not either deny knowledge of the contents of the gift bag in which the cocaine was found or admit that he possessed a particular substance while denying any knowledge of the substance's identity. Instead, defendant simply denied having had any knowledge that the van that he was driving contained either the gift bag or cocaine. As a result, since defendant did not "contend[ ] that he did not know the true identity of what he possessed," the prerequisite for giving the instruction in question simply did not exist in this case. As a result, the trial court did not err by failing to deliver the additional instruction contained in footnote four . . . in this case. (citation omitted).

The court went on to distinguish the case before it from *State v. Coleman*, ___ N.C. App. ___, 742 S.E.2d 346 (2013).

State v. Velazquez-Perez, __ N.C. App. __, 756 S.E.2d 869 (April 15, 2014). In a case involving trafficking and possession with intent charges, the evidence was insufficient to establish that the defendant Villalvavo knowingly possessed the controlled substance. The drugs were found in secret compartments of a truck. The defendant was driving the vehicle, which was owned by a passenger, Velazquez-Perez, who hired Villalvavo to drive the truck. The court found insufficient incriminating circumstances to support a conclusion that Villalvavo acted knowingly with respect to the drugs; while evidence regarding the truck's log books may have been incriminating as to Velazquez-Perez, it did not apply to Villalvavo, who had not been working for Velazquez-Perez long and had no stake in the company or control over Velazquez-Perez. The court was unconvinced that Villalvavo's nervousness during the stop constituted adequate incriminating circumstances.

State v. Beam, __ N.C. App. __, 753 S.E.2d 232 (Jan. 21, 2014). In a case in which the defendant was convicted of possession of heroin and trafficking in opium or heroin by transportation, the trial court did not err by denying the defendant's request for an instruction about knowing possession or transportation. The court concluded that the requested instruction was not required because the defendant did not present any evidence that he was confused or mistaken about the nature of the illegal drug his accomplice was carrying.

State v. Coleman, __ N.C. App. __, 742 S.E.2d 346 (May 21, 2013). In a heroin trafficking case where the defendant argued that he did not know that the item he possessed was heroin, the trial court committed plain error by denying the defendant's request for a jury instruction that the State must prove that the defendant knew that he possessed heroin (footnote 4 of the relevant trafficking instructions). The court noted that knowledge that one possesses contraband is presumed by the act of possession unless the defendant denies knowledge of possession and contests knowledge as disputed fact. It went on to reject the State's argument that the defendant was not entitled to the instruction because he did not testify or present any evidence to raise the issue of knowledge as a disputed fact. The court noted that its case in chief the State presented evidence that the defendant told a detective that he did not know the container in his vehicle

contained heroin; this constituted a contention by the defendant that he did not know the true identity of what he possessed, the critical issue in the case.

State v. Aguilar-Ocampo, 219 N.C. App. 417 (Mar. 20, 2012). The trial court did not err by declining to give the defendant's proposed jury instruction on the element that the defendant acted "knowingly." The instructions given by the trial court adequately contained the substance of the defendant's proposed instruction. Specifically, it instructed the jury that in order to possess or sell cocaine, the defendant must have been aware of its presence and have had the power and intent to control its distribution or use. These instructions effectively inform the jury that the defendant must have had knowledge of the substance and the crime being committed, and he must have intentionally and voluntarily participated in the crime.

Proof the Substance is a Controlled Substance

State v. Poole, __ N.C. App. __, 733 S.E.2d 564 (Oct. 16, 2012). In a case involving a charge of possessing a controlled substance on the premises of a local confinement facility, the defendant's own testimony that he had a "piece of dope . . . in the jail" was sufficient evidence that he possessed a controlled substance on the premises.

Maintaining a Dwelling, Etc.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (July 21, 2015). The trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a dwelling. The court first held that the evidence established that the defendant kept or maintained the dwelling where it showed that he resided there. Specifically, the defendant received mail addressed to him at the residence; his probation officer visited him there numerous times to conduct routine home contacts; the defendant's personal effects were found in the residence, including a pay stub and protective gear from his employment; and the defendant placed a phone call from the Detention Center and informed the other party that officers had "come and searched his house." Next, the court held that the evidence was sufficient to show that the residence was being used for keeping or selling drugs. In assessing this issue, the court looks at factors including the amount of drugs present and paraphernalia found. Here, a bag containing 39.7 grams of 4-methylethcathinone and methylone was found in a bedroom closet alongside another plastic bag containing "numerous little corner baggies." A set of digital scales and $460.00 in twenty dollar bills also were found.

State v. Simpson, __ N.C. App. __, 748 S.E.2d 756 (Oct. 15, 2013). The trial court erred by denying the defendant's motion to dismiss a charge of maintaining a vehicle for use, storage, or sale of a controlled substance. The statute provides two ways to show a violation: first, that the defendant knowingly allowed others to resort to his vehicle to use drugs; and second, that the defendant knowingly used the dwelling for the keeping or selling of drugs. The court reasoned that the defendant could not be convicted under the first prong because of his own use of drugs in his vehicle and that the State presented no evidence as to the second prong. [Author's note: the court does not explain why the State's evidence that the defendant's acquaintance also "got[] high" with the defendant in the defendant's vehicle was insufficient to prove the first prong.]

State v. Huerta, 221 N.C. App. 436 (July 3, 2012). There was sufficient evidence to support a conviction of maintaining a dwelling. The defendant argued that there was insufficient evidence that he knew about the drugs found in the home. However, the court held that its conclusion that he constructively possessed the drugs resolved that issue in favor of the State.

State v. Fuller, 196 N.C. App. 412 (Apr. 21, 2009). There was insufficient evidence to establish that the defendant "maintained" the dwelling. Evidence showed only that the defendant had discussed, with the home's actual tenant, taking over rent payments but never reached an agreement to do so; a car, similar to defendant's was normally parked at the residence; and the defendant's shoes and some of his personal papers were found there.

State v. Craven, 205 N.C. App. 393 (July 20, 2010), *reversed on other grounds*, 367 N.C. 51 (June 27, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle where the evidence was sufficient to establish that the defendant had possession of cocaine in his mother's vehicle over a duration of time and/or on more than one occasion.

State v. Hudson, 206 N.C. App. 482 (Aug. 17, 2010). The evidence was sufficient to support a conviction for maintaining a vehicle. Drugs were found in a vehicle being transported by a car carrier driven by the defendant. The evidence showed that the defendant kept or maintained the vehicle where the bill of lading showed that the defendant picked it up and maintained possession as the authorized bailee continuously and without variation for two days. Having stopped to rest overnight at least one time during the time period, the defendant retained control and disposition over the vehicle and resumed his planned route with the car carrier.

Possession

Knowing Possession

State v. Beam, __ N.C. App. __, 753 S.E.2d 232 (Jan. 21, 2014). In a case in which the defendant was convicted of possession of heroin and trafficking in opium or heroin by transportation, the trial court did not err by denying the defendant's request for an instruction about knowing possession or transportation. The court concluded that the requested instruction was not required because the defendant did not present any evidence that he was confused or mistaken about the nature of the illegal drug his accomplice was carrying.

State v. Coleman, __ N.C. App. __, 742 S.E.2d 346 (May 21, 2013). In a heroin trafficking case where the defendant argued that he did not know that the item he possessed was heroin, the trial court committed plain error by denying the defendant's request for a jury instruction that the State must prove that the defendant knew that he possessed heroin (footnote 4 of the relevant trafficking instructions). The court noted that knowledge that one possesses contraband is presumed by the act of possession unless the defendant denies knowledge of possession and contests knowledge as disputed fact. It went on to reject the State's argument that the defendant was not entitled to the instruction because he did not testify or present any evidence to raise the issue of knowledge as a disputed fact. The court noted that its case in chief the State presented evidence that the defendant told a detective that he did not know the container in his vehicle

contained heroin; this constituted a contention by the defendant that he did not know the true identity of what he possessed, the critical issue in the case.

State v. Lopez, 219 N.C. App. 139 (Feb. 21, 2012). In a trafficking by possession case there was sufficient evidence of knowing possession where the defendant was driving the vehicle that contained the cocaine.

State v. Nunez, 204 N.C. App. 164 (May 18, 2010). The evidence was sufficient to establish that the defendant knowingly possessed and transported the controlled substance. The evidence showed that (1) the packages involved in the controlled delivery leading to the charges at issue were addressed to "Holly Wright;" although a person named Holly Wainwright had lived in the apartment with the defendant, she had moved out; (2) the defendant immediately accepted possession of the packages, dragged them into the apartment, and never mentioned to the delivery person that Wainwright no longer lived there; (3) Wainwright testified that she had not ordered the packages; (4) the defendant told a neighbor that another person (Smallwood) had ordered the packages for her; (5) the defendant did not open the packages, but immediately called Smallwood to tell him that they had arrived; (6) after getting off the phone with Smallwood, the defendant acted like she was in a hurry to leave; and (7) Smallwood came to the apartment within thirty-five minutes of the packages being delivered.

State v. Robledo, 193 N.C. App. 521 (Nov. 4, 2008). There was sufficient evidence to show that the defendant knowingly possessed marijuana in a case where the defendant was convicted of trafficking in marijuana and conspiracy to traffic by possession. Defendant signed for and collected a UPS package containing 44.1 pounds of marijuana. About a half hour later, the defendant helped load a second UPS package containing 43.8 pounds of marijuana into the back seat of a car. Both boxes were found when police searched the car, driven by the defendant. The defendant had once lived in the same residence as his niece, the person to whom the packages were addressed, and knew that his niece frequently got packages like these. Also, the defendant expected to earn between $50 and $200 for simply taking the package from UPS to his niece. Finally the address on one of the boxes did not exist.

Constructive Possession

State v. Lindsey, 366 N.C. 325 (Dec. 14, 2012). For the reasons stated in the dissenting opinion below, the court reversed *State v. Lindsey*, 219 N.C. App. 249 (Mar. 6, 2012). In the opinion below the court of appeals held—over a dissent—that there was insufficient evidence of constructive possession. After the defendant fled from his van, which he had crashed in a Wendy's parking lot, an officer recovered a hat and a cell phone in the van's vicinity. No weapons or contraband were found on the defendant or along his flight path. A search of the driver's side seat of the van revealed a "blunt wrapper" and a wallet with $800. Officers discovered a bag containing cocaine and a bag containing marijuana near trash receptacles in the Wendy's parking lot. The officers had no idea how long the bags had been there, and though the Wendy's was closed at the time, the lot was open and had been accessible by the public before the area was secured. Finding the evidence insufficient, the court of appeals noted that the defendant was not at his residence or in a place where he exercised any control; although an

officer observed the defendant flee, he did not see the defendant take any actions consistent with disposing of the marijuana and cocaine in two separate locations in the parking lot; there was no physical evidence linking the defendant to the drugs recovered; and no drugs were found on or in the defendant's van. The dissenting court of appeals judge would have found the evidence sufficient to establish constructive possession of the marijuana.

State v. Bradshaw, 366 N.C. 90 (June 14, 2012). Affirming an unpublished opinion below, the court held that the trial court properly denied the defendant's motion to dismiss charges of trafficking by possession and possession of a firearm by a felon. The State presented sufficient evidence to support the jury's determination that the defendant constructively possessed drugs and a rifle found in a bedroom that was not under the defendant's exclusive control. Among other things, photographs, a Father's Day card, a cable bill, a cable installation receipt, and a pay stub were found in the bedroom and all linked the defendant to the contraband. Some of the evidence placed the defendant in the bedroom within two days of when the contraband was found.

State v. Miller, 363 N.C. 96 (Mar. 20, 2009). There was sufficient evidence that the defendant constructively possessed cocaine. Two factors frequently considered in analyzing constructive possession are the defendant's proximity to the drugs and indicia of the defendant's control over the place where the drugs are found. The court found the following evidence sufficient to support constructive possession: Officers found the defendant in a bedroom of a home where two of his children lived with their mother. When first seen, the defendant was sitting on the same end of the bed where the cocaine was recovered. Once the defendant slid to the floor, he was within reach of the package of cocaine recovered from the floor behind the bedroom door. The defendant's birth certificate and state-issued identification card were found on top of a television stand in that bedroom. The only other person in the room was not near any of the cocaine. Even though the defendant did not exclusively possess the premises, these incriminating circumstances permitted a reasonable inference that the defendant had the intent and capability to exercise control and dominion over cocaine in that room.

State v. Slaughter, 365 N.C. 321 (Dec. 9, 2011). For the reasons stated in the dissenting opinion below, the court reversed a decision by the court of appeals in *State v. Slaughter*, 212 N.C. App. 59 (May 17, 2011). The court of appeals had held, over a dissent, that there was sufficient evidence of constructive possession of marijuana. The dissenting judge had noted that the evidence showed only that the defendant and two others were detained by a tactical team and placed on the floor of a 10-by-15 foot bedroom in the back of the mobile home, which had a pervasive odor of marijuana; inside the bedroom, police found, in plain view, numerous bags containing marijuana, approximately $38,000 in cash, several firearms, a grinder, and a digital scale; stacks of $20 and $100 bills, plastic sandwich baggies, and marijuana residue were found in the bathroom adjoining the bedroom. The dissenter noted that there was no evidence of the defendant's proximity to the contraband prior to being placed on the floor, after being placed on the floor, or relative to the other detained individuals. Having concluded that the evidence was insufficient as to proximity, the dissenting judge argued that mere presence in a room where contraband is located does not itself support an inference of constructive possession. The dissenting judge further concluded that the fact that the contraband was in plain view did not "take this case out of the realm of conjecture." He asserted: "The contraband being in plain view

suggests that defendant knew of its presence, but there is no evidence — and the majority points to none — indicating that defendant had the intent and capability to maintain control and dominion over it." (quotation omitted).

State v. Henry, __ N.C. App. __, 765 S.E.2d 94 (Nov. 18, 2014). In a possession of cocaine case, the evidence was sufficient to prove that the defendant constructively possessed cocaine. The drugs were found on the ground near the rear driver's side of the defendant's car after an officer had struggled with the defendant. Among other things, video from the officer's squad car showed that during the struggle the defendant dropped something that looked like an off-white rock near rear driver's side of the vehicle. This and other facts constituted sufficient evidence of other incriminating circumstances to establish constructive possession.

State v. Davis, __ N.C. App. __, 762 S.E.2d 886 (Sept. 16, 2014). The evidence was sufficient to establish that the defendant constructively possessed the methamphetamine and drug paraphernalia. Agreeing with the defendant that the evidence tended to show that methamphetamine found in a handbag belonged to the defendant's accomplice, the court found there was sufficient evidence that he constructively possessed methamphetamine found in a duffle bag. Among other things, the defendant and his accomplice were the only people observed by officers at the scene of the "one pot" outdoor meth lab, the officer watched the two for approximately forty minutes and both parties moved freely about the site where all of the items were laid out on a blanket.

State v. Rodelo, __ N.C. App. __, 752 S.E.2d 766 (Jan. 7, 2014). (1) In a trafficking by possession case, there was sufficient evidence of constructive possession. The court rejected the defendant's argument that the State's evidence showed only "mere proximity" to the drugs. Among other things, the defendant hid from the agents when they entered the warehouse; he was discovered alone in a tractor-trailer where money was hidden; no one else was discovered in the warehouse; the cocaine was found in a car parked, with its doors open, in close proximity to the tractor-trailer containing the cash; the cash and the cocaine were packaged similarly; wrappings were all over the tractor-trailer, in which the defendant was hiding, and in the open area of a car parked close by; the defendant admitted knowing where the money was hidden; and the entire warehouse had a chemical smell of cocaine. (2) Conspiracy to traffic in cocaine is not a lesser-included offense of trafficking in cocaine. The former offense requires an agreement; the latter does not.

State v. Torres-Gonzalez, __ N.C. App. __, 741 S.E.2d 502 (May 7, 2013). The evidence was sufficient to support a charge of trafficking in cocaine by possession. A detective set up a cocaine sale. The defendant and an individual named Blanco arrived at the location and both came over to the detective to look at the money. The defendant and Blanco left together, with the defendant telling Blanco to wait at a parking lot for the drug delivery. Later, the defendant told Blanco to come to the defendant's house to get the drugs. Blanco complied and completed the sale.

State v. Hazel, __ N.C. App. __, 739 S.E.2d 196 (April 2, 2013). There was sufficient evidence that the defendant had constructive possession of heroin found in an apartment that was not owned or rented by him. Evidence that the defendant was using the apartment included that he

had a key to the apartment on his key ring, his clothing was found in the bedroom, he was seen entering and exiting the apartment shortly before the drug transaction, and he characterize the apartment as "where he was staying." Also, the defendant told the officer he had more heroin in the apartment and once inside lead them directly to it. The defendant also told the officers that his roommate was not involved with heroin and knew nothing of the defendant's involvement with drugs.

State v. Chisholm, __ N.C. App. __, 737 S.E.2d 818 (Feb. 19, 2013). The trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell and deliver cocaine where there was sufficient evidence of constructive possession. Because the defendant did not have exclusive possession of the bedroom where the drugs were found, the State was required to show other incriminating circumstances. There was sufficient evidence of such circumstances where among other things, the defendant was sleeping in the bedroom, his dog was in the room, his clothes were in the closet, and plastic baggies, drug paraphernalia, and an electronic scale with white residue were in the bedroom. Additionally, the nightstand contained a wallet with a Medicare Health Insurance Card and customer service card identifying the defendant, a letter addressed to defendant at the address, and $600 in cash.

State v. Huerta, 221 N.C. App. 436 (July 3, 2012). In this drug trafficking case the court held that there was sufficient evidence to support a finding of constructive possession of cocaine. Police had previously received a tip that drug sales were occurring at the home where the drugs were found; police later received similar information in connection with a DEA investigation; when officers went to the home the defendant admitted living there with his wife and children for three years, the defendant had a pistol, which he admitted having purchased illegally, ammunition, and more than $9,000.00 in cash in his closet; the defendant had more than $2,000 in cash on his person; almost 2 kilograms of powder cocaine worth more than $50,000 were found within easy reach of an opening leading from the hallway area to the attic; and the home small and had no residents other than the defendant and his family.

State v. Adams, 218 N.C. App. 589 (Feb. 7, 2012). In a trafficking by possession case, the evidence was sufficient to show constructive possession. After receiving a phone call from an individual named Shaw requesting cocaine, the defendant contacted a third person, Armstrong, to obtain the drugs. The defendant picked up Armstrong in a truck and drove to a location that the defendant had arranged with Shaw for the purchase. The defendant knew that Armstrong had the cocaine. Officers found cocaine on scales in the center of the truck. The defendant's facilitation of the transaction by providing the vehicle, transportation, and arranging the location constituted sufficient incriminating circumstances to support a finding of constructive possession.

State v. Johnson, 217 N.C. App. 605 (Dec. 20, 2011). In a trafficking case, the evidence was sufficient to show that the defendant constructively possessed cocaine found in a vehicle in which the defendant was a passenger. Another occupant in the vehicle testified that the cocaine belonged to the defendant, the cocaine was found in the vehicle "where [the defendant]'s feet would have been[,]" and, cocaine also was found on the defendant's person.

State v. Ferguson, 204 N.C. App. 451 (June 15, 2010). There was insufficient evidence that the defendant had constructive possession of bags of marijuana found in a vehicle. An officer found a vehicle that had failed to stop on his command in the middle of a nearby street with the engine running. The driver and passengers had fled. Officers searched the vehicle and found, underneath the front passenger seat, a large bag containing two smaller bags of marijuana; in the glove box, a small bag of marijuana; and in the defendant's handbag, a burned marijuana cigarette. The defendant, who had been sitting in the back seat, did not own the vehicle. There was no evidence that the defendant behaved suspiciously or failed to cooperate with officers after being taken into custody. There was no evidence that the defendant made any incriminating admissions, had a relationship with the vehicle's owner, had a history of selling drugs, or possessed an unusually large amount of cash.

State v. Terry, 207 N.C. App. 311 (Oct. 5, 2010). There was sufficient evidence of constructive possession of drugs found in a house. The defendant lived at and owned a possessory interest in the house; he shared the master bedroom where the majority of the marijuana and drug paraphernalia were found; he was in the living space adjoining the master bedroom when the search warrant was executed; there were drugs in plain view in the back bedroom; he demonstrated actual control over the premises in demanding the search warrant; and in a conversation with his wife after their arrest, the two questioned each other about how the police found out about the drugs and the identity of the confidential informant who said that the contraband belonged to the defendant).

State v. Robledo, 193 N.C. App. 521 (Nov. 4, 2008). There was sufficient evidence to show that the defendant knowingly possessed marijuana in a case where the defendant was convicted of trafficking in marijuana and conspiracy to traffic by possession. Defendant signed for and collected a UPS package containing 44.1 pounds of marijuana. About a half hour later, the defendant helped load a second UPS package containing 43.8 pounds of marijuana into the back seat of a car. Both boxes were found when police searched the car, driven by the defendant. The defendant had once lived in the same residence as his niece, the person to whom the packages were addressed, and knew that his niece frequently got packages like these. Also, the defendant expected to earn between $50 and $200 for simply taking the package from UPS to his niece. Finally the address on one of the boxes did not exist.

State v. Hough, 202 N.C. App. 674 (Mar. 2, 2010). There was sufficient evidence of constructive possession even though the defendant did not have exclusive control of the residence where the controlled substances were found. The defendant admitted that he resided there, officers found luggage, mail, and a cellular telephone connected to the defendant at the residence, the defendant's car was in the driveway, and when the officers arrived, no one else was present. Additionally, the defendant was found pushing a trash can that contained the bulk of the marijuana seized, acted suspiciously when approached by the officers, and ran when an officer attempted to lift the lid.

State v. Fuller, 196 N.C. App. 412 (Apr. 21, 2009). There was sufficient evidence of constructive possession of cocaine for purposes of charges of trafficking by possession, possession with intent, and possession of paraphernalia.

State v. Fortney, 201 N.C. App. 662 (Jan. 5, 2010). There was sufficient evidence that the defendant constructively possessed controlled substances found in a motorcycle carry bag even though the defendant did not own the motorcycle.

State v. Barron, 202 N.C. App. 686 (Mar. 2, 2010). There was insufficient evidence that the defendant constructively possessed the controlled substances at issue. The defendant did not have exclusive possession of the premises where the drugs were found; evidence showed only that the defendant was present, with others, in the room where the drugs were found.

State v. Richardson, 202 N.C. App. 570 (Feb. 16, 2010). There was insufficient evidence that the defendant constructively possessed cocaine and drug paraphernalia. When officers announced their presence at a residence to be searched pursuant to a warrant, the defendant exited through a back door and was detained on the ground; crack cocaine was found on the ground near the defendant and drug paraphernalia was found in the house. As to the cocaine, the defendant did not have exclusive control of the house, which was rented by a third party, and there was insufficient evidence of other incriminating circumstances. The defendant did not rent the premises, no documents bearing his name were found there, none of his family lived there, and there was no evidence that he slept or lived at the home. The defendant's connection to the paraphernalia was even weaker where no evidence connected the defendant to the paraphernalia or to the room where it was found.

State v. Hudson, 206 N.C. App. 482 (Aug. 17, 2010). There was sufficient evidence of constructive possession to sustain a conviction for possession with the intent to sell and deliver marijuana. The drugs were found in a vehicle being transported by a car carrier driven by the defendant. The court determined that based on the defendant's power and control of the vehicle in which the drugs were found, an inference arose that he had knowledge their presence. The vehicle had been under the defendant's exclusive control since it was loaded onto his car carrier two days earlier and the defendant had keys to every car on the carrier. Although the defendant's possession of the vehicle was not exclusive because he did not own it, other evidence created an inference of his knowledge. Specifically, he acted suspiciously when stopped (held his hands up, nervous, sweating), he turned over a suspect bill of lading, and he had fully functional keys for all cars on the carrier except the one at issue for which he gave the officers a "fob" key which prevented its user from opening the trunk housing the marijuana.

Possession with Intent

State v. Blakney, __ N.C. App. __, 756 S.E.2d 844 (April 15, 2014). The trial court did not err by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. The defendant argued that the amount of marijuana found in his car—84.8 grams—was insufficient to show the required intent. The court rejected this argument noting that the marijuana was found in multiple containers and a box of sandwich bags and digital scales were found in the vehicle. This evidence shows not only a significant quantity of marijuana, but the manner in which the marijuana was packaged raised more than an inference that defendant intended to sell or deliver the marijuana. Further, it noted, the presence of items commonly used in packaging and weighing drugs for sale—a box of sandwich bags and digital scales—along

with a large quantity of cash in small denominations provided additional evidence that defendant intended to sell or deliver marijuana.

State v. McCain, 212 N.C. App. 228 (May 17, 2011) (No. COA10-534). The trial court erred by submitting to the jury the charge of possession with intent to manufacture cocaine because it is not a lesser-included offense of the charged crime of trafficking by possession of cocaine. However, possession of cocaine is a lesser of the charged offense; because the jury convicted on possession with intent to manufacture, the court remanded for entry of judgment on possession of cocaine.

State v. Wilkins, 208 N.C. App. 729 (Dec. 21, 2010). The trial court erred by denying the defendant's motion to dismiss a charge of possession with intent to sell or deliver. Evidence that an officer found 1.89 grams of marijuana on the defendant separated into three smaller packages, worth about $30, and that the defendant was carrying $1,264.00 in cash was insufficient to establish the requisite intent.

Possession on Premises of Local Confinement facility

State v. Barnes, 367 N.C. 453 (April 11, 2014). The court per curiam affirmed the decision below, *State v. Barnes*, __ N.C. App. __, 747 S.E.2d 912 (Sept. 17, 2013). Over a dissent, the court of appeals held, in part, that the trial court did not err by denying the defendant's motion to dismiss a charge of possession of a controlled substance on the premises of a local confinement facility. The defendant first argued that the State failed to show that he intentionally brought the substance on the premises. The court held that the offense was a general intent crime. As such, there is no requirement that a defendant has to specifically intend to possess a controlled substance on the premises of a local confinement facility. It stated: "[W]e are simply unable to agree with Defendant's contention that a conviction . . . requires proof of any sort of specific intent and believe that the relevant offense has been sufficiently shown to exist in the event that the record contains evidence tending to show that the defendant knowingly possessed a controlled substance while in a penal institution or local confinement facility." The court also rejected the defendant's argument that his motion should have been granted because he did not voluntarily enter the relevant premises but was brought to the facility by officers against his wishes. The court rejected this argument concluding, "a defendant may be found guilty of possession of a controlled substance in a local confinement facility even though he was not voluntarily present in the facility in question." Following decisions from other jurisdictions, the court reasoned that while a voluntary act is required, "the necessary voluntary act occurs when the defendant knowingly possesses the controlled substance." The court also concluded that the fact that officers may have failed to warn the defendant that taking a controlled substance into the jail would constitute a separate offense, was of no consequence.

Multiple Convictions

State v. Simpson, __ N.C. App. __, 748 S.E.2d 756 (Oct. 15, 2013). No double jeopardy violation occurred when the defendant was convicted of trafficking in methamphetamine, manufacturing methamphetamine, and possession of methamphetamine based on the same illegal substance.

State v. Barnes, 367 N.C. 453 (April 11, 2014). The court per curiam affirmed the decision below, State v. Barnes, __ N.C. App. __, 747 S.E.2d 912 (Sept. 17, 2013). The court of appeals held, in part, that the trial court erred by entering judgment for both simple possession of a controlled substance and possession of a controlled substance on the premises of a local confinement facility when both charges stemmed from the same act of possession. Simple possession is a lesser-included offense of the second charge.

State v. Parlee, 209 N.C. App. 144 (Jan. 4, 2011). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

State v. Springs, 200 N.C. App. 288 (Oct. 6, 2009). A defendant may be convicted and punished for both felony possession of marijuana and felony possession of marijuana with intent to sell or deliver.

State v. Hall, 203 N.C. App. 712 (May 4, 2010). A defendant may be convicted and sentenced for both possession of ecstasy and possession of ketamine when both of the controlled substances are contained in a single pill.

Manufacturing

State v. Davis, __ N.C. App. __, 762 S.E.2d 886 (Sept. 16, 2014). There was sufficient evidence of manufacturing methamphetamine. An officer observed the defendant and another person at the scene for approximately 40 minutes. Among the items recovered were a handbag containing a syringe and methamphetamine, a duffle bag containing a clear two liter bottle containing methamphetamine, empty boxes and blister packs of pseudoephedrine, a full pseudoephedrine blister pack, an empty pack of lithium batteries, a lithium battery from which the lithium had been removed, iodized salt, sodium hydroxide, drain opener, funnels, tubing, coffee filters, syringes, various items of clothing, and a plastic bottle containing white and pink granular material. The defendant's presence at the scene, the evidence recovered, the officer's testimony that the defendant and his accomplice were going back and forth in the area, moving bottles, and testimony that the defendant gave instructions to his accomplice to keep the smoke out of her eyes was sufficient evidence of manufacturing.

State v. Miranda, __ N.C. App. __, 762 S.E.2d 349 (Aug. 19, 2014). (1) The trial court did not commit plain error by failing to instruct the jury that to convict the defendant for trafficking by compounding it had to find he did so with an intent to distribute. Because the evidence showed that the defendant also manufactured by packaging and repackaging, the court concluded that the defendant failed to establish that a different outcome would probably have been reached had the instruction at issue been delivered at trial. (2) The court rejected the defendant's argument that the evidence was insufficient to show trafficking in cocaine by manufacture. Where officers find

cocaine or a cocaine-related mixture and an array of items used to package and distribute that substance, the evidence suffices to support a manufacturing conviction. Here, State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from the defendant's bedroom.

State v. Simpson, __ N.C. App. __, 748 S.E.2d 756 (Oct. 15, 2013). (1) Reiterating that in a manufacturing case based on preparing or compounding the State must prove intent to distribute, the court found that no plain error had occurred where such a jury instruction was lacking. (2) No double jeopardy violation occurred when the defendant was convicted of trafficking in methamphetamine, manufacturing methamphetamine, and possession of methamphetamine based on the same illegal substance.

State v. Hinson, 203 N.C. App. 172 (Apr. 6, 2010), *rev'd on other grounds*, 364 N.C. 414 (Oct. 8, 2010). The offense of manufacturing a controlled substance does not require an intent to distribute unless the activity constituting manufacture is preparing or compounding. An indictment charging the defendant with manufacturing methamphetamine "by chemically combining and synthesizing precursor chemicals" does not charge compounding but rather charges chemically synthesizing and thus the State was not required to prove an intent to distribute.

Sale or Delivery

Delivery of Less Than 5 Grams of Marijuana

State v. Land, __ N.C. App. __, 733 S.E.2d 588 (Nov. 6, 2012), *aff'd per curiam*, 366 N.C. 550 (Jun. 13, 2013). (1) In a delivery of marijuana case, the evidence was sufficient to survive a motion to dismiss where it established that the defendant transferred less than five grams of marijuana for remuneration. The State need not show that the defendant personally received the compensation. (2) Where the evidence showed that the defendant transferred less than five grams of marijuana, the trial court erred by not instructing the jury that in order to prove delivery, the State was required to prove that the defendant transferred the marijuana for remuneration. The error, however, did not rise to the level of plain error.

Multiple Conviction Issues

State v. Fleig, __ N.C. App. __, 754 S.E.2d 461 (Mar. 4, 2014). The trial court erred by sentencing the defendant for both selling marijuana and delivering marijuana when the acts occurred as part of a single transaction.

State v. Parlee, 209 N.C. App. 144 (Jan. 4, 2011). For purposes of double jeopardy, a second-degree murder conviction based on unlawful distribution of and ingestion of a controlled substance was not the same offense as sale or delivery of a controlled substance to a juvenile or possession with intent to sell or deliver a controlled substance.

Counterfeit Controlled Substance Offenses

State v. Chisholm, __ N.C. App. __, 737 S.E.2d 818 (Feb. 19, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss a charge of possession with the intent to sell or deliver a counterfeit controlled substance. The court rejected the argument that to be considered a counterfeit controlled substance, the State must prove all three factors listed in G.S. 90-87(6)(b); the statute simply sets out factors that can constitute evidence that the controlled substance was intentionally misrepresented as a controlled substance. (2) The court found sufficient evidence of intent to sell or deliver the counterfeit controlled substance given the substance's packaging and weight and the presence of other materials used for drug packaging.

State v. Bivens, 204 N.C. App. 350 (June 1, 2010). For purposes of the counterfeit controlled substance offenses, a counterfeit controlled substance is defined, in part, by G.S. 90-87(6) to include any substance intentionally represented as a controlled substance. The statute further provides that "[i]t is evidence that the substance has been intentionally misrepresented as a controlled substance" if certain factors are established. The court rejected the defendant's argument that for a controlled substance to be considered intentionally misrepresented, all of the factors listed in the statute must be proved, concluding that the factors are evidence that the substance has been intentionally misrepresented as a controlled substance, not elements of the crime. The court also concluded that the evidence was sufficient to establish that the defendant misrepresented the substance at issue—calcium carbonate—as crack cocaine where the defendant approached a vehicle, asked its occupants what they were looking for, departed to fill their request for "a twenty," and handed the occupants a little baggie containing a white rock-like substance. Finally, the court held that the statute does not require the State to prove that the defendant had specific knowledge that the substance was counterfeit.

State v. Mobley, 206 N.C. App. 285 (Aug. 3, 2010). There was sufficient evidence to support the defendant's conviction of conspiracy to sell a counterfeit controlled substance. The court concluded that G.S. 90-87(6) (definition of counterfeit controlled substance) requires only that the substance be intentionally represented as a controlled substance, not that a defendant have specific knowledge that it is counterfeit. There was sufficient evidence that the defendant intentionally represented the substance as a controlled substance in this case: when an undercover officer asked for a "40" ($40 worth of crack cocaine), an accomplice produced a hard, white substance packaged in two small corner baggies, which the officers believed to be crack cocaine. There also was substantial evidence that the defendant conspired with the accomplice: the defendant initiated contact with the officers, directed them where to park, spoke briefly with the accomplice who emerged from a building with the substance, and the defendant brokered the deal.

Trafficking

Quantity Issues

State v. Ellison, 366 N.C. 439 (Mar. 8, 2013). Affirming the opinion below, the court held that G.S. 90-95(h)(4) (trafficking in opium) applies in cases involving prescription pharmaceutical tablets and pills. The court reasoned that the statute explicitly provides that criminal liability is based on the total weight of the mixture involved and that tablets and pills are mixtures covered by that provision.

State v. Davis, __ N.C. App. __, 762 S.E.2d 886 (Sept. 16, 2014). The evidence was sufficient to prove a trafficking amount of methamphetamine. The court rejected the defendant's argument that the entire weight of a mixture containing methamphetamine at an intermediate stage in the manufacturing process cannot be used to support trafficking charges because the mixture is not ingestible, is unstable, and is not ready for distribution. The defendant admitted that the methamphetamine had already been formed in the liquid and it was only a matter of extracting it from the mixture. Also, the statute covers mixtures.

State v. Miranda, __ N.C. App. __, 762 S.E.2d 349 (Aug. 19, 2014). In a case in which the defendant was charged with trafficking in cocaine by manufacturing, the trial court did not commit plain error by failing to instruct the jury on manufacturing cocaine. The evidence showed that the defendant possessed cocaine and a mixture of cocaine and rice that exceeded the statutory trafficking amount. The defendant admitted to having mixed rice with the cocaine to remove moisture. The court rejected the defendant's argument that the combination of cocaine base and rice does not constitute a "mixture" as used in the trafficking statutes and concluded that the statutory reference to a "mixture" encompasses the mixture of a controlled substance with any other substance regardless of the reason for which that mixture was prepared.

State v. Hazel, __ N.C. App. __, 739 S.E.2d 196 (April 2, 2013). The trial court did not err by allowing heroin recovered from the defendant's person outside the apartment to be combined with the heroin recovered from the apartment for the purposes of arriving at a trafficking amount for trafficking by possession. The defendant was observed entering the apartment immediately before his sale of 3.97 grams of heroin to an undercover officer. Upon arrest, the defendant said that he had more heroin in the apartment, and provided the key and consent for the officers to enter the apartment where 0.97 grams of additional heroin were recovered. This additional heroin was packaged for sale in the same manner as the heroin sold to the officer. The defendant admitted to being a drug dealer. There was no evidence any of the heroin was for the defendant's personal use. Under these circumstances, the defendant possessed the heroin in the apartment simultaneously with the heroin sold to the officer.

State v. Conway, 194 N.C. App. 73 (Dec. 2, 2008). The evidence was insufficient to support the defendant's methamphetamine trafficking convictions because G.S. 90-95(h)(3b) requires the state to prove the actual weight of the methamphetamine in a mixture. The defendant was convicted of trafficking by possession and manufacture of 400 grams or more methamphetamine. The state's evidence consisted of 530 grams of a liquid that contained a detectable amount of methamphetamine. The exact amount of methamphetamine was not determined. The court noted that the trafficking statutes for methaqualone, cocaine, heroin, LSD, and MDA/MDMA specifically contain the clause "or mixture containing such substance," whereas G.S. 90-95(h)(3b) for methamphetamine and as amphetamine does not contain that clause. Note: The court did not discuss whether the use of the term "mixture" at the end of the introductory paragraph in G.S. 90-95(h)(3b) is relevant in determining the legislature's intent and outweighs what may have been the inadvertent omission of the clause "or mixture containing such substance" earlier in the paragraph.

Conspiracy to Engage in Trafficking

See also Conspiracy under General Crimes, above.

State v. Davis, __ N.C. App. __, 762 S.E.2d 886 (Sept. 16, 2014). The evidence was sufficient to show a drug trafficking conspiracy where there was evidence of an implied agreement between the defendant and his accomplice. The defendant was present at the scene and aware that his accomplice was involved producing methamphetamine and there was sufficient evidence that the defendant himself was involved in the manufacturing process. The court concluded: "Where two subjects are involved together in the manufacture of methamphetamine and the methamphetamine recovered is enough to sustain trafficking charges, we hold the evidence sufficient to infer an implied agreement between the subjects to traffic in methamphetamine by manufacture and withstand a motion to dismiss."

Trafficking by Delivery

State v. Beam, 201 N.C. App. 643 (Jan. 5, 2010). The term "deliver," used in the trafficking statutes, is defined by G.S. 90-87(7) to "mean[] the actual constructive, or attempted transfer from one person to another of a controlled substance, whether or not there is an agency relationship." Thus, an actual delivery is not required. In a prosecution under G.S. 90-95, the defendant bears the burden of establishing that an exemption applies, such as possession pursuant to a valid prescription. In this case, the trial court properly denied the defendant's motion to dismiss and properly submitted to the jury the issue of whether the defendant was authorized to possess the controlled substances.

Trafficking by Manufacture

State v. Miranda, __ N.C. App. __, 762 S.E.2d 349 (Aug. 19, 2014). (1) The trial court did not commit plain error by failing to instruct the jury that to convict the defendant for trafficking by compounding it had to find he did so with an intent to distribute. Because the evidence showed that the defendant also manufactured by packaging and repackaging, the court concluded that the defendant failed to establish that a different outcome would probably have been reached had the instruction at issue been delivered at trial. (2) The court rejected the defendant's argument that the evidence was insufficient to show trafficking in cocaine by manufacture. Where officers find cocaine or a cocaine-related mixture and an array of items used to package and distribute that substance, the evidence suffices to support a manufacturing conviction. Here, State's evidence showed that more than 28 grams of cocaine and several items that are commonly used to weigh, separate, and package cocaine for sale were seized from the defendant's bedroom.

Greater and Lesser Included Offenses

State v. McCain, 212 N.C. App. 228 (May 17, 2011) (No. COA10-534). The trial court erred by submitting to the jury the charge of possession with intent to manufacture cocaine because it is not a lesser-included offense of the charged crime of trafficking by possession of cocaine. However, possession of cocaine is a lesser of the charged offense; because the jury convicted on possession with intent to manufacture, the court remanded for entry of judgment on possession of cocaine.

Multiple Convictions & Punishments

State v. Simpson, __ N.C. App. __, 748 S.E.2d 756 (Oct. 15, 2013). No double jeopardy violation occurred when the defendant was convicted of trafficking in methamphetamine, manufacturing methamphetamine, and possession of methamphetamine based on the same illegal substance.

Paraphernalia

State v. Satterthwaite, __ N.C. App. __, 759 S.E.2d 369 (June 17, 2014). Where a drug paraphernalia indictment charged the defendant with possession of plastic baggies used to package and repackage pills but the State introduced no evidence of plastic baggies at trial, the trial court erred by denying the defendant's motion to dismiss. At trial, the State's evidence showed that the defendant used a bottle to deliver the pills. The court stated: "We hold that the specific items alleged to be drug paraphernalia must be enumerated in the indictment, and that evidence of such items must be presented at trial."

Motor Vehicle Offenses

Jurisdiction to Prosecute

State v. Kostick, __ N.C. App. __, 755 S.E.2d 411 (Mar. 18, 2014). In this DWI case in which a State Highway Patrol officer arrested the defendant, a non-Indian, on Indian land, the court rejected the defendant's argument that the State lacked jurisdiction over the crime. The court noted that pursuant to the Tribal Code of the Eastern Band of the Cherokee Indians and mutual compact agreements between the Tribe and other law enforcement agencies, the North Carolina Highway Patrol has authority to patrol and enforce the motor vehicle laws of North Carolina within the Qualla boundary of the Tribe, including authority to arrest non-Indians who commit criminal offenses on the Cherokee reservation. Thus, the court concluded, "Our State courts have jurisdiction over the criminal offense of driving while impaired committed by a non-Indian, even where the offense and subsequent arrest occur within the Qualla boundary of the Cherokee reservation."

Impaired Driving

State v. Ricks, __ N.C. App. __, 764 S.E.2d 692 (Nov. 18, 2014). (1) In this impaired driving case, there was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32). The State argued that the cut through was a public vehicular area because it was an area "used by the public for vehicular traffic at any time" under G.S. 20-4.01(32)(a). The court concluded that the definition of a public vehicular area in that subsection "contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public." In this case there was no evidence concerning the lot's ownership or that it had been designated as a public vehicular area by the owner. (2) Even if there had been sufficient evidence to submit the issue to the jury, the trial court erred in its jury instructions. The trial court instructed the jury that a public vehicular area is "any area within the State of North Carolina

used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." The court noted that

> the entire definition of public vehicular area in [G.S.] 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. . . . [As such] the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with [G.S.] 20-4.01(32)(a)."

State v. Hawk, __ N.C. App. __, 762 S.E.2d. 883 (Sept. 2, 2014). In this felony death by vehicle case, even without evidence of the defendant's blood-alcohol, the evidence was sufficient to establish that the defendant was impaired. When an officer interviewed the defendant at the hospital, she admitted drinking "at least a 12-pack." The defendant admitted at trial that she drank at least seven or eight beers, though she denied being impaired. The first responding officer testified that when he arrived on the scene, he noticed the strong odor of alcohol and when he spoke with defendant, she kept asking for a cigarette, slurring her words. He opined that she seemed intoxicated. Finally, the doctor who treated the defendant at the hospital diagnosed her with alcohol intoxication, largely based on her behavior.

State v. Reeves, 218 N.C. App. 570 (Feb. 7, 2012). In an impaired driving case, there was sufficient evidence apart from the defendant's extrajudicial confession that he was driving the vehicle. Specifically, when an officer arrived at the scene, the defendant was the only person in the vehicle and he was sitting in the driver's seat.

State v. Clowers, 217 N.C. App. 520 (Dec. 20, 2011). (1) There was sufficient evidence that the defendant was operating the vehicle in question. At trial a witness testified about her observations of the car, which continued from her first sighting of it until the car stopped in the median and the police arrived. She did not observe the driver or anyone else exit the car and the car did not move. The witness talked to an officer who arrived at the scene and then left. An officer testified that when she arrived at the scene eight minutes after the call went out, another officer was already talking to the driver who was still seated in the car. (2) The evidence was sufficient to show that the Intoxilyzer test was administered on the defendant at the time in question. Jacob Sanok, a senior identification technician with the local bureau of identification testified that he read the defendant his rights for a person requested to submit to a chemical analysis to determine alcohol concentration; the defendant indicated that he understood those rights; Sanok administered the Intoxilyzer tests to the defendant; and Sanok gave the defendant a copy of the Intoxilyzer test. The State introduced the rights form signed by the defendant; Sanok's "Affidavit and Revocation Report of Chemical Analyst[,]" showing that Sanok performed the Intoxilyzer test on the defendant; and the printout from the Intoxilyzer test showing that the defendant, who was listed by name, had a reported alcohol concentration of ".25g/210L[.]" Even though Sanok did not directly identify the defendant as the person to whom he administered the Intoxilyzer test, an officer identified the defendant in the courtroom as the person who was arrested and transported to the jail to submit to the Intoxilyzer test.

State v. Arrington, 215 N.C. App. 161 (Aug. 16, 2011). The evidence was sufficient to sustain the defendant's conviction for impaired driving when there was evidence of two .08 readings.

The court rejected the defendant's argument that since the blood alcohol reading was the lowest for which he could be convicted under the statute, the margin of error of the Intoxilyzer should be taken into account to undermine the State's case against him.

State v. Norton, 213 N.C. App. 75 (June 21, 2011). The evidence was sufficient to survive a motion to dismiss. Evidence of faulty driving, along with evidence of consumption of alcohol and cocaine, is sufficient to show a violation of G.S. 20-138.1. Witnesses observed the defendant's behavior as he was driving, not sometime after. Multiple witnesses testified as to his faulty driving and other conduct, including that he "had a very wild look on his face" and appeared to be in a state of rage; drove recklessly without regard for human life; drove in circles on a busy street and on a golf course; twice collided with other motorists; drove on the highway at speeds varying between 45 and 100 mph; drove with the car door open and with his left leg and both hands hanging out; struck a patrol vehicle; and exhibited "superhuman" strength when officers attempted to apprehend him. Blood tests established the defendant's alcohol and cocaine use, and one witness testified that she smelled alcohol on the defendant.

State v. Davis, 208 N.C. App. 26 (Nov. 16, 2010). In a case in which there was no admissible evidence as to the defendant's blood alcohol level, the court found that the evidence was insufficient to show that the defendant drove while impaired, even though it showed that she had been drinking before driving. The accident at issue occurred when the defendant collided with someone or something extending over the double yellow line and into her lane of traffic. Under these circumstances, the fact of the collision itself did not establish faulty or irregular driving indicating impairment.

State v. Armstrong, 203 N.C. App. 399 (Apr. 20, 2010). A defendant may be convicted for both second-degree murder (for which the evidence of malice was the fact that the defendant drove while impaired and had prior convictions for impaired driving) and impaired driving.

State v. Davis, 198 N.C. App. 443 (Aug. 4, 2009). A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

Felony Death & Serious Injury by Vehicle

State v. Davis, 364 N.C. 297 (Aug. 27, 2010). The trial court erred by imposing punishment for felony death by vehicle and felony serious injury by vehicle when the defendant also was sentenced for second-degree murder and assault with a deadly weapon inflicting serious injury based on the same conduct. G.S. 20-141.4(a) prescribes the crimes of felony and misdemeanor death by vehicle, felony serious injury by vehicle, aggravated felony serious injury by vehicle, aggravated felony death by vehicle, and repeat felony death by vehicle. G.S. 20-141.4(b), which sets out the punishments for these offenses, begins with the language: "Unless the conduct is covered under some other provision of law providing greater punishment, the following classifications apply to the offenses set forth in this section[.]" Second-degree murder and assault with a deadly weapon inflicting serious injury provide greater punishment than felony death by vehicle and felony serious injury by vehicle. The statute thus prohibited the trial court from

imposing punishment for felony death by vehicle and felony serious injury by vehicle in this case.

State v. Davis, 198 N.C. App. 443 (Aug. 4, 2009). A defendant may not be sentenced for both felony death by vehicle and impaired driving arising out of the same incident. However, a defendant may be sentenced for both involuntary manslaughter and impaired driving.

State v. Elmore, __ N.C. App. __, 736 S.E.2d 568 (Dec. 18, 2012). G.S. 20-141.4(c) does not bar simultaneous prosecutions for involuntary manslaughter and death by vehicle; it only bars punishment for both offenses when they arise out of the same death.

State v. Leonard, 213 N.C. App. 526 (July 19, 2011). There was sufficient evidence of felonious serious injury by motor vehicle. The defendant had argued that his willful action in attempting to elude arrest was the proximate cause of the victim's injuries, not his impaired driving. The court rejected this argument concluding that even if his willful attempt to elude arrest was a cause of the injuries, his driving under the influence could also be a proximate cause.

Reckless Driving

State v. Geisslercrain, __ N.C. App. __, 756 S.E.2d 92 (April 1, 2014). There was sufficient evidence of reckless driving where the defendant was intoxicated; all four tires of her vehicle went off the road; distinctive "yaw" marks on the road indicated that she lost control of the vehicle; the defendant's vehicle overturned twice; and the vehicle traveled 131 feet from the point it went off the road before it flipped, and another 108 feet after it flipped.

In re A.N.C., __ N.C. App. __, 750 S.E.2d 835 (Feb. 5, 2013). The evidence was insufficient to adjudicate the thirteen-year-old juvenile delinquent for reckless driving under G.S. 20-140(b). The evidence showed that the juvenile was driving a vehicle registered to his mother at the time of the wreck and that the vehicle that he was driving collided with a utility pole. However there was no evidence showing that the collision resulted from careless or reckless driving. The court concluded that the "mere fact that an unlicensed driver ran off the road and collided with a utility pole does not suffice to establish a violation of [G.S.] 20-140(b)."

Speeding to Elude
Intent

State v. Cameron, __ N.C. App. __, 732 S.E.2d 386 (Oct. 2, 2012). In a speeding to elude case, the court rejected the defendant's argument that she did not intend to elude an officer because she preferred to be arrested by a female officer rather than the male officer who stopped her. The defendant's preference in this regard was irrelevant to whether she intended to elude the officer.

Identification of Driver

State v. Lindsey, 366 N.C. 325 (Dec. 14, 2012). For the reasons stated in the dissenting opinion below, the court reversed *State v. Lindsey*, 219 N.C. App. 249 (Mar. 6, 2012). In the opinion below the court had held, over a dissent, that the trial court erred by denying the defendant's

motion to dismiss where an officer, who lost sight of the vehicle was unable to identify the driver.

Proximate Cause of Death

State v. Pierce, 216 N.C. App. 377 (Oct. 18, 2011). In a case in which a second officer died in a vehicular accident when responding to a first officer's communication about the defendant's flight from a lawful stop, the evidence was sufficient to establish that the defendant's flight was the proximate cause of death to support a charge of fleeing to elude arrest and causing death. The evidence was sufficient to allow a reasonable jury to conclude that the second officer's death would not have occurred had the defendant remained stopped after the first officer pulled him over and that the second officer's death was reasonably foreseeable. The court rejected the defendant's argument that the second officer's contributory negligence broke the causal chain.

Felony Aggravating Factors

State v. Jackson, 212 N.C. App. 167 (May 17, 2011). In a felony speeding to elude case there was sufficient evidence that the defendant drove recklessly. An officer testified that the defendant drove 82 mph in a 55 mph zone and that he was weaving around traffic; also a jury could infer from his testimony that the defendant crossed the solid double yellow line.

State v. Dewalt, 209 N.C. App. 187 (Jan. 4, 2011). The trial court did not err by instructing the jury that in order to constitute an aggravating factor elevating speeding to elude arrest to a felony, driving while license revoked could occur in a public vehicular area. Although the offense of driving while license revoked under G.S. 20-28 requires that the defendant drive on a highway, driving while license revoked can aggravate speeding to elude even if it occurs on a public vehicular area. While the felony speeding to elude arrest statute lists several other aggravating factors with express reference to the motor vehicle statutes proscribing those crimes (e.g., passing a stopped school bus as proscribed by G.S. 20-217), the aggravating factor of driving while license revoked does not reference G.S. 20-28.

Jury Instructions

State v. Cameron, __ N.C. App. __, 732 S.E.2d 386 (Oct. 2, 2012). Even if the trial court erred in its jury instruction with regard to the required state of mind, no plain error occurred in light of the overwhelming evidence of guilt.

State v. Banks, 213 N.C. App. 599 (July 19, 2011). (1) In a felony speeding to elude case, the trial court did not err by giving a disjunctive jury instruction that allowed the jury to convict the defendant if it found at least two of three aggravating factors submitted. The defendant had argued that the trial court should have required the jury to be unanimous as to which aggravating factors it found. (2) The trial judge did not commit plain error by failing to define the aggravating factor of reckless driving in felony speeding to elude jury instructions. The defendant had argued that the trial court was obligated to include the statutory definition of reckless driving in G.S. 20-140.

Multiple Convictions and Punishments

State v. Mulder, __ N.C. App. __, 755 S.E.2d 98 (Mar. 18, 2014). Double jeopardy barred convicting the defendant of speeding and reckless driving when he also was convicted of felony speeding to elude arrest, which was raised from a misdemeanor to a felony based on the aggravating factors of speeding and driving recklessly. The court determined that the aggravating factors used in the felony speeding to elude conviction were essential elements of the offense for purposes of double jeopardy. Considering the issue of whether legislative intent compelled a different result, the court determined that the General Assembly did not intend punishment for speeding and reckless driving when a defendant is convicted of felony speeding to elude arrest based on the aggravating factors of speeding and reckless driving. Thus, the court arrested judgment on the speeding and reckless driving convictions.

Animal Cruelty

State v. Mauer, 202 N.C. App. 546 (Feb. 16, 2010). The evidence was sufficient to establish misdemeanor cruelty to animals under G.S. 14-360(a) on grounds of torment. The odor of cat feces and ammonia could be smelled outside of the property and prevented officers from entering without ventilating and using a breathing apparatus; while the house was ventilated, residents from two blocks away were drawn outside because of the smell; fecal matter and debris blocked the front door; all doors and windows were closed; old and new feces and urine covered everything, including the cats; the cats left marks on the walls, doors and windows, trying to get out of the house.

Hunting Crimes

State v. Oxendine, ___ N.C. App. ___, ___ S.E.2d ___ (July 7, 2015). (1) In this hunting without a license case, the trial court did not err by denying defendant Oxendine's request to instruct the jury on legal justification. The defendant argued that he was exempt under G.S. 113-276 from the requirement of a hunting license because he had been engaged in a Native American religious hunting ceremony. That statute applies to "member[s] of an Indian tribe recognized under Chapter 71A of the General Statutes." Although the defendant argued that he is "an enrolled member of the Haudenosaunee Confederacy of the Tuscarora Nation," he is not a member of a Native American tribe recognized under Chapter 71A. Additionally the defendant did not show that he was hunting on tribal land, as required by the statute. (2) The evidence was sufficient to convict defendant Pedro of hunting without a license. Based on the facts presented, the court rejected the defendant's argument that the State's evidence was insufficient to show that he "was preparing to immediately kill a dove."

Regulatory Offenses

Hill v. StubHub, 219 N.C. App. 227 (Mar. 6, 2012). Fees that the defendant StubHub charged for its services did not violate G.S. 14-344 (sale of admission tickets in excess of printed price) [Author's note: As the court noted, after the present case was initiated, the General Assembly

amended G.S. 14-344 and enacted G.S. 14-344.1 to exempt internet ticket sales accompanied by a ticket assurance guarantee from the strictures otherwise established by that statutory provision.]

Defenses

Accident

State v. Clapp, __ N.C. App. __, 761 S.E.2d 710 (Aug. 5, 2014). In a child sexual assault case, the trial court did not err by failing to instruct the jury on the defense of accident as requested by the defendant. The defendant, who assisted high school sports teams, was charged with sexual offense and indecent liberties with students in connection with stretching and massages he provided to injured student athletes. The trial court properly denied the defendant's request for the instruction "given the complete absence of any evidence tending to show that he digitally penetrated [the victim's] vagina with his fingers in an accidental manner." The court noted that at trial the defendant denied doing the acts in question.

State v. Yarborough, 198 N.C. App. 22 (July 7, 2009). The trial court did not err by failing to instruct on accident. The defense is unavailable when the defendant was engaged in misconduct at the time of the killing. Here, the defendant was engaged in misconduct—he broke into a home with the intent to commit robbery and the killing occurred during a struggle over the defendant's gun. The court also rejected the defendant's argument that because he abandoned his plan to commit the robbery, his right to the defense of accident was "restored." Even assuming that the defendant abandoned his plan, that fact would not break the sequence of events giving rise to the shooting.

Automatism

State v. Rogers, 219 N.C. App. 296 (Mar. 6, 2012). The trial court did not commit plain error by instructing the jury that the defendant had the burden of persuasion to prove the defense of automatism. Automatism is an affirmative defense, and the burden is on the defendant to prove its existence to the jury.

State v. Clowers, 217 N.C. App. 520 (Dec. 20, 2011). In an impaired driving case, the trial court did not err by declining to instruct on automatism or unconsciousness. The defendant asserted that even though unconsciousness through voluntary consumption of alcohol or drugs does not support an instruction as to automatism or unconsciousness, his unconsciousness could have been the result of the effects of voluntary consumption of alcohol combined with the effects of Alprazolam, a drug that he had been prescribed to control his panic attacks. The court concluded that there was no evidence that the defendant's consumption of alcohol or his medication was involuntary.

Diminished Capacity

State v. Maldonado, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). The trial court did not err by denying the defendant's request for a diminished capacity instruction with respect to a charge of discharging a firearm into occupied property that served as a felony for purposes of a felony-murder conviction. Because discharging a firearm into occupied property is a general intent crime, diminished capacity offers no defense.

State v. Shareef, 221 N.C. App. 285 (June 19, 2012). Although the defendant met his burden of production with respect to diminished capacity in this murder and assault case in which the defendant stuck various persons with a vehicle, the State introduced sufficient evidence of specific intent to kill. The State did not present expert witnesses. Rather, the State's evidence focused on the defendant's acts before, during, and after the crime as showing that he had the specific intent to kill necessary for first-degree murder based on premeditation and deliberation and the other felony assaults. The State's evidence showed for example that the defendant specifically targeted the victims and that he did not just hit them and drive on but rather continued to injure them further after the first impact.

State v. McDowell, 215 N.C. App. 184 (Sept. 6, 2011). In a murder case, the trial court did not err by denying the defendant's request for a jury instruction on diminished capacity. The defendant had argued that he was entitled to the instruction based on evidence that he suffered from post-traumatic stress syndrome, alcohol dependence, and cognitive impairment resulting from a head injury, causing him to possibly overreact to stress or conclude that deadly force was necessary to deal with a threatening situation. The court found no evidence casting doubt on the defendant's ability to premeditate, deliberate, or form the specific intent to kill necessary for guilt of first-degree murder on the basis of malice, premeditation, and deliberation.

Duress

State v. Stokes, 216 N.C. App. 529 (Nov. 1, 2011). The court rejected the defendant's argument that he could not be convicted of aiding and abetting a sexual offense and child abuse by sexual act on grounds that the person who committed the acts—his son—was under duress from the defendant. Even if the son was under duress, his acts were still criminal**.**

State v. Sanders, 201 N.C. App. 631 (Jan. 5, 2010). The trial court did not err in denying the defendant's request for a jury instruction on duress. The defendant voluntarily joined with his accomplices to commit an armed robbery, he did not object or attempt to exit the vehicle as an accomplice forced the victims into the car, and the defendant took jewelry from one victim while an accomplice pointed a gun at her. There was no evidence that any coercive measures were directed toward the defendant prior to the crimes being committed. Any threats made to the defendant occurred after the crimes were committed.

Entrapment and Entrapment by Estoppel

State v. Ott, __ N.C. App. __, 763 S.E.2d 530 (Oct. 7, 2014). In this drug case, the trial court erred by denying the defendant's request for an instruction on entrapment. The court agreed with the defendant that the plan to sell the pills originated in the mind of the defendant's friend Eudy, who was acting as an agent for law enforcement, and the defendant was only convinced to do so through trickery and persuasion. It explained: [A]ccording to defendant's evidence, Eudy was acting as an agent for the Sherriff's office when she approached defendant, initiated a conversation about selling pills to her buyer, provided defendant the pills, and coached her on what to say during the sale. While it is undisputed that defendant was a drug user, defendant claimed that she had never sold pills to anyone before. In

fact, the only reason she agreed to sell them was because she was "desperate for some pills," and she believed Eudy's story that she did not want her husband to find out what she was doing. Defendant's testimony established that Eudy told defendant exactly what to say such that, during the encounter, defendant was simply playing a role which was defined and created by an agent of law enforcement. In sum, this evidence, if believed, shows that Eudy not only came up with the entire plan to sell the drugs but also persuaded defendant, who denied being a drug dealer, to sell the pills to [the undercover officer] by promising her pills in exchange and by pleading with her for her help to keep the sale secret from her husband. Furthermore, viewing defendant's evidence as true, she had no predisposition to commit the crime of selling pills.

State v. Foster, __ N.C. App. __, 761 S.E.2d 208 (Aug. 5, 2014). (1) In a delivery of cocaine case where the defendant presented sufficient evidence of the essential elements of entrapment, the trial court erred by refusing to instruct the jury on that defense. The defendant's evidence showed that an undercover officer tricked the defendant into believing that the officer was romantically interested in the defendant in order to persuade the defendant to obtain cocaine for him, that the defendant had no predisposition to commit a drug offense such as delivering cocaine, and that the criminal design originated solely with the officer. The court rejected the State's argument that the evidence showed that the officer merely afforded the defendant the opportunity to commit the offense.

State v. Thomas, __ N.C. App. __, 742 S.E.2d 307 (May 7, 2013). In a drug trafficking case where the record failed to indicate that law enforcement officers utilized acts of persuasion, trickery or fraud to induce the defendant to commit a crime, or that the criminal design originated in the minds of law enforcement rather than with the defendant, the trial court did not err in failing to instruct the jury on the defense of entrapment.

State v. Reid, __ N.C. App. __, 735 S.E.2d 389 (Dec. 4, 2012). The trial court did not err by denying the defendant's request for an entrapment instruction where no credible evidence suggested that he would not have committed the crime except for law enforcement's persuasion, trickery or fraud or that the crime was the creative production of law enforcement authorities.

State v. Adams, 218 N.C. App. 589 (Feb. 7, 2012). In a drug trafficking case, the trial court did not err by denying the defendant's request for a jury instruction on entrapment. After an individual named Shaw repeatedly called the defendant asking for cocaine, the defendant told Shaw he would "call a guy." The defendant called a third person named Armstrong to try to obtain the cocaine. When Armstrong did not answer his phone, the defendant drove to his house. The next day, the defendant picked up Armstrong and drove him to a location previously arranged to meet Shaw. The court found that these actions illustrate the defendant's "ready compliance, acquiescence in, [and] willingness to cooperate in the criminal plan" and thus his predisposition. Additionally, the court noted, the defendant admitted that he had been involved as a middle man on a prior deal; this admission further demonstrates predisposition.

State v. Barr, 218 N.C. App. 329 (Feb. 7, 2012). The trial court did not err by denying the defendant's request for an instruction on the defense of entrapment by estoppel. The defendant was charged with violating G.S. 14-454.1(a)(2) (unlawful to "willfully . . . access or cause to be accessed any government computer for the purpose of . . . [o]btaining property or services by

means of false or fraudulent pretenses, representations, or promises"). The State alleged that the defendant, who worked for a private license plate agency, submitted false information into the State Title and Registration System (STARS) so that a car dealer whose dealer number was invalid could transfer title. The defendant asserted that she was told by a colleague named Granados, who was a licensed title clerk, how to enter the transaction. The court concluded that Granados was not a governmental official; Granados was an employee of the license plate agency, not the State of North Carolina, and the agency was a private contractor. It stated that a government license does not transform private licensees into governmental officials.

State v. Pope, 213 N.C. App. 413 (July 19, 2011). The trial court erred by dismissing larceny by employee charges based on the theory of entrapment by estoppel. The defendant, a public works supervisor, was accused of selling "white goods" and retaining the proceeds. The court concluded that while officials testified that they were aware that some "white goods" were sold and that the money was deposited to a common pool, no evidence was offered to show that government officials expressly condoned the defendant pocketing money from that fund. Thus, the explicit permission requirement for entrapment by estoppel was not met.

State v. Morse, 194 N.C. App. 685 (Jan. 6, 2009). The trial judge did not err by refusing to instruct on entrapment. The defendant was convicted of soliciting a child by computer with intent to commit an unlawful sex act. The "child" was a law enforcement officer pretending to be a 14 year old in an adults-only Yahoo chat room. The court concluded that there was no credible evidence that the criminal design originated in the minds of the government officials, rather than defendant, such that the crime was the product of the creative activity of the government. Instead, it stated, the evidence indicates that undercover deputies merely provided the opportunity for the defendant and, when presented with that opportunity, the defendant pursued it with little hesitance.

State v. Beam, 201 N.C. App. 643 (Jan. 5, 2010). In a drug case, the evidence failed to establish that the defendant was entitled to the entrapment defense as a matter of law. Thus, the trial court did not err by denying the defendant's motion to dismiss on grounds of entrapment and submitting the issue to the jury.

Insanity

State v. Castillo, 213 N.C. App. 536 (July 19, 2011). No plain error occurred when the trial judge instructed the jury on insanity using N.C.P.I.—Crim. 304.10. The defendant had argued that the trial court erred by failing to instruct the jury that the insanity defense applies if a defendant believed, due to mental illness, that his conduct was morally right.

Jurisdiction

State v. Lalinde, __ N.C. App. __, 750 S.E.2d 868 (Dec. 3, 2013), *review allowed*, 367 N.C. 503 (June 11, 2014). Where the evidence showed that part of a child abduction occurred in North Carolina jurisdiction was established and no jury instruction on jurisdiction was required. The defendant took the child from North Carolina to Florida. The court noted that jurisdiction over interstate criminal cases is governed by G.S. 15A-134 ("[i]f a charged offense occurred in part in

North Carolina and in part outside North Carolina, a person charged with that offense may be tried in this State"). It was undisputed that the defendant picked up the child in North Carolina. Therefore, the child abduction occurred, at least in part, in North Carolina.

Public Authority

State v. McGee, __ N.C. App. __, 758 S.E.2d 661 (June 3, 2014). (1) In an involuntary manslaughter case where a death occurred during a high speed chase by a bail bondsman in his efforts to arrest a principal, the trial court did not err by instructing the jury that bail bondsmen cannot violate motor vehicle laws in order to make an arrest. While the statute contains specific exemptions to the motor vehicle laws pertaining to speed for police, fire, and emergency service vehicles, no provision exempts a bail bondsman from complying with speed limits when pursuing a principal. (2) The trial court did not err by failing to submit to the jury the question whether the defendant's means in apprehending his principal were reasonable. Under the law the defendant bail bondsman was not authorized to operate his motor vehicle at a speed greater than was reasonable and prudent under the existing conditions because of his status as a bail bondsman. It concluded:

> Just as the bail bondsmen cannot enter the homes of third parties without their consent, a bail bondsmen pursuing a principal upon the highways of this State cannot engage in conduct that endangers the lives or property of third parties. Third parties have a right to expect that others using the public roads, including bail bondsmen, will follow the laws set forth in Chapter 20 of our General Statutes.

Self-Defense

State v. Monroe, 367 N.C. 771 (Jan. 23, 2015) (per curiam). The court affirmed the decision below in *State v. Monroe*, __ N.C. App. __, 756 S.E.2d 376 (April 15, 2014) (holding, over a dissent, that even assuming arguendo that the rationale in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), applies in North Carolina, the trial court did not err by denying the defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon; the majority concluded that the evidence did not support a conclusion that the defendant possessed the firearm under unlawful and present, imminent, and impending threat of death or serious bodily injury).

State v. Moore, 363 N.C. 793 (Jan. 29, 2010). The trial court erred by refusing to instruct the jury on self-defense and defense of a family member. Viewed in the light most favorable to the defendant, the evidence showed that the defendant was at his produce stand; the victim was a 16-year-old male, approximately 6 feet tall and 180 pounds; the victim had a physical altercation with the defendant's wife as he attempted to rob the cash box; the victim struck at the defendant's wife and violently pulled at the cash box; the defendant's wife, was "scared to death" and cried out for her husband; when the defendant ordered the victim to "back off", the victim did so, but placed his hand in his pocket, and as he again approached the defendant and the defendant's wife, began to pull his hand from his pocket; and defendant shot the victim once because he feared for the safety of his wife, his grandson, and himself. The defendant's evidence was sufficient to show that he believed that it was necessary to use force to prevent death or great

bodily injury to himself or a family member.

State v. Cruz, 364 N.C. 417 (Oct. 8, 2010). The court affirmed per curiam *State v. Cruz*, 203 N.C. App. 230 (Apr. 6, 2010) (holding, in a murder case, and over a dissenting opinion, that an instruction on self-defense was not required where there was no evidence that the defendant believed it was necessary to kill the victim in order to save himself from death or great bodily harm).

State v. Baldwin, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) The trial court did not commit plain error when it instructed the jury on attempted first-degree murder but failed to instruct on imperfect self-defense and on attempted voluntary manslaughter. In light of the fact that "the State introduced abundant testimony supporting a finding of defendant's murderous intent," the court held that the defendant failed to demonstrate that if the trial court had instructed on imperfect self-defense, the jury probably would have acquitted defendant of attempted first-degree murder.

State v. Edwards, ___ N.C. App. ___, 768 S.E.2d 619 (Feb. 17, 2015). The trial court did not err by denying defendant's request for an instruction on duress or necessity as a defense to possession of a firearm by a felon. On appeal, defendant urged the court to adopt the reasoning of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), an opinion recognizing justification as an affirmative defense to possession of a firearm by a felon. The court declined this invitation, instead holding that assuming without deciding that the *Deleveaux* rule applies, defendant did not satisfy its prerequisites. Specifically, even when viewed in the light most favorable to defendant, the evidence does not support a conclusion that defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury.

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). In this homicide case in which defendant was found guilty of second-degree murder, the trial court did not err by denying defendant's request to instruct the jury on voluntary manslaughter based on imperfect self-defense. The trial court instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter based on heat of passion. During the charge conference, defendant requested an instruction on voluntary manslaughter based on imperfect self-defense. The trial court denied this request. On appeal, defendant argued that evidence of his stature and weight compared with that of the victim and testimony that the victim held him in a headlock when the stabbing occurred was sufficient to allow the jury to infer that he reasonably believed it was necessary to kill the victim to protect himself from death or great bodily harm. The court disagreed, concluding:

> Here, the uncontroverted evidence shows that defendant fully and aggressively participated in the altercation with [the victim] in the yard of [the victim's] home. No evidence was presented that defendant tried to get away from [the victim] or attempted to end the altercation. Where the evidence does not show that defendant reasonably believed it was necessary to stab [the victim], who was unarmed, in the chest to escape death or great bodily harm, the trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based upon imperfect self-defense.

State v. Hinnant, ___ N.C. App. ___, 768 S.E.2d 317 (Dec. 31, 2014). In this assault and second-degree murder case, the trial court did not err by refusing to instruct the jury on self-defense and by omitting an instruction on voluntary manslaughter. The court noted that the defendant himself testified that when he fired the gun he did not intend to shoot anyone and that he was only firing warning shots. It noted: "our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter 'while still insisting . . . that he did not intend to shoot anyone[.]'"

State v. Rawlings, __ N.C. App. __, 762 S.E.2d 909 (Sept. 16, 2014). The trial court erred by instructing pursuant to G.S. 14-51.4 (justification for defensive force not available) where the statute, enacted in 2011, did not apply to the 2006 incident in question.

State v. Gurkin, __ N.C. App. __, 758 S.E.2d 450 (June 3, 2014). In this murder case, the trial court did not err by denying the defendant's request to instruct the jury on self-defense and imperfect self-defense. The defendant never testified that he thought it was necessary or reasonably necessary to kill his wife, the victim, to protect himself from death or great bodily harm; he only testified that his wife was holding a stun gun and that he pushed her up against the bathroom cabinets to keep her from using it. The defendant was able to push the stun gun into his wife's side and ultimately subdued her. He did not state that he feared for his life or that he feared he might suffer great bodily harm.

State v. Allen, __ N.C. App. __, 756 S.E.2d 852 (April 15, 2014). The trial court did not commit plain error by failing to instruct the jury on self-defense with respect to a charge of discharging a firearm into an occupied vehicle. The trial court instructed the jury regarding self-defense in its instructions for attempted first-degree murder and assault. For the discharging a firearm charge, the trial court did not give the full self-defense instruction, but rather stated that the jury must find whether the defendant committed the offense without justification or excuse. At the jury instruction conference the defendant agreed to this instruction. The court found that the trial court placed the burden of proof on the State to satisfy the jury beyond a reasonable doubt that the defendant did not act in self-defense when he shot at the car. It also noted that the defendant agreed to the proposed instruction and that the jury found the defendant guilty of the other charges even though each included a self-defense instruction.

State v. Evans, __ N.C. App. __, 747 S.E.2d 151 (Aug. 6, 2013). (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges that were based on the underlying offenses of attempted robbery. Self-defense is only relevant to felony-murder if it is a defense to the underlying felony. The court continued: "We fail to see how defendant could plead self-defense to a robbery the jury found he had attempted to commit himself." (2) The trial court did not err by failing to include self-defense in its mandate on felony-murder charges based on underlying assault offenses. The trial court gave the full self-defense instructions with respect to the assault charges. It then referenced these instructions, and specifically the self-defense instructions, in its instructions concerning felony-murder based upon the assault charges. Taken as a whole, this was not error.

State v. Vaughn, __ N.C. App. __, 742 S.E.2d 276 (May 7, 2013). The trial court committed plain error by instructing the jury that the defendant was not entitled to the benefit of self-defense if she was the aggressor when no evidence suggested that the defendant was the aggressor.

State v. Ramseur, __ N.C. App. __, 739 S.E.2d 599 (April 2, 2013). The trial court did not commit plain error by failing to instruct on perfect or imperfect self-defense or perfect or imperfect defense of others where no evidence supported those instructions.

State v. Sessoms, __ N.C. App. __, 741 S.E.2d 449 (April 2, 2013). The trial court did not commit plain error by failing to instruct on defense of others. The defendant's statement that he was defending himself, his vehicle and his wife was not evidence from which the jury could find that the defendant reasonably believed a third person was in immediate peril of death or serious bodily harm at the hands of another.

State v. Hope, __ N.C. App. __, 737 S.E.2d 108 (Nov. 20, 2012). In an assault with a deadly weapon with intent to kill inflicting serious injury case where the weapon was not a deadly weapon per se, the trial court did not err by declining to give self-defense instruction N.C.P.I.—Crim. 308.40 and did not commit plain error by declining to give self-defense instruction N.C.P.I.—Crim. 308.45 over the defendant's objection. The court clarified that when a defendant is charged with assault with a deadly weapon and the weapon is a deadly weapon per se, the trial judge should instruct that the assault would be excused as being in self-defense only if the circumstances would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself or herself from death or great bodily harm. If, however, the weapon is not a deadly weapon per se, the trial judge should further instruct the jury that if they find that the defendant assaulted the victim but do not find that the defendant used a deadly weapon, that assault would be excused as being in self-defense if the circumstances would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself or herself from bodily injury or offensive physical contact.

State v. Gaston, __ N.C. App. __, 748 S.E.2d 21 (Sept. 3, 2013). In this murder case, the trial court did not err by denying the defendant's request for jury instructions on self-defense and voluntary manslaughter. The defendant's theory was that the gun went off accidentally. Additionally, there was no evidence that the defendant in fact formed a belief that it was necessary to kill his adversary in order to protect himself from death or great bodily harm.

State v. Presson, __ N.C. App. __, 747 S.E.2d 651 (Aug. 20, 2013). (1) The trial court did not err by denying the defendant's motion to dismiss homicide charges. The defendant argued that the evidence showed perfect self-defense. Noting that there was some evidence favorable to the defendant as to each of the elements of perfect self-defense, the court concluded that there was also evidence favorable to the State showing that the defendant's belief that it was necessary to kill was not reasonable, and that defendant was the aggressor or used excessive force. (2) The trial court did not commit plain error by instructing the jury that the defendant would lose the right to self-defense if he was the aggressor. The defendant had argued that the State failed to put forth evidence that the defendant was the aggressor.

State v. Whetstone, 212 N.C. App. 551 (June 21, 2011). The trial court committed plain error by charging the jury with a self-defense instruction that related to assaults not involving deadly force (N.C.P.I.—Crim. 308.40) when the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The court explained: "in those cases where the weapon is not a deadly weapon per se, but . . . the trial judge concludes on the evidence . . . that the weapon used was a deadly weapon as a matter of law, the jury should be instructed that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm." The instruction given lessened the State's burden of proving that the defendant did not act in self-defense.

State v. Effler, 207 N.C. App. 91 (Sept. 7, 2010). The trial court did not commit plain error by instructing the jury that a defendant acting in self-defense is guilty of voluntary manslaughter if he was the aggressor, where there was sufficient evidence suggesting that the defendant was indeed the aggressor. Although the trial court erred by failing to include an instruction on no duty to retreat, the error did not rise to the level of plain error given the evidence suggesting that the defendant used excessive force and was the aggressor.

State v. Haire, 205 N.C. App. 436 (July 20, 2010). No error, much less plain error, occurred when the trial judge gave a self defense instruction based on NCPJI – Crim. 308.45. Although the court found the wording of the pattern instruction confusing as to burden of proof on self defense, it concluded that the trial court properly edited the pattern instruction by repeatedly telling the jury that the State had the burden of proving beyond a reasonable doubt that defendant's actions were not in self-defense.

State v. Jenkins, 202 N.C. App. 291 (Feb. 2, 2010). Reversing and remanding for a new trial where, despite the fact that there was no evidence that the defendant was the aggressor, the trial judge instructed the jury that in order to receive the benefit of self-defense, the defendant could not have been the aggressor.

State v. Kirby, 206 N.C. App. 446 (Aug. 17, 2010). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder based on the defendant's contention that he acted in self-defense where the evidence was sufficient to establish that rather than acting in self-defense, the defendant went armed after the victim to settle an argument.

State v. Pittman, 207 N.C. App. 205 (Sept. 21, 2010). In a murder case, the trial court did not err by declining to instruct on self-defense where there was no evidence that would support a finding that the defendant reasonably believed that he needed to use deadly force against the victim to prevent death or serious bodily injury. Although the victim had threatened the defendant repeatedly, there was no evidence that he threatened to kill the defendant or attempted to harm him. There was no evidence that anyone had ever seen the victim with a weapon or attack another person. There was no indication that the victim had a reputation for violence; in fact, although the victim was angry with the defendant for a while, their conflict had never escalated beyond threats. There was no evidence that the victim threatened to hurt or attack the defendant on the day in question or that the encounter between them was more heated than earlier disputes.

Instead, the evidence established that the defendant approached the victim with a gun, fired multiple shots at the victim, and continued firing as the victim attempted to retreat. The victim's prior threats against the defendant, without more, did not establish a reasonable need for deadly force. The defendant's description of the victim's conduct immediately prior to the shooting did not, whether considered in isolation or in the context of the victim's prior threats, suffice to support a self-defense instruction. The fact that the victim may have been "edging up" on the defendant while reaching behind his back did not support a finding that the defendant reasonably believed that he needed to use lethal force given that the defendant did not claim to have seen the victim with a weapon on that or any occasion, the victim had not threatened him immediately prior to the shooting, and the defendant had no other objective basis, aside from prior threats, for believing that the victim was about to attack him and create a risk of death or great bodily injury.

Statute of Limitations

State v. Taylor, 212 N.C. App. 238 (June 7, 2011). The statute of limitations applicable to misdemeanor offenses does not apply when the issue of a defendant's guilt of a misdemeanor offense is submitted to the jury as a lesser included offense of a properly charged felony. Applying this rule, the court held that the two-year misdemeanor statute of limitations does not bar conviction for misdemeanor common law obstruction of justice when the misdemeanor was submitted to the jury as a lesser-included offense of felonious obstruction of justice, the crime charged in the indictment.

Voluntary Intoxication

State v. Surrett, 217 N.C. App. 89 (Nov. 15, 2011). Although the State presented evidence that the defendant smoked crack, there was no evidence regarding the crack cocaine's effect on the defendant's mental state and thus the trial court did not commit plain error in failing to instruct the jury on the defense of voluntary intoxication.

State v. Flaugher, 214 N.C. App. 370 (Aug. 16, 2011). The trial court did not err by refusing to instruct on voluntary intoxication. Some evidence showed that the defendant had drunk two beers and "could feel it," had taken Xanax, and may have smoked crack cocaine. However, the defendant herself said she was not drunk and had not smoked crack. The defendant did not produce sufficient evidence to show that her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent.

State v. Merrell, 212 N.C. App. 502 (June 7, 2011). Because the defendant failed to present evidence of intoxication to the degree required to show that he was incapable of forming the requisite intent to commit attempted statutory rape and indecent liberties, the trial court did not commit plain error by failing to instruct the jury on voluntary intoxication. The State's evidence showed that the defendant made careful plans to be alone with the child, and in at least one instance, tricked her into coming out of her room after she had locked herself away from him. The defendant offered evidence that he has abused alcohol and drugs for so long that his memory has deteriorated so that he cannot remember the relevant events. However, the court concluded, the defendant's failure to remember later when accused is not proof of his mental condition at the time of the crime.

Withdrawal

State v. Wright, 210 N.C. App. 697 (Apr. 5, 2011). The trial court did not err by denying the defendant's request to instruct the jury on the defense of withdrawal where the evidence showed that the defendant completed his assigned task in the home invasion (kicking in the door) and failed to renounce the common purpose or indicate that he did not intend to participate in the crime any further.

Capital Law

Rule 24 Hearing

State v. Defoe, 364 N.C. 29 (Apr. 15, 2010). The 2001 amendments to the capital sentencing statutes revoked the statutory mandate that provided the rationale for *State v. Rorie*, 348 N.C. 266 (1998) (holding that the trial court exceeded its authority to enforce Rule 24 by precluding the State from prosecuting a first-degree murder case capitally). Thus, the trial court has inherent authority to enforce Rule 24 by declaring a case noncapital in appropriate circumstances. Declaring a case noncapital is appropriate only when the defendant makes a sufficient showing of prejudice resulting from the State's delay in holding the Rule 24 conference. In this case, the defendant did not show sufficient prejudice to warrant declaring the cases noncapital.

Right to Be Present

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). The random segregation of the entire jury pool so that it could be split among the defendant's proceeding and other matters being handled at the courthouse that day was a preliminary administrative matter at which defendant did not have a right to be present.

Jury Selection

State v. Waring, 364 N.C. 443 (Nov. 5, 2010). (1) The trial court did not err by allowing the State's challenge for cause of a prospective juror when the juror's beliefs about the death penalty could not be pinned down. (2) The trial court did not err in denying the defendant's motion to dismiss asserting that disproportionate numbers of prospective jurors who were African-American, opposed the death penalty, or both, were excluded from the jury in violation of *Wainwright v. Witt*, 469 U.S. 412 (1985). The court declined to reconsider its previous holding that death qualifying a jury in a capital case does not violate the United States or North Carolina Constitutions. (3) The trial court did not err by prohibiting defense counsel from suggesting during voir dire that there is a presumption that life without parole is the appropriate sentence when North Carolina law does not establish such a presumption. (4) The court rejected the defendant's argument that the State injected error when it stated to prospective jurors that the jury had to be unanimous as to a sentence of death or life without parole. According to the defendant, these comments erroneously indicated that the jury had to recommend a life sentence unanimously, placing a burden on the defendant, when in fact life sentence is imposed if the jury cannot agree during a capital sentencing proceeding. While the defendant was correct that an inability to reach unanimity in a capital sentencing proceeding will result in a life sentence, the jury is not to be instructed as to the result of being unable to reach a unanimous sentencing recommendation. (5) The State did not reduce its burden when it asked prospective jurors to presuppose that the defendant had been found guilty. Such a supposition was a necessary prelude to voir dire questions relating to the sentencing proceeding, should one be needed.

Jury Instructions

Smith v. Spisak, 558 U.S. 139, 130 S. Ct. 676 (Jan. 12, 2010). Distinguishing *Mills v. Maryland*, 486 U.S. 367 (1988), and holding that the penalty phase jury instructions and verdict forms were not unconstitutional. The defendant had asserted that the instructions improperly required the jury to consider in mitigation only those factors the jury unanimously found to be mitigating.

Bobby v. Mitts, 563 U.S. ___, 131 S. Ct. 1762 (May 2, 2011). In a per curiam opinion, the Court reversed a Sixth Circuit decision granting relief to a defendant on grounds that the jury instructions used in his capital trial ran afoul of *Beck v. Alabama*, 447 U.S. 625 (1980) (holding that the death penalty may not be imposed when the jury was not permitted to consider a verdict of guilt of a lesser-included non-capital offense, and when the evidence would have supported such a verdict). The Court concluded that the penalty phase instruction at issue was not invalid under *Beck*, which dealt with guilt-innocence phase instructions.

Aggravating Circumstances

(e)(3) ─ Prior Violent Felony Conviction

State v. Garcell, 363 N.C. 10 (Mar. 20, 2009). The defendant was convicted of first-degree murder and sentenced to death. Notwithstanding *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of one who commits murder before eighteenth birthday), prior violent felonies committed when the defendant was only 16 years old could be considered with respect to the G.S. 15A-2000(e)(3) (prior violent felony conviction) aggravating circumstance.

(e)(4) ─ Murder Committed To Prevent Arrest Or Effect Escape

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial court did not commit plain error by submitting both the (e)(4) (murder committed to prevent arrest or effect escape) and (e)(8) (crime committed against law enforcement officer) aggravating circumstances. The (e)(4) aggravating circumstance focuses on the defendant's subjective motivation for his or her actions while the (e)(8) aggravating circumstance pertains to the underlying factual basis of the crime. The court rejected the defendant's argument that the aggravating circumstances impermissibly overlapped because the defendant's motive for killing the officer was to avoid the very arrest that the officer was attempting to carry out at the time of the killing.

(e)(8) ─ Crime Committed Against Law Enforcement Officer

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial court did not commit plain error by submitting both the (e)(4) (murder committed to prevent arrest or effect escape) and (e)(8) (crime committed against law enforcement officer) aggravating circumstances. The (e)(4) aggravating circumstance focuses on the defendant's subjective motivation for his or her actions while the (e)(8) aggravating circumstance pertains to the underlying factual basis of the crime. The court rejected the defendant's argument that the aggravating circumstances impermissibly overlapped because the defendant's motive for killing the officer was to avoid the very arrest that the officer was attempting to carry out at the time of the killing.

Mitigating Circumstances

(f)(1) – No Significant History of Prior Criminal Activity

State v. Phillips, 365 N.C. 103 (June 16, 2011). The trial court did not err by submitting the (f)(1) mitigating circumstance (no significant history of prior criminal activity) to the jury. The defendant's prior record included: felony breaking and entering in 1999; felony larceny in 1998; driving under the influence in 1996; larceny in 1993; sale of marijuana in 1991; and sale of a narcotic or controlled substance in 1990. The court found it significant that the priors were somewhat remote in time and did not appear to involve violence against a person.

State v. Lane, 365 N.C. 7 (Mar. 11. 2011). The trial court did not err by failing to submit the G.S. 15A-2000(f)(1) (no significant history of prior criminal activity) mitigating circumstance. A forecast of evidence suggested that the defendant had violently abducted his former wife and forced her to engage in sexual activity.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010).. The trial court did not err by instructing the jury to consider, over the defendant's objection, the (f)(1) mitigating circumstance (no significant history of prior criminal activity). The defendant's priors consisted of breaking and entering a motor vehicle (Class I felony) and several misdemeanors (larceny, public disturbance, defrauding an innkeeper, trespassing, carrying a concealed weapon, and possession of marijuana). There was also evidence of unspecified thefts, mostly at school. Because the evidence pertained to minor offenses, a rational jury could conclude that the defendant had no significant history of criminal activity.

(f)(4) -- Accomplice or Accessory With Minor Role

State v. Phillips, 365 N.C. 103 (June 16, 2011). The trial court erred by submitting the (f)(4) mitigating circumstance (defendant was an accomplice in or accessory to the capital felony committed by another person and his participation was relatively minor) to the jury where it was not supported by substantial evidence. However, in the absence of "extraordinary facts," the court concluded that the error was harmless.

(f)(7) ─ Defendant's Age When Murder Committed

State v. Garcell, 363 N.C. 10 (Mar. 20, 2009). The defendant was convicted of first-degree murder and sentenced to death. The defendant was eighteen years and five months old when he committed the murder. The court rejected the defendant's argument that *Roper v. Simmons*, 543 U.S. 551 (2005) (Eighth Amendment prohibits execution of one who commits murder before eighteenth birthday), required it to conclude that the defendant's age had mitigating value as a matter of under the G.S. 15A-2000(f)(7) (defendant's age when murder committed) mitigating circumstance.

Peremptory Instructions

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial judge did not err by declining to give a

peremptory instruction on a non-statutory mitigating circumstance that the defendant accepted responsibility for his criminal conduct. While the defendant admitted killing the victim and acknowledged that the killing was a terrible mistake, he only authorized his lawyers to concede guilt to second-degree murder. A willingness to plead guilty to second-degree murder is evidence only of the defendant's willingness to lessen exposure to the death penalty or a life sentence upon a conviction for first-degree murder.

State v. Waring, 364 N.C. 443 (Nov. 5, 2010).. (1) The trial court did not err by failing to give a peremptory instruction on statutory mitigating circumstances when the evidence as to each was contested. (2) Although the trial court erred by failing to give a peremptory instruction on the non-statutory mitigating circumstance that the defendant's mother did not accept his deficits, the error was harmless beyond a reasonable doubt. (3) The trial court did not err by failing to give peremptory instructions on non-statutory mitigating circumstances when it was not clear how one was mitigating or that the evidence was credible; as to others, the evidence was not uncontroverted.

Lethal Injection

Glossip v. Gross, 576 U.S. ___ (June 29, 2015). In this case, challenging Oklahoma's lethal injection protocol, the Court affirmed the denial of the prisoner's application for a preliminary injunction. The prisoners, all sentenced to death in Oklahoma, filed an action in federal court, arguing that Oklahoma's method of execution violates the Eighth Amendment because it creates an unacceptable risk of severe pain. They argued that midazolam, the first drug employed in the State's three-drug protocol, fails to render a person insensate to pain. After holding an evidentiary hearing, the District Court denied the prisoner's application for a preliminary injunction, finding that they had failed to prove that midazolam is ineffective. The Tenth Circuit affirmed, as did the Supreme Court, for two independent reasons. First, the Court concluded that the prisoners failed to identify a known and available method of execution that entails a lesser risk of pain. Second, the Court concluded that the District Court did not commit clear error when it found that the prisoners failed to establish that Oklahoma's use of a massive dose of midazolam in its execution protocol entails a substantial risk of severe pain.

Mental Retardation Issues

Brumfield v. Cain, 576 U.S. __ (June 18, 2015). Because the Louisiana state court's decision rejecting the defendant's *Atkins* claim without affording him an evidentiary hearing was based on an unreasonable determination of the facts, the defendant was entitled to have his claim considered on the merits in federal court. After the defendant was convicted, the U.S. Supreme Court held, in *Atkins*, that "in light of . . . 'evolving standards of decency,'" the Eighth Amendment "'places a substantive restriction on the State's power to take the life' of a mentally retarded offender." The Court however left "to the State[s] the task of developing appropriate ways to enforce the constitutional restriction upon [their] execution of sentences." The Louisiana Supreme Court later held that "a diagnosis of mental retardation has three distinct components: (1) subaverage intelligence, as measured by objective standardized IQ tests; (2) significant impairment in several areas of adaptive skills; and (3) manifestations of this neuro-psychological disorder in the developmental stage." That court further held that an *Atkins* evidentiary hearing is

required when an inmate has put forward sufficient evidence to raise a "reasonable ground" to believe him to be intellectually disabled. In a post-conviction motion in the case at bar, the defendant sought an *Atkins* hearing. Without holding an evidentiary hearing or granting funds to conduct additional investigation, the state trial court dismissed the defendant's petition. After losing in state court, the defendant pursued federal habeas relief. The defendant won at the federal district court but the Fifth Circuit reversed. The U.S. Supreme Court granted review and held that the state court's decision denying his *Atkins* claim was premised on an "unreasonable determination of the facts." In reaching this decision, the Court focused on the two underlying factual determinations on which the trial court's decision was premised: that the defendant's IQ score of 75 was inconsistent with a diagnosis of intellectual disability and that he had presented no evidence of adaptive impairment. The Court held that both of the state court's critical factual determinations were unreasonable.

Hall v. Florida, 572 U.S. __, 134 S. Ct. 1986 (May 27, 2014). The Court held unconstitutional a Florida law strictly defining intellectual disability for purposes of qualification for the death penalty. The Eighth and Fourteenth Amendments forbid the execution of persons with intellectual disability. Florida law defines intellectual disability to require an IQ test score of 70 or less. If, from test scores, a prisoner is deemed to have an IQ above 70, all further exploration of intellectual disability is foreclosed. The Court held: "This rigid rule . . . creates an unacceptable risk that persons with intellectual disability will be executed, and thus is unconstitutional." Slip Op. at 1. The Court concluded:

> Florida seeks to execute a man because he scored a 71 instead of 70 on an IQ test. Florida is one of just a few States to have this rigid rule. Florida's rule misconstrues the Court's statements in *Atkins* that intellectually disability is characterized by an IQ of "approximately 70." 536 U. S., at 308, n. 3. Florida's rule is in direct opposition to the views of those who design, administer, and interpret the IQ test. By failing to take into account the standard error of measurement, Florida's law not only contradicts the test's own design but also bars an essential part of a sentencing court's inquiry into adaptive functioning. [Defendant] Freddie Lee Hall may or may not be intellectually disabled, but the law requires that he have the opportunity to present evidence of his intellectual disability, including deficits in adaptive functioning over his lifetime.
>
> The death penalty is the gravest sentence our society may impose. Persons facing that most severe sanction must have a fair opportunity to show that the Constitution prohibits their execution. Florida's law contravenes our Nation's commitment to dignity and its duty to teach human decency as the mark of a civilized world. The States are laboratories for experimentation, but those experiments may not deny the basic dignity the Constitution protects.

Slip Op. at 22.

State v. Locklear, 363 N.C. 438 (Aug. 28, 2009). The trial court erred by denying the defendant's request to instruct the jury that a verdict finding the defendant mentally retarded would result in a sentence of life imprisonment without parole. The trial judge had given N.C.P.J.I.—Crim. 150.05, which states, in part, that "no defendant who is mentally retarded shall be sentenced to death," and the attorneys argued that if the defendant was found mentally retarded he would receive life in prison. Stating that on remand, the trial court should instruct the jury that "[i]f the

jury determines the defendant to be mentally retarded, the court shall declare the case noncapital and the defendant shall be sentenced to life imprisonment."

State v. Ward, 364 N.C. 157 (June 17, 2010). The trial judge has discretion regarding whether to submit the special issue of mental retardation to the jury in a bifurcated or unitary capital sentencing proceeding. The court held that in the case before it, the trial court did not abuse its discretion by denying a defense motion to bifurcate the issues of mental retardation and sentence.

Multiple Errors Requiring Reversal

State v. Hembree, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). In this capital case, the court held that the cumulative effect of several errors at trial denied the defendant a fair trial; the court vacated the conviction and sentence and remanded for a new trial. Specifically, and as discussed in more detail in the summaries that follow, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to another murder; by admitting evidence of the 404(b) murder victim's good character; and by allowing the prosecution to argue without basis to the jury that defense counsel had in effect suborned perjury.

Non-Unanimous Jury Poll

State v. Maness, 363 N.C. 261 (June 18, 2009). The trial judge properly denied a defense motion for imposition of a sentence of life imprisonment when polling revealed that the jury had returned a non-unanimous verdict after deliberations of just over 1 hour and 30 minutes. Under 15A-2000(b) "the only contingency in which a trial court unilaterally shall impose a life sentence in a capital case is when the jury is non[-]unanimous after having deliberated for a 'reasonable time.'"

Execution Issues

Conner v. N.C. Council of State, 365 N.C. 242 (Oct. 7, 2011). (1) In a case centered on the constitutionality of the State's method of execution in capital cases, the Court held that the N.C. Council of State's process for approving or disapproving the Department of Correction's lethal injection protocol is not subject to the Administrative Procedure Act and that petitioners cannot challenge it by going through the Office of Administrative Hearings. Instead, the court held, any issue petitioners have with the protocol rests with the state trial courts or the federal courts. (2) The court also held that the superior court erred by dismissing the petitioners' declaratory judgment claim that the Council's approval of the execution protocol violated G.S. 15-188. Nevertheless, the court affirmed the superior court's order as modified because the court correctly construed G.S. 15-188 to mean that petitioners' rights "are limited to the obligation that [their] death[s] be by lethal injection, in a permanent death chamber in Raleigh, and carried out pursuant to an execution protocol approved by the Governor and the Council of State" and that no factual or legal authority "supports Petitioner[s] claims of a due process right to participate in the approval process."

N.C. Dep't of Correction v. N.C. Medical Board, 363 N.C. 189 (May 1, 2009). The N.C. Medical Board's position statement on physician participation in executions exceeds its authority under

G.S. Chapter 90 because it contravenes the specific requirement of physician presence in G.S. 15-190.

Robinson v. Shanahan, __ N.C. App. __, 755 S.E.2d 398 (Mar. 18, 2014). The court remanded to the trial court this case challenging North Carolina's drug protocol for lethal injections. The plaintiffs appealed a trial court order granting summary judgment to the defendants on the plaintiffs' challenge to North Carolina's previously used three-drug protocol for the administration of lethal injections ("the 2007 Protocol"). During the appeal, the 2007 Protocol was replaced by the "Execution Procedure Manual for Single Drug Protocol (Pentobarbital)" ("the new Manual") after a statutory amendment vested the Secretary of NC Department of Public Safety with the authority to determine execution procedures. As a result, the plaintiffs' only remaining contention on appeal was that the new Manual must be promulgated through rule-making under the Administrative Procedure Act. The court remanded so that the trial court could determine this issue in the first instance.

Jurisdictional Issues

State v. Williams, 363 N.C. 689 (Dec. 11, 2009). A judge who did not preside over the guilt phase of a capital trial had jurisdiction to preside over the penalty phase. The first judge had declared a mistrial as to the penalty phase after the defendant attacked one of his lawyers and both counsel were allowed to withdraw. The fact that the original guilt phase jury did not hear the penalty phase when it was re-tried after the mistrial did not create a jurisdictional issue. A death sentence imposed after the re-trial of the penalty phase was not out-of-session or out-of-term.

Post-Conviction Proceedings

G.S. 15A-1335

State v. Powell, __ N.C. App. __, 750 S.E.2d 899 (Dec. 3, 2013). In a case where the trial court initially sentenced the defendant correctly but then erroneously thought it had used the wrong sentencing grid and re-sentenced the defendant to a lighter sentence using the wrong grid, the court remanded for imposition of the initial correct but more severe sentence. The court noted that G.S. 15A-1335 did not apply because the higher initial sentence was statutorily mandated.

State v. Wray, __ N.C. App. __, 747 S.E.2d 133 (Aug. 6, 2013). G.S. 15A-1335 did not apply when on retrial the trial court sentenced the defendant for a different, more serious offense.

State v. Cook, __ N.C. App. __, 738 S.E.2d 773 (Mar. 5, 2013). The trial court did not violate G.S. 15A-1335 when on remand it sentenced the defendant to a term that was longer than he originally received. The trial court initially imposed an illegal term, sentencing the defendant to a presumptive range sentence of 120 to 153 months; the correct presumptive range sentence for the defendant's class of offense and prior record level was 135 to 171 months. When the trial court imposed a presumptive range of 135 to 171 months on remand, it was imposing a statutorily mandated sentence that did not run afoul of G.S. 15A-1335.

State v. Skipper, 214 N.C. App. 556 (Aug. 16, 2011). No violation of G.S. 15A-1335 occurred on resentencing. A jury found the defendant guilty of felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and for being a habitual felon. The trial court consolidated the offenses for judgment and sentenced the defendant to 125-159 months of imprisonment. The appellate court subsequently vacated the felony larceny conviction and remanded for resentencing. At resentencing the trial court consolidated the offenses and again sentenced the defendant to 125-150 months. The defendant argued that because he received the same sentence even though one of the convictions had been vacated, the new sentence violated G.S. 15A-1335. The court disagreed, concluding that the pursuant to G.S. 15A-1340.15(b), having consolidated the sentences, the trial court was required to sentenced the defendant for the most serious offense, which it did at the initial sentencing and the resentencing.

State v. Goode, 211 N.C. App. 637 (May 3, 2011). Citing, *State v. Oliver*, 155 N.C. App 209 (2002), the court held that no violation of G.S. 15A-1335 occurred when, after the defendant's two death sentences for murder were vacated, the trial judge imposed two consecutive life sentences.

State v. Daniels, 203 N.C. App. 350 (Apr. 6, 2010). After being found guilty of first-degree rape and first-degree kidnapping, the defendant was sentenced to consecutive terms of 307-378 months for the rape and 133-169 for the kidnapping. On appeal, the court held that the trial judge erred by allowing the same sexual assault to serve as the basis for the rape and first-degree kidnapping convictions. The court remanded for a new sentencing hearing, instructing the trial judge to either arrest judgment on first-degree kidnapping and resentence on second-degree kidnapping, or arrest judgment on first-degree rape and resentence on first-degree kidnapping.

The trial judge chose the first option, resentencing the defendant to 370-453 months for first-degree rape and to a consecutive term of 46-65 months for second-degree kidnapping. The resentencing violated G.S. 15A-1335 because the trial court imposed a more severe sentence for the rape conviction after the defendant's successful appeal. The court rejected the State's argument that when applying G.S. 15A-1335, the court should consider whether the aggregated new sentences are greater than the aggregated original sentences.

Clerical Errors/Error Correction

State v. Gillespie, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). Where the judgment form mistakenly contained a reference to "Assault with a Deadly Weapon," a charge on which the defendant was acquitted, but where the error did not affect the sentence imposed, the court remanded for correction of this clerical error. The court rejected the defendant's argument that the error entitled him to a resentencing.

State v. Everette, __ N.C. App. __, 764 S.E.2d 634 (Oct. 21, 2014). Where the trial court miscalculated the defendant's prior record level but where a correction in points would not change the defendant's sentence, the court treated the error as clerical and remanded for correction. A dissenting judge would have concluded that the error was judicial not clerical.

State v. Edmonds, __ N.C. App. __, 763 S.E.2d 552 (Oct. 7, 2014). The court remanded for correction of a clerical error. Specifically, the trial court found at the sentencing hearing that the defendant was a PRL IV offender and ordered him to pay $6,841.50 in attorney's fees. However, the judgment incorrectly listed him at PRL II and stated that the defendant owes $13,004.45 in attorney's fees (the amount owed by his co-defendant).

State v. Rawlings, __ N.C. App. __, 762 S.E.2d 909 (Sept. 16, 2014). The court remanded for correction of a clerical error where the defendant was convicted of assault with a deadly weapon but the trial court entered judgment for AWDWIK.

State v. Lee, __ N.C. App. __, 745 S.E.2d 73 n.1 (July 16, 2013). Where the trial court determined that the defendant had 16 prior record points and was a prior record level V but the judgment indicated that he had 5 prior record points and was a prior record level III, the entries on the judgment were clerical errors.

State v. Jones, __ N.C. App. __, 736 S.E.2d 634 (Jan. 15, 2013). A clerical error occurred where the trial court found that it could revoke the defendant's probation under the Justice Reinvestment Act because the defendant was convicted of another criminal offense while on probation but checked the box on the form indicating that the revocation was based on the fact that the defendant had twice previously been confined in response to violations. Remanding for correction.

State v. Barnett, __ N.C. App. __, 734 S.E.2d 130 (Nov. 20, 2012). A clerical error occurred in a Fair Sentencing Act case when the trial court found an aggravating factor and went on to sentence the defendant above the presumptive range but failed to check the box on the judgment indicating that the aggravating factor existed. The court remanded for correction of the error.

State v. Lewis, __ N.C. App. __, 732 S.E.2d 589 (Sept. 4, 2012). The court remanded for correction of a clerical error where the trial court announced a fine of $100 but the judgment incorrectly reflected a $500 fine.

State v. Rico, 218 N.C. App. 109 (Jan. 17, 2012), *reversed on other grounds*, State v. Rico, 366 N.C. 327 (Dec. 14, 2012). Where the trial judge erroneously sentenced the defendant to an aggravated term without finding that an aggravating factor existed and that an aggravated sentence was appropriate, a second judge erroneously treated this as a clerical that could be corrected simply by amending the judgment.

State v. Carrouthers, 213 N.C. App. 384 (July 19, 2011). In dicta, the court noted that the trial judge was entitled to modify her ruling on a suppression motion because court was still in session.

State v. Ellison, 213 N.C. App. 300 (July 19, 2011), *aff'd on other grounds*, 366 N.C. 439 (Mar. 8, 2013). The court remanded to the trial court for correction of a clerical error in the judgment so that the judgment would reflect the offense the defendant was convicted of committing (trafficking by transportation versus trafficking by delivery).

State v. Eaton, 210 N.C. App. 142 (Mar. 1, 2011). In a case in which the defendant was sentenced as a Class C habitual felon, the court remanded for correction of a clerical error regarding the felony class of the underlying felony.

State v. Moore, 209 N.C. App. 551 (Feb. 15, 2011), *reversed on other grounds by* 365 N.C. 283 (Oct. 7, 2011). Trial judge's failure to mark the appropriate box in the judgment indicating that the sentence was in the presumptive range was a clerical error.

State v. Blount, 209 N.C. App. 340 (Jan. 18, 2011). Listing the victim on the restitution worksheet as an "aggrieved party" was a clerical error.

State v. Kerrin, 209 N.C. App. 72 (Jan. 4, 2011). The trial court committed a clerical error when, in a written order revoking probation, it found that the conditions violated and the facts of each violation were set forth in a violation report dated October 20, 2008, which was the date of a probation violation hearing, not a violation report.

State v. Dobbs, 208 N.C. App. 272 (Dec. 7, 2010). The court treated as a clerical error the trial court's mistake on the judgment designating an offense as Class G felony when it in fact was a Class H felony. The court remanded for correction of the clerical error.

State v. Mohamed, 205 N.C. App. 470 (July 20, 2010). The inclusion of an incorrect file number on the caption of a transcript of plea was a clerical error where the plea was taken in compliance with G.S. 15A-1022 and the body of the form referenced the correct file number.

State v. Curry, 203 N.C. App. 375 (Apr. 20, 2010). The trial judge committed a clerical error when he entered judgment for a violation of G.S. 14-34.1(a), the Class E version of discharging a

firearm into occupied property. The record showed that, based on the defendant's prior record level, the judge's sentence reflected a decision to sentence the defendant to the Class D version of this offense (shooting into occupied dwelling) and at sentencing the judge stated that the defendant was being sentenced for discharging a firearm into an occupied dwelling, the Class D version of the offense.

State v. McCormick, 204 N.C. App. 105 (May 18, 2010). Inadvertent listing of the wrong criminal action number on the judgment was a clerical error.

State v. Treadway, 208 N.C. App. 286 (Dec. 7, 2010). On the judicial findings and order for sex offender form, the trial court erroneously indicated that the defendant had been convicted of an offense against a minor under G.S. 14-208.6(1i) when in fact he was convicted of a sexually violent offense under G.S. 14-208.6(5). The court remanded for correction of the clerical error.

State v. Yow, 204 N.C. App. 203 (May 18, 2010). The trial court's mistake of ordering SMB for a period of ten years (instead of lifetime registration) after finding that the defendant was a recidivist was not a clerical error.

State v. May, 207 N.C. App. 260 (Sept. 21, 2010). When the trial court intended to check one box on AOC-CR-615 (judicial findings and order for sex offenders) but another box was marked on the form signed by the judge, this was a clerical error that could be corrected on remand.

DNA Testing & Related Matters

District of Attorney's Office v. Osborne, 557 U.S. 52 (June 18, 2009). A defendant whose criminal conviction has become final does not have a substantive due process right to gain access to evidence so that it can be subjected to DNA testing to attempt to prove innocence. Additionally, the Court rejected the holding below that Alaska's procedures for post-conviction relief violated the defendant's procedural due process rights.

Skinner v. Switzer, 562 U.S. 521 (Mar. 7, 2011). In a 6-to-3 decision, the Court held that a convicted state prisoner seeking DNA testing of crime-scene evidence may assert a claim under 42 U.S.C. § 1983. However, the Court noted that *District Attorney's Office for Third Judicial Dist. v. Osborne*, 557 U.S. 52 (2009), severely limits the federal action a state prisoner may bring for DNA testing. It stated: "*Osborne* rejected the extension of substantive due process to this area, and left slim room for the prisoner to show that the governing state law denies him procedural due process." Slip Op. at 2 (citation omitted).

State v. Doisey, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2015). (1) The court dismissed the defendant's argument that the trial court erred by failing to order an inventory of biological evidence under G.S. 15A-269(f). Under the statute, a request for post-conviction DNA testing triggers an obligation for the custodial agency to inventory relevant biological evidence. Thus, a defendant who requests DNA testing under G.S. 15A-269 need not make any additional written request for an inventory of biological evidence. However, the required inventory under section 15A-269 is merely an ancillary procedure to an underlying request for DNA testing. Where, as here, the defendant has abandoned his right to appellate review of the denial of his request for

DNA testing, there is no need for the inventory required by G.S. 15A-269(f). (2) The court rejected the defendant's argument that the trial court erred by failing to order preparation of an inventory of biological evidence under G.S. 15A-268 where the defendant failed to make a written request as required by G.S. 15A-268(a7). The defendant's motion asked only that certain "physical evidence obtained during the investigation of his criminal case be located and preserved."

State v. Turner, ___ N.C. App. ___, 768 S.E.2d 356 (Feb. 17, 2015). (1) The trial court did not err by denying defendant's motion for post-conviction DNA testing under G.S. 15A-269. Defendant's motion contained only the following conclusory statement regarding materiality: "The ability to conduct the requested DNA testing is material to defendant[']s defense[.]" That conclusory statement was insufficient to satisfy his burden under the statute. (2) The court rejected defendant's argument that the trial court erred in failing to consider defendant's request for the appointment of counsel pursuant to G.S. 15A-269(c), concluding that an indigent defendant must make a sufficient showing of materiality before he or she is entitled to appointment of counsel.

State v. Floyd, __ N.C. App. __, 765 S.E.2d 74 (Nov. 18, 2014). (1) The trial court properly denied the defendant's motion for post-conviction DNA testing. The defendant was convicted of murdering his wife; her body was discovered in a utility shop behind their home. He sought DNA testing of five cigarettes and a beer can that were found in the utility shop, arguing that Karen Fowler, with whom the defendant had an affair, or her sons committed the murder. He asserted that testing may show the presence of DNA from Fowler or her sons at the scene. The defendant failed to prove the materiality of sought-for evidence, given the overwhelming evidence of guilt and the fact that DNA testing would not reveal who brought the items into the utility shop or when they were left there. The court noted: "While the results from DNA testing might be considered 'relevant,' had they been offered at trial, they are not 'material' in this postconviction setting." (2) The post-conviction DNA testing statute does not require the trial court to make findings of fact when denying a motion. "A trial court's order is sufficient so long as it states that the court reviewed the defendant's motion, cites the statutory requirements for granting the motion, and concludes that the defendant failed to show that all the required conditions were met." (3) The court held that trial court was not required to hold an evidentiary hearing on the defendant's motion, noting:

> [A] trial court is not required to conduct an evidentiary hearing where it can determine from the trial record and the information in the motion that the defendant has failed to meet his burden of showing any evidence resulting from the DNA testing being sought would be material. A trial court is not required to conduct an evidentiary hearing on the motion where the moving defendant fails to describe the nature of the evidence he would present at such a hearing which would indicate that a reasonable probability exists that the DNA testing sought would produce evidence that would be material to his defense.

State v. Collins, __ N.C. App. __, 761 S.E.2d 914 (June 17, 2014). The trial court properly denied the defendant's pro se motion for post-conviction DNA testing where the defendant failed to adequately establish that newer and more accurate tests would identify the perpetrator or contradict prior test results. It reasoned:

> Defendant's mere allegations that "newer and more accurate testing" methods exist, "which would provide results that are significantly more accurate and probative of the identity of the perpetrator [o]r accomplice, or have a reasonable probability of . . . contradicting prior test results" are incomplete and conclusory. Even though he named a new method of DNA testing, he provided no information about how this method is different from and more accurate than the type of DNA testing used in this case. Without more specific detail from Defendant or some other evidence, the trial court could not adequately determine whether additional testing would be significantly more accurate and probative or have a reasonable probability of contradicting past test results.

State v. Gardner, __ N.C. App. __, 742 S.E.2d 352 (May 21, 2013). (1) The trial court did not err by failing to appoint counsel to represent the defendant on a motion for post-conviction DNA testing. The trial court is required to appoint counsel for a motion under G.S. 15A-269 only if the defendant makes a showing of indigence and that the DNA testing is material to defendant's claim of wrongful conviction. Here, the defendant did not make a sufficient showing of materiality, which requires more than a conclusory statement that the evidence is material. (2) The court adopted the following standard of review of a denial for post-conviction DNA testing: Findings of fact are binding if supported by competent evidence and may not be disturbed absent an abuse of discretion; conclusions of law are reviewed de novo. (3) The trial court did not err by failing to make specific findings of fact when denying the defendant's request for post-conviction DNA testing under G.S. 15A-269. The statute contains no requirement that the trial court make specific findings of fact.

State v. Foster, 222 N.C. App. 199 (Aug. 7, 2012). (1) The rules of evidence apply to proceedings related to post-conviction motions for DNA testing under G.S. 15A-269. (2) The trial court did not err by denying the defendant's motion for post-conviction DNA testing where the defendant did not meet his burden of showing materiality under G.S. 15A-269(a)(1). The defendant made only a conclusory statement that "[t]he ability to conduct the requested DNA testing is material to the Defendant's defense"; he provided no other explanation of why DNA testing would be material to his defense.

State v. Hewson, 220 N.C. App. 117 (Apr. 17, 2012). The trial court did not err by denying the defendant's motion for post-conviction independent DNA testing. The defendant was convicted of first-degree murder (based on premeditation and deliberation and felony-murder predicated upon discharge of a weapon into occupied property), discharge of a weapon into occupied property, and misdemeanor violation of a domestic violence protective order. The defendant argued that the trial court erred by concluding that DNA testing was not material to the defense. Specifically, he asserted that the State's theory of the case indicated that the victim was inside the home and the defendant was outside when he discharged his handgun. The defendant further argued that blood on his pants was never tested. He asserted that if DNA evidence indicates the blood belonged to the victim, the defendant could argue that he was in close proximity to the victim, that he did not shoot from outside the residence, and that he would have the basis for a heat-of-passion defense to first-degree murder. The court rejected this argument, concluding that the evidence submitted by defendant in support of his motion supported the jury's verdict and did not support a jury instruction on the heat-of-passion defense. It noted: "Defendant's

contention that he was in close proximity to the victim at some point, even if supported by DNA evidence, does not minimize the significance of or otherwise refute the substantial evidence that defendant fired a gun into occupied property and that the victim suffered fatal gunshot wounds as a result."

State v. Norman, 202 N.C. App. 329 (Feb. 2, 2010). A defendant does not have a right to appeal a trial judge's order denying relief following a hearing to evaluate test results.

Habeas Corpus

State v. Chapman, __ N.C. App. __, 747 S.E.2d 114 (Aug. 6, 2013). The trial court erred by granting the defendant habeas relief and dismissing two first-degree capital murder charges. The trial court concluded that the victims were previable fetuses that did not meet the born alive rule for murder. It thus dismissed the murder charges. The court concluded that this was error, reasoning that whether the fetuses could be deemed living persons within the meaning of the homicide statute was a factual issue for the jury.

State v. Leach, __ N.C. App. __, 742 S.E.2d 608 (May 21, 2013). (1) When a trial judge conducts an initial review of an application for the issuance of a writ of habeas corpus, the issues are whether the application is in proper form and whether the applicant has established a valid basis for believing that he or she is being unlawfully detained and entitled to be discharged. In making this determination, the trial court is simply required to examine the face of the applicant's application, including any supporting documentation, and decide whether the necessary preliminary showing has been made. Given the nature of the inquiry, there is no reason to require findings of fact and conclusions of law at this initial review stage. The decision whether an application should be summarily denied or whether additional proceedings should be conducted is a question of law and is reviewed de novo. (2) Where the trial court summarily denied the defendant's application, it had no obligation to make findings of fact or conclusions of law and thus its failure to do so does not provide a valid basis for overturning its order on appeal. (3) The trial court did not err by summarily denying the defendant's application where the defendant failed to establish that he had a colorable claim to be entitled to be discharged from custody based on an alleged deprivation of a constitutionally protected liberty interest established by a MAPP contract.

Invalid Judgment

State v. Petty, 212 N.C. App. 368 (June 7, 2011). Having erroneously arrested judgment on a DWI charge to which the defendant had pleaded guilty, the trial court had authority to correct the invalid judgment and sentence the defendant even after the session ended. Citing *State v. Branch*, 134 N.C. App. 637 (1999), the court noted in dicta that the trial court's authority to correct invalid sentences includes sentences that exceed the statutory maximum. For a more detailed discussion of *Branch* and the trial court's authority to sua sponte correct errors, see *Jessica Smith, Trial Judge's Authority to Sua Sponte Correct Errors after Entry of Judgment in a Criminal Case*, ADMIN. OF JUSTICE. BULL. May 2003 (UNC School of Government) (online here : http://www.sog.unc.edu/sites/www.sog.unc.edu/files/aoj200302.pdf).

Motions for Appropriate Relief
Appeal & Certiorari

State v. Stubbs, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). Under G.S. 15A-1422, the court of appeals had subject matter jurisdiction to review the State's appeal from a trial court's order granting the defendant relief on his motion for appropriate relief. The court rejected the defendant's argument that Appellate Rule 21 required a different conclusion. In the decision below, *State v. Stubbs*, __ N.C. App. __, 754 S.E.2d 174 (2014), the court of appeals held, over a dissent that the trial court erred by concluding that the defendant's sentence of life in prison with the possibility of parole violated of the Eighth Amendment.

State v. Thomsen, ___ N.C. App. ___, ___ S.E.2d ___ (Aug. 4, 2015). Over a dissent the court held that it had jurisdiction to review the trial court's sua sponte MAR (granting the defendant relief) by way of a writ of certiorari filed by the State.

State v. Wilkerson, __ N.C. App. __, 753 S.E.2d 829 (Feb. 18, 2014). The court rejected the defendant's argument that the State had no avenue to obtain review of a trial court order granting his G.S. 15A-1415 MAR (MAR made more than 10 days after entry of judgment) on grounds that his sentence violated the Eighth Amendment. The court found that it had authority to grant the State's petition for writ of certiorari. The court rejected the contention that *State v. Starkey*, 177 N.C. App. 264, 268 (2006), required a different conclusion, noting that case conflicts with state Supreme Court decisions.

State v. Peterson, __ N.C. App. __, 744 S.E.2d 153 (July 16, 2013). (1) Under G.S. 15A-1445, the State could appeal the trial court's order granting the defendant's MAR on the basis of newly discovered evidence. (2) At the MAR hearing, the trial court properly excluded the State's expert witness, who did not testify at the original trial. The court viewed the State's position as "trying to collaterally establish that the jury would have reached the same verdict based on evidence not introduced at trial." It concluded that the trial court properly excluded this evidence:

> Defendant's newly discovered evidence concerned Agent Deaver, arguably, the State's most important expert witness. Thus, the State could have offered its own evidence regarding Agent Deaver's qualifications, lack of bias, or the validity of his experiments and conclusions. Furthermore, the State was properly allowed to argue that the evidence at trial was so overwhelming that the newly discovered evidence would have no probable impact on the jury's verdict. However, the State may not try to minimize the impact of this newly discovered evidence by introducing evidence not available to the jury at the time of trial. Thus, the trial court did not err in prohibiting the introduction of this evidence at the MAR hearing.

State v. Lee, __ N.C. App. __, 745 S.E.2d 73 (July 16, 2013). State could appeal an amended judgment entered after the trial court granted the defendant's MAR. The trial court entered the amended judgment after concluding (erroneously) that the 2009 amendments to the SSA applied to the defendant's 2005 offenses.

Claims That Can Be Raised
Unconstitutional Conviction or Sentence

State v. Wilkerson, __ N.C. App. __, 753 S.E.2d 829 (Feb. 18, 2014). (1) The court rejected the defendant's argument that the State had no avenue to obtain review of a trial court order granting his G.S. 15A-1415 MAR (MAR made more than 10 days after entry of judgment) on grounds that his sentence violated the Eighth Amendment. The court found that it had authority to grant the State's petition for writ of certiorari. The court rejected the contention that *State v. Starkey*, 177 N.C. App. 264, 268 (2006), required a different conclusion, noting that case conflicts with state Supreme Court decisions. (2) The defendant's claim that his sentence violated the Eighth Amendment was properly asserted under G.S. 15A-1415(b)(4) (convicted/sentenced under statute in violation of US or NC Constitutions) and (b)(8) (sentence unauthorized at the time imposed, contained a type of disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level, was illegally imposed, or is otherwise invalid as a matter of law).

State v. Stubbs, __ N.C. App. __, 754 S.E.2d 174 (Feb. 4, 2014), *aff'd on other grounds, State v. Stubbs*, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). The trial court erred by concluding that the defendant's 1973 sentence of life in prison with the possibility of parole on a conviction of second-degree burglary, committed when he was 17 years old, violated the Eighth Amendment. The defendant brought a MAR challenging his sentence as unconstitutional. The court began by noting that the defendant's MAR claim was a valid under G.S. 15A-1415(b)(4) (unconstitutional conviction or sentence) and (8) (sentence illegal or invalid). On the substantive issue, the court found that unlike a life sentence without the possibility of parole, the defendant's sentence "allows for the realistic opportunity to obtain release before the end of his life." In fact, the defendant had been placed on parole in 2008, but it was revoked after he committed a DWI.

Significant Change in the Law

State v. Chandler, 364 N.C. 313 (Aug. 27, 2010). On the State's petition for writ of certiorari, the court reversed the trial court and held that no significant change in the law pertaining to the admissibility of expert opinions in child sexual abuse cases had occurred and thus that the defendant was not entitled to relief under G.S. 15A-1415(b)(7) (in a motion for appropriate relief, a defendant may assert a claim that there has been a significant change in law applied in the proceedings leading to the defendant's conviction or sentence, and retroactive application of the changed legal standard is required). Contrary to the trial court's findings and conclusions, *State v. Stancil*, 355 N.C. 266 (2002), was not a significant change in the law, but merely an application of the court's existing case law on expert opinion evidence requiring that in order for an expert to testify that abuse occurred, there must be physical findings consistent with abuse.

State v. Whitehead, 365 N.C. 444 (Mar. 9, 2012). The superior court judge erred by "retroactively" applying Structured Sentencing Law (SSL) provisions to a Fair Sentencing Act (FSA) case. The defendant was sentenced under the FSA. After SSL came into effect, he filed a motion for appropriate relief asserting that SSL applied retroactively to his case and that he was entitled to a lesser sentence under SSL. The superior court judge granted relief. The supreme court, exercising rarely used general supervisory authority to promote the expeditious

administration of justice, allowed the State's petition for writ of certiorari and held that the superior court judge erred by modifying the sentence. The court relied on the effective date of the SSL, as set out by the General Assembly when enacting that law. Finding no other ground for relief, the court remanded for reinstatement of the original FSA sentence.

State v. Harwood, __ N.C. App. __, 746 S.E.2d 445 (Aug. 6, 2013). Declining to address whether *State v. Garris*, 191 N.C. App. 276 (2008), applied retroactively, the court held that the defendant's MAR was subject to denial because the *Garris* does not constitute a significant change in the substantive or procedural law as required by G.S. 15A-1415(b)(7), the MAR ground asserted by the defendant. When *Garris* was decided, no reported NC appellate decisions had addressed whether the possession of multiple firearms by a convicted felon constituted a single violation or multiple violations of G.S. 14-415.1(a). For that reason, *Garris* resolved an issue of first impression. The court continued: "Instead of working a change in existing North Carolina law, *Garris* simply announced what North Carolina law had been since the enactment of the relevant version of [G.S.] 14-415.1(a)." As a result, it concluded, "a decision which merely resolves a previously undecided issue without either actually or implicitly overruling or modifying a prior decision cannot serve as the basis for an award of appropriate relief made pursuant to [G.S.] 15A-1415(b)(7)." It thus concluded that the trial court lacked jurisdiction to grant relief for the reason requested and properly denied the MAR.

Illegal of Invalid Sentence

State v. Wilkerson, __ N.C. App. __, 753 S.E.2d 829 (Feb. 18, 2014). (1) The court rejected the defendant's argument that the State had no avenue to obtain review of a trial court order granting his G.S. 15A-1415 MAR (MAR made more than 10 days after entry of judgment) on grounds that his sentence violated the Eighth Amendment. The court found that it had authority to grant the State's petition for writ of certiorari. The court rejected the contention that *State v. Starkey*, 177 N.C. App. 264, 268 (2006), required a different conclusion, noting that case conflicts with state Supreme Court decisions. (2) The defendant's claim that his sentence violated the Eighth Amendment was properly asserted under G.S. 15A-1415(b)(4) (convicted/sentenced under statute in violation of US or NC Constitutions) and (b)(8) (sentence unauthorized at the time imposed, contained a type of disposition or a term of imprisonment not authorized for the particular class of offense and prior record or conviction level, was illegally imposed, or is otherwise invalid as a matter of law).

State v. Stubbs, __ N.C. App. __, 754 S.E.2d 174 (Feb. 4, 2014, *aff'd on other grounds, State v. Stubbs*, ___ N.C. ___, ___ S.E.2d ___ (April 10, 2015). The trial court erred by concluding that the defendant's 1973 sentence of life in prison with the possibility of parole on a conviction of second-degree burglary, committed when he was 17 years old, violated the Eighth Amendment. The defendant brought a MAR challenging his sentence as unconstitutional. The court began by noting that the defendant's MAR claim was a valid under G.S. 15A-1415(b)(4) (unconstitutional conviction or sentence) and (8) (sentence illegal or invalid). On the substantive issue, the court found that unlike a life sentence without the possibility of parole, the defendant's sentence "allows for the realistic opportunity to obtain release before the end of his life." In fact, the defendant had been placed on parole in 2008, but it was revoked after he committed a DWI.

Newly Discovered Evidence

State v. Rhodes, 366 N.C. 532 (June 13, 2013). Reversing the court of appeals, the court held that information supporting the defendant's motion for appropriate relief (MAR) was not newly discovered evidence. After the defendant was convicted of drug possession offenses, his father told a probation officer that the contraband belonged to him. The trial court granted the defendant's MAR, concluding that this statement constituted newly discovered evidence under G.S. 15A-1415(c). The court concluded that because the information implicating the defendant's father was available to the defendant before his conviction, the statement was not newly discovered evidence and that thus the defendant was not entitled to a new trial. The court noted that the search warrant named both the defendant and his father, the house was owned by both of the defendant's parents, and the father had a history of violating drug laws. Although the defendant's father invoked the Fifth Amendment at trial when asked whether the contraband belonged to him, the information implicating him as the sole possessor of the drugs could have been made available by other means. It noted that on direct examination of the defendant's mother, the defendant did not pursue questioning about whether the drugs belonged to the father; also, although the defendant testified at trial, he gave no testimony regarding the ownership of the drugs.

State v. Peterson, __ N.C. App. __, 744 S.E.2d 153 (July 16, 2013). In this murder case, the trial court properly granted the defendant a new trial on the basis of newly discovered evidence. At trial one of the State's most important expert witnesses was SBI Agent Duane Deaver, who testified as an expert in bloodstain pattern analysis. Deaver testified that the victim was struck a minimum of four times before falling down stairs. Deaver stated that, based on his bloodstain analysis, the defendant attempted to clean up the scene, including his pants, prior to police arriving and that defendant was in close proximity to the victim when she was injured. The court held that Deaver's misrepresentations regarding his qualifications (discussed in the opinion) constituted newly discovered evidence entitling the defendant to a new trial.

Court's Order

State v. Williamson, 365 N.C. 326 (Dec. 9, 2011). The court vacated and remanded an opinion by the court of appeals in *State v. Williamson*, 206 N.C. App. 599 (Sept. 7, 2010) (over a dissent, the court rejected the defendant's argument that the trial court erred by failing to enter a written order with findings of fact and conclusions of law when denying the defendant's MAR; the trial court's oral order, containing findings of fact and conclusions of law and appearing in the transcript, was sufficient). The court noted that during review it became apparent that a written order actually was entered by the trial court, the existence of which apparently was not known to appellate counsel. The court remanded to the court of appeals to determine: (1) whether to amend the record on appeal to permit consideration of the order; (2) whether to order new briefs and/or oral arguments in light of its ruling on item (1) above; (3) whether to address defendant's issues on the merits; and (4) whether to enter any other or further relief as it may deem appropriate.

Hearings & Notice

State v. Rollins, 367 N.C. 114 (Oct. 4, 2013). The court per curiam affirmed the decision below, *State v. Rollins*, __ N.C. App. __, 734 S.E.2d 634 (Dec. 4, 2012), in which the court of appeals had held, over a dissent, that the trial court did not abuse its discretion by denying the defendant's MAR without an evidentiary hearing. The MAR asserted that the defendant "did not receive a fair trial as a result of a juror watching irrelevant and prejudicial television publicity during the course of the trial, failing to bring this fact to the attention of the parties or the Court, and arguing vehemently for conviction during jury deliberations." Although the MAR was supported by an affidavit from one of the jurors, the court found that the affidavit "merely contained general allegations and speculation." The defendant's MAR failed to specify which news broadcast the juror in question had seen; the degree of attention the juror had paid to the broadcast; the extent to which the juror received or remembered the broadcast; whether the juror had shared the contents of the news broadcast with other jurors; and the prejudicial effect, if any, of the alleged juror misconduct.

State v. Marino, __ N.C. App. __, 747 S.E.2d 633 (Aug. 20, 2013). The trial court did not err by rejecting the defendant's G.S. 15A-1414 MAR without an evidentiary hearing.

State v. Williams, __ N.C. App. __, 741 S.E.2d 486 (May 7, 2013). (1) The trial court gave the State proper notice when it made a sua sponte oral MAR in open court one day after judgment had been entered. (2) The trial court did not violate the MAR provision stating that any party is entitled to a hearing on a MAR where the State did not request a hearing but merely requested a continuance so that the prosecutor from the previous day could be present in court.

State v. Sullivan, 216 N.C. App. 495 (Nov. 1, 2011). The trial court did not abuse its discretion by denying the defendant's motion for appropriate relief (MAR) made under G.S. 15A-1414 without first holding an evidentiary hearing. Given that the defendant's MAR claims pertained only to mitigating sentencing factors and the defendant had been sentenced in the presumptive range, the trial judge could properly conclude that the MAR was without merit and that the defendant was not entitled to an evidentiary hearing.

State v. Shropshire, 210 N.C. App. 478 (Mar. 15, 2011). The trial court did not err by denying the defendant's post-sentencing motion to withdraw a plea without an evidentiary hearing. The defendant's motion was a motion for appropriate relief. Evidentiary hearings are required on such motions only to resolve issues of fact. In this case, no issue of fact was presented. The defendant's statement that he did not understand the trial court's decision to run the sentences consecutively did not raise any factual issue given that he had already stated that he accepted and understood the plea agreement and its term that "the court will determine whether the sentences will be served concurrently or consecutively." Furthermore, nothing in the record indicates that the defendant's plea was not the product of free and intelligent choice. Rather, it appears that his only reason for moving to withdraw was his dissatisfaction with his sentence.

Miscellaneous Issues

State v. Long, 365 N.C. 5 (Feb. 4. 2011). With one justice taking no part in consideration of the case and with the other members of the court equally divided, the court affirmed, without opinion, a ruling by the trial court on the defendant's motion for appropriate relief. The case was

before the court on writ of certiorari to review the trial court's order. The question presented, as stated in the defendant's appellate brief, was: "Whether the trial court erred in finding in a capitally-charged case that failing to disclose exculpatory SBI reports, testifying falsely as to what evidence was brought to the SBI and failing to preserve irreplaceable biological evidence did not violate due process?"

Procedural and Other Defaults

Beard v. Kindler, 558 U.S. 53 (Dec. 8, 2009). A federal habeas court will not review a claim rejected by a state court if the state court decision rests on an adequate and independent state law ground. The Court held that a state rule is not inadequate for purposes of this analysis just because it is a discretionary rule.

State v. Jackson, 220 N.C. App. 1 (Apr. 17, 2012). The trial court erred by summarily denying the defendant's motion for appropriate relief (MAR) and accompanying discovery motion. In the original proceeding, the trial court denied the defendant's motion to suppress in part because it was not filed with the required affidavit. After he was convicted, the defendant filed a MAR asserting that trial counsel was ineffective in failing to file the required affidavit. The trial court denied the MAR and the court of appeals granted certiorari. The court rejected the State's argument that because the defendant failed to raise the ineffectiveness claim on direct appeal, he was procedurally defaulted from raising it in the MAR. The court reasoned that the record did not provide appellate counsel with sufficient information to establish the prejudice prong of the ineffectiveness test. Specifically, proof of this prong would have required appellate counsel to show that the defendant had standing to challenge the search at issue.

State v. Taylor, 212 N.C. App. 238 (June 7, 2011). The court suggested in dicta that on a motion for appropriate relief (as on appellate review) a defendant may be deemed to have waived errors in jury instructions by failing to raise the issue at trial. However, the court did not decide the issue since it concluded that even when considered on the merits, the defendant's alleged instructional error lacked merit.

Summary Denial

State v. Jackson, 220 N.C. App. 1 (Apr. 17, 2012). The court held that the trial court erred by summarily denying the defendant's MAR alleging ineffective assistance. Because the State did not contest that trial counsel's failure to attach the requisite affidavit to a suppression motion constituted deficient representation, the focus of the court's inquiry was on whether the defendant's MAR forecast adequate evidence of prejudice. On this issue, it concluded that the MAR adequately forecast evidence on each issue relevant to the prejudice analysis: that the defendant had standing to challenge the search and that the affidavit supporting the warrant contained false statements.

Retroactivity

Metrish v. Lancaster, 569 U.S. __, 133 S. Ct. 1781 (May 20, 2013). In this federal habeas case, the Court held that the Michigan Court of Appeals did not unreasonably apply clearly established federal law when it retroactively applied to the defendant's case a state supreme court decision

rejecting the diminished capacity defense for first-degree murder. The defendant was convicted in Michigan state court of first-degree murder. When the crime was committed, Michigan's intermediate appellate court had repeatedly recognized diminished capacity as a defense negating the mens rea required for first-degree murder. However, by the time the defendant's case was tried, the Michigan Supreme Court, in a decision called *Carpenter,* had rejected the defense and he thus was precluded from offering it at trial. In the Michigan Court of Appeals, the defendant unsuccessfully argued that retroactive application of *Carpenter* denied him due process of law. He then sought federal habeas relief. The Court noted that judicial changes to a common law doctrine of criminal law violate the principle of fair warning and thus must not be given retroactive effect only where the change "is unexpected and indefensible by reference to the law which had been expressed prior to the conduct in issue." Slip Op. at 7 (quotation omitted). Judged against this standard, the Court held that the Michigan court's rejection of the defendant's due process claim was not an unreasonable application of federal law.

Chaidez v. United States, 568 U.S. __, 133 S. Ct. 1103 (Feb. 20, 2013). *Padilla v. Kentucky*, 559 U. S. 356 (2010) (criminal defense attorneys must inform non-citizen clients of the risks of deportation arising from guilty pleas), does not apply retroactively to cases that became final before *Padilla* was decided. Applying the *Teague* retroactivity analysis, the Court held that *Padilla* announced a new rule. The defendant did not assert that *Padilla* fell within either of the *Teague* test's exceptions to the anti-retroactivity rule.

State v. Alshaif, 219 N.C. App. 162 (Feb. 21, 2012). The court held that *Padilla v. Kentucky*, 559 U.S. 356 (Mar. 31, 2010), dealing with ineffective assistance of counsel in connection with advice regarding the immigration consequences of a plea, did not apply retroactively to the defendant's motion for appropriate relief. Applying *Teague* retroactivity analysis, the court held that *Padilla* announced a new procedural rule but that the rule was not a watershed one. [Author's note: for the law on retroactivity and the *Teague* test, see my paper here]

§ 1983 Liability

Brady Violations

Connick v. Thompson, 563 U.S. __, 131 S. Ct. 1350 (Mar. 29, 2011). A district attorney's office may not be held liable under 42 U.S.C. § 1983 for failure to train based on a single *Brady* violation. The Orleans Parish District Attorney's Office conceded that, in prosecuting the defendant for attempted armed robbery, prosecutors failed to disclose evidence that should have been turned over under *Brady*. The defendant was convicted. Because of that conviction, the defendant chose not to testify in his own defense in his later murder trial. He was again convicted and spent 18 years in prison. Shortly before his scheduled execution, his investigator discovered the undisclosed evidence from his armed robbery trial. The reviewing court determined that the evidence was exculpatory and both convictions were vacated. The defendant then sued the district attorney's office for damages under § 1983, alleging that the district attorney failed to train prosecutors adequately about their duty to produce exculpatory evidence and that the lack of training had caused the nondisclosure at issue. The jury awarded the defendant $14 million, and Fifth Circuit affirmed. Reversing, the Court, in an opinion authored by Justice Thomas, clarified that the failure-to-train claim required the defendant to prove both that (1) the district attorney, the policymaker for the district attorney's office, was deliberately indifferent to the

need to train prosecutors about their *Brady* disclosure obligation with respect to the type of evidence at issue and (2) the lack of training actually caused the *Brady* violation at issue. The Court determined that the defendant failed to prove that the district attorney was on actual or constructive notice of, and therefore deliberately indifferent to, a need for more or different *Brady* training. The Court noted that a pattern of similar constitutional violations by untrained employees is "ordinarily necessary" to demonstrate deliberate indifference for purposes of failure to train. Here, however, no such pattern existed; the Court declined to adopt a theory of "single-incident liability." Justice Scalia concurred, joined by Justice Alito, writing separately only to address several issues raised by the dissent. Justice Ginsburg dissented, joined by Justices Breyer, Sotomayor, and Kagan. For another discussion of this opinion, see the blog post here.

Jails and Corrections

Brown v. Plata, 563 U.S. __, 131 S. Ct. 1910 (May 23, 2011). In a 5-to-4 decision, the Court affirmed a remedial order issued by a three-judge court directing California to remedy ongoing constitutional violations involving prisoners with serious mental disorders and medical conditions primarily caused by prison overcrowding. The order below leaves the choice of means to reduce overcrowding to the discretion of state officials. But absent compliance through new construction, out-of-state transfers, or other means—or modification of the order upon a further showing by the State—California will be required to release some number of prisoners before their full sentences have been served. The Court held that the Prison Litigation Reform Act of 1995 authorizes the relief afforded and that the court-mandated population limit is necessary to remedy the violation of prisoners' constitutional rights.

Wilkins v. Gaddy, 559 U.S. 34 (Feb. 22, 2010). Trial court erred by dismissing the prisoner's excessive force claim on grounds that his injuries were de minimis. In an excessive force claim, the core inquiry is not whether a certain quantum of injury was sustained but rather whether the force was applied in a good-faith effort to maintain or restore discipline, or maliciously and sadistically to cause harm.

Judicial Administration

Contempt

State v. Phillips, __ N.C. App. __, 750 S.E.2d 43 (Nov. 5, 2013). A criminal contempt order was fatally deficient where it failed to indicate that the standard of proof was proof beyond a reasonable doubt.

State v. Okwara, __ N.C. App. __, 733 S.E.2d 576 (Oct. 16, 2012). For reasons discussed in the opinion, the court affirmed the trial judge's order finding defense counsel in contempt of court for willfully disobeying a court order regarding permissible inquiry under the Rape Shield statute.

Due Process and Recusal

Caperton v. Massey Coal Co., Inc., 556 U.S. 868 (June 8, 2009). A violation of due process occurred when West Virginia Supreme Court justice Brent Benjamin denied a recusal motion. The Supreme Court of West Virginia reversed a trial court judgment which had entered a jury verdict of $50 million against A.T. Massey Coal Co., Inc. Five justices heard the case, and the vote was 3 to 2. The basis for the recusal motion was that Justice Benjamin had received campaign contributions in an extraordinary amount from, and through the efforts of, Don Blankenship, Massey's board chairman and principal officer. After the initial verdict in the case, but before the appeal, West Virginia held its 2004 judicial elections. Benjamin was running against an incumbent justice. In addition to contributing the $1,000 statutory maximum to Benjamin's campaign committee, Blankenship donated almost $2.5 million to a political organization opposed to the incumbent and supporting Benjamin. Additionally, Blankenship spent just over $500,000 on independent expenditures—direct mailings and letters soliciting donations as well as television and newspaper advertisements supporting Benjamin. Blankenship's $3 million in contributions were more than the total amount spent by all other Benjamin supporters and three times the amount spent by Benjamin's own committee. Benjamin won, in a close election. In October 2005, before Massey filed its petition for appeal to the West Virginia Supreme Court, the plaintiffs in the underlying action moved to disqualify now-Justice Benjamin based on the conflict caused by Blankenship's campaign involvement. Justice Benjamin denied the motion. In November 2007, the West Virginia Supreme Court reversed the $50 million verdict against Massey. It did so again on rehearing, after another recusal motion was denied. The U.S. Supreme Court held that "Blankenship's significant and disproportionate influence—coupled with the temporal relationship between the election and the pending case—offer a possible temptation to the average . . . judge to . . . lead him not to hold the balance nice, clear, and true" and that "[o]n these extreme facts, the probability of actual bias rises to an unconstitutional level."

Immunity

Rehberg v. Paulk, 566 U.S. __, 132 S. Ct. 1497 (Apr. 2, 2012). A "complaining witness" in a grand jury proceeding is entitled to the same immunity in an action under 42 U.S.C. §1983 as a witness who testifies at trial.

One Trial Judge Overruling Another

State v. Macon, __ N.C. App. __, 741 S.E.2d 688 (May 7, 2013). The trial court did not err when during a retrial in a DWI case it instructed the jury that it could consider the defendant's refusal to take a breath test as evidence of her guilt even though during the first trial a different trial judge had ruled that the instruction was not supported by the evidence. Citing *State v. Harris*, 198 N.C. App. 371 (2009), the court held that neither collateral estoppel nor the rule prohibiting one superior court judge from overruling another applies to legal rulings in a retrial following a mistrial. It concluded that on retrial de novo, the second judge was not bound by rulings made during the first trial. Moreover, it concluded, collateral estoppel applies only to an issue of ultimate fact determined by a final judgment. Here, the first judge's ruling involved a question of law, not fact, and there was no final judgment because of the mistrial.

State v. Harris, 198 N.C. App. 371 (July 21, 2009). When a mistrial was declared, the judge retrying the case was not bound by rulings made by the judge who presided over the prior trial. Here, the rulings pertained to the admissibility of 404(b) evidence and complete recordation of the trial.

Out of Session, Out of Term, etc.

State v. Collins, __ N.C. App. __, 761 S.E.2d 914 (June 17, 2014). The court held that the trial court had jurisdiction to enter an order denying the defendant's request for post-conviction DNA testing, rejecting the defendant's argument that the order was entered out of session and without his consent. Harmonizing *State v. Boone*, 310 N.C. 284 (1984), *State v. Trent*, 359 N.C. 583 (2005), and *Capital Outdoor Adver., Inc. v. City of Raleigh*, 337 N.C. 150 (1994), the court held:

> The . . . rule is that the superior court is divested of jurisdiction when it issues an out-of-term order substantially affecting the rights of the parties unless that order is issued with the consent of the parties. If the court issues an order out of session, however, the court is not divested of jurisdiction as long as either section 7A-47.1 or Rule 6(c) is applicable.

Although Rule 6(c) had no bearing on this criminal case, G.S. 7A-47.1 applied and validated the trial court's out-of-session order.

Preemption

Arizona v. United States, 567 U.S. __, 132 S. Ct. 2492 (June 25, 2012). The Court held that federal law preempted three of four provisions of Arizona's immigration statute. Four provisions of the Arizona law were at issue. One section made failure to comply with federal alien registration requirements a state misdemeanor. A second section made it a misdemeanor for an unauthorized alien to seek or engage in work in Arizona. A third section authorized officers to arrest without a warrant a person "the officer has probable cause to believe . . . has committed any public offense that makes the person removable from the United States." A fourth section

provided that officers who conduct a stop, detention, or arrest must in some circumstances make efforts to verify the person's immigration status with the Federal Government. The Court held that the first three provisions were preempted by federal law but that it was improper to enjoin the fourth provision "before the state courts had an opportunity to construe it and without some showing that enforcement of the provision in fact conflicts with federal immigration law and its objectives."

Pretrial Release Policies

State v. Harrison, 217 N.C. App. 363 (Dec. 6, 2011). A district court judge did not err by failing to follow an administrative order issued by the senior resident superior court judge when that order was not issued in conformity with G.S. 15A-535(a) (issuance of policies on pretrial release). The administrative order provided, in part, that "the obligations of a bondsman or other surety pursuant to any appearance bond for pretrial release are, and shall be, terminated immediately upon the entry of the State and a Defendant into a formal Deferred Prosecution Agreement." The district court judge was not required to follow the administrative order because the superior court judge issued it without consulting with the chief district court judge or other district court judges within the district.

Recusal

State v. Oakes, 209 N.C. App. 18 (Jan. 4, 2011). The defendant failed to demonstrate grounds for recusal. The defendant argued that recusal was warranted based on the trial judge's comments at various hearings and on the fact that "the trial court was often dismissive of defense counsel's efforts and made a number of rulings unfavorable to the Defendant." The court cautioned the trial court with respect to the following statement made at trial: "The other thing I want to do is put on the record that I leave to the appellate courts whether or not any recommendation as to discipline should be made to any of the responses or conduct of the attorneys based upon the record in this case as to whether any of the Rules of Practice or Rules of Conduct have been violated." The court concluded that although it was unclear what issue the trial court meant to address with this statement, "it is the trial court's responsibility initially to pass on these concerns if the court has them, especially in view of the fact that the trial court is in a better position than a Court of the Appellate Division both to observe and control the trial proceedings. . . . It is not for the trial court to abdicate its role in managing the conduct of trial to an appellate court whose task is to review the cold record" (citation omitted).

Removal of DA

In re Cline, __ N.C. App. __, 749 S.E.2d 91 (Oct. 1, 2013). (1) In a proceeding for removal of an elected district attorney (DA) from office, the trial court did not err by denying the DA's motion to continue where the statute, G.S. 7A-66, mandated that the matter be heard within 30 days. (2) In the absence of a statutory or rule-based provision for discovery in proceedings under the statute, the DA did not have a right to discovery. (3) Where the trial court put the burden of proof in the removal proceeding on the party who had initiated the action by clear, cogent and convincing evidence, no error occurred. (4) The court held that the trial court's rulings in the removal proceeding did not violate the DA's right to due process, noting that the DA had no

right to discovery and that the trial court properly allocated the burden of proof. (5) The standard in the relevant provision of the removal statute of conduct prejudicial to the administration of justice which brings the office into disrepute is not unconstitutionally vague. (6) No violation of the prosecutor's First Amendment free speech rights occurred where the DA's removal was based on statements she made about a judge. The statements were made with actual malice and thus were not protected speech by the First Amendment. (7) Qualified immunity does not insulate the DA from removal based on statements made with actual malice. (8) Where the matter was heard without a jury, it is presumed that the trial court considered only admissible evidence, and the trial court did not err in admitting lay testimony.

Sanctioning Lawyers

In Re Appeal from Order Sanctioning Benjamin Small, 201 N.C. App. 390 (Dec. 8, 2009). The trial court had inherent authority to order an attorney to pay $500 as a sanction for filing motions in violation of court rules, that were vexatious and without merit, and that were for the improper purpose of harassing the prosecutor. The attorney received proper notice that the sanctions might be imposed and of the alleged grounds for their imposition, as well as an opportunity to be heard.

Sealing Search Warrants

In Re Baker, 220 N.C. App. 108 (Apr. 17, 2012). Where search warrants were unsealed in accordance with procedures set forth in a Senior Resident Superior Court Judge's administrative order and where the State failed to make a timely motion to extend the period for which the documents were sealed, the trial judge did not err by unsealing the documents. At least 13 search warrants were issued in an investigation. As each was issued, the State moved to have the warrant and return sealed. Various judges granted these motions, ordering the warrants and returns sealed "until further order of the Court." However, an administrative order in place at the time provided that an order directing that a warrant or other document be sealed "shall expire in 30 days unless a different expiration date is specified in the order." Subsequently, media organizations made a made a public records request for search warrants more than thirty days old and the State filed motions to extend the orders sealing the documents. A trial judge ordered that search warrants sealed for more than thirty days at the time of the request be unsealed. The State appealed. The court began by rejecting the State's argument that the trial court erred by failing to give effect to the language in the original orders that the records remain sealed "until further order of the Court." The court noted the validity of the administrative order and the fact that the trial judge acted in compliance with it. The court also rejected the State's argument that the trial judge erred by having the previously sealed documents delivered without any motion, hearing, or notice to the State and without findings of fact. The court noted that the administrative order afforded an opportunity and corresponding procedure for the trial court to balance the right of access to records against the governmental interests sought to be protected by the prior orders. Specifically, the State could make a motion to extend the orders. Here, however, the State failed to make a timely motion to extend the orders. Therefore, the court concluded, the administrative order did not require the trial court to balance the right to access against the governmental interests in protecting against premature release. The court further found that the State had sufficient notice given that all relevant officials were aware of the administrative order.

In re Cooper, 200 N.C. App. 180 (Oct. 6, 2009). Affirming the trial court's order denying the plaintiffs' motion to unseal three returned search warrants and related papers. Holding that although returned search warrants are public records, the trial court did not abuse its discretion by sealing the documents where the release of information would undermine the ongoing investigation, and that sealing for a limited time period was necessary to ensure the interests of maintaining the State's right to prosecute a defendant, protecting a defendant's right to a fair trial, and preserving the integrity of an investigation. The court also rejected the plaintiffs' argument that the orders violated North Carolina common law on the public's right of access to court records and proceedings, concluding that the public records law had supplanted any common law right and that even if the common law right existed no abuse of discretion occurred. The court rejected the plaintiffs' First Amendment argument, concluding that because the documents were not historically open to the press and public, the plaintiffs did not have a qualified First Amendment right to access. The court rejected the plaintiff's argument that the sealing orders violated the open courts provision of Article I, § 18 of the State Constitution. Although the court recognized a qualified right of access to the documents under the open courts provision, it found that right was outweighed by compelling governmental interests. Finally, the court concluded that the trial court's findings were sufficiently specific, that any alternatives were not feasible, and that by limiting the sealing orders to 30 days the trial court used the least restrictive means of keeping the information confidential.

Closing the Courtroom

Presley v. Georgia, 558 U.S. 209 (Jan. 19, 2010). The Sixth Amendment right to a public trial extends to the voir dire of prospective jurors. Trial courts are required to consider alternatives to closure even when they are not offered by the parties.

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In a child sexual abuse case, the trial court did not violate the defendant's right to a public trial by closing the courtroom for part of the victim's testimony. The trial court made the requisite inquiries under *Waller* and made appropriate findings of fact supporting closure.

State v. Godley, __ N.C. App. __, 760 S.E.2d. 285 (July 1, 2014). On appeal after a remand for the trial court to conduct a hearing and make appropriate findings of fact and conclusions of law regarding a closure of the courtroom during testimony by a child sexual abuse victim, the court held that the closure of the courtroom was proper and that the defendant's constitutional right to a public trial was not violated.

State v. Williams, __ N.C. App. __, 754 S.E.2d 418 (Jan. 21, 2014). In a sexual exploitation of a minor case, the trial court did not violate the defendant's constitutional right to a public trial by closing the courtroom during the presentation of the sexual images at issue.

State v. Rollins, __ N.C. App. __, 752 S.E.2d 230 (Dec. 17, 2013). The trial court did not err on remand when it conducted a retrospective hearing to determine whether closure of the courtroom during the victim's testimony was proper under *Waller v. Georgia* and decided that question in the affirmative. The court rejected the defendant's argument that the trial court's findings of fact

had to be based solely on evidence presented prior to the State's motion for closure; it also determined that the evidence supported the trial court's factual findings.

State v. Comeaux, __ N.C. App. __, 741 S.E.2d 346 (Dec. 31, 2012). The trial court did not violate the defendant's constitutional right to a public trial under *Waller v. Georgia* by closing the courtroom during a sexual abuse victim's testimony where the State advanced an overriding interest that was likely to be prejudiced; the closure of the courtroom was no broader than necessary to protect the overriding interest; the trial court considered reasonable alternatives to closing the courtroom; and the trial court made findings adequate to support the closure.

State v. Rollins, 221 N.C. App. 572 (July 17, 2012). The trial court violated the defendant's right to a public trial by temporarily closing the courtroom while the victim testified concerning an alleged rape perpetrated by defendant without engaging in the four-part test set forth in *Waller v. Georgia*, 467 U.S. 39 (1984). The court held that while the trial court need not make exhaustive findings of fact, it must make findings sufficient for the appellate court to review the propriety of the trial court's decision to close the proceedings. The court cautioned trial courts to avoid making "broad and general" findings that impede appellate review. The court remanded for a hearing on the propriety of the closure:

> The trial court must engage in the four-part *Waller* test and make the appropriate findings of fact regarding the necessity of closure during [the victim's] testimony in an order. If the trial court determines that the trial should not have been closed during [the victim's] testimony, then defendant is entitled to a new trial. If the trial court determines that the trial was properly closed during [the victim's] testimony on remand, then defendant may seek review of the trial court's order by means of an appeal . . . .

State v. Register, 206 N.C. App. 629 (Sept. 7, 2010). In a child sexual abuse case, the trial court did not err by excluding spectators from the courtroom during the victim's testimony. The court excluded all spectators except the victim's mother and stepfather, investigators for each side, and a high school class. Because the defendant did not argue that he was denied a public trial, the requirements of *Waller v. Georgia*, 467 U.S. 39 (1984), do not apply. The defendant waived any constitutional issues by failing to raise them at trial. The trial court's action was permissible under G.S. 15-166 (in sexual assault cases the trial judge may, during the victim's testimony, exclude from the courtroom everyone except the officers of the court, the defendant, and those engaged in the trial of the case). Furthermore, the court noted, G.S. 15A-1034(a) gives the trial court authority to restrict access to the courtroom to ensure orderliness in the proceedings. The State was concerned about the child victim being confronted with "a hostile environment with [defendant's] family sitting behind him;" the trial court was concerned about the potential for outbursts or inappropriate reactions by supporters of both the defendant and the victim. Although it was unusual to allow the high school class to stay, this decision was not unreasonable given that the issue was reactions by family members.