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Criminal Case Update

Winter 2017 Criminal Law Webinar
(includes selected cases decided between June 9, 2017 and November 21, 2017)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Warrantless Stops

Reversing court of appeals, no Rodriguez violation where officer lawfully stopped the defendant and then developed reasonable suspicion of drug activity; stop was not unlawfully extended.

State v. Bullock, ___ N.C. ___, 805 S.E.2d 671 (Nov. 3, 2017). On an appeal from a divided panel of the Court of Appeals, ___ N.C. App. ___, 785 S.E.2d 746 (2016), the court reversed, concluding that the stop at issue was not unduly prolonged. An officer puller over the defendant for several traffic violations. During the traffic stop that ensued, officers discovered heroin inside a bag in the car. The defendant moved to suppress the evidence, arguing that the search was unduly prolonged under *Rodriguez.* The trial court denied the motion and the Court of Appeals reversed, concluding that the stop had been unduly prolonged. The Supreme Court reversed. After initiating the stop, the officer asked the defendant, the vehicle's sole occupant, for his license and registration. The defendant's hand trembled as he provided his license. Although the car was a rental vehicle, the defendant was not listed as a driver on the rental agreement. The officer noticed that the defendant had two cell phones, a fact he associated, based on experience, with those transporting drugs. The defendant was stopped on I-85, a major drug trafficking thoroughfare. When the officer asked the defendant where he was going, the defendant said he was going to his girlfriend's house on Century Oaks Drive and that he had missed his exit. The officer knew however that the defendant was well past the exit for that location, having passed three exits that would have taken him there. The defendant said that he recently moved to North Carolina. The officer asked the defendant to step out of the vehicle and sit in the patrol car, telling him that he would receive a warning, not a ticket. At this point the officer frisked the defendant, finding $372 in cash. The defendant sat in the patrol car while the officer ran the defendant's information through law enforcement databases, and the two continued to talk. The defendant gave contradictory statements about his girlfriend. Although the defendant made eye contact with the officer when answering certain questions, he looked away when asked about his girlfriend and where he was traveling. The database checks revealed that the defendant was issued a driver's license in 2000 and that he had a criminal history in North Carolina starting in 2001, facts contradicting his earlier claim to have just moved to the state. The officer asked the defendant for permission to search the vehicle. The defendant agreed to let the officer search the vehicle but declined to allow a search of a bag and two hoodies. When the officer found the bag and hoodies in the trunk, the defendant quickly objected that the bag was not his, contradicting his earlier statement, and said he did not want it searched. The officer put the bag on the ground and a police dog alerted to it. Officers opened the bag and found a large amount of heroin. The defendant did not challenge the validity of the initial stop. The court began by noting during a lawful stop, an officer can ask the driver to exit the vehicle. Next, it held that the frisk was lawful for two reasons. First, frisking the defendant before putting them in the patrol car enhanced the officer safety. And second, where, as here, the frisk lasted only 8-9 seconds it did not measurably prolong stop so as to require reasonable suspicion. The court went on to find that asking the defendant to sit in the patrol car did not unlawfully extend the stop. The officer was required to check three databases before the stop could be finished and it was not prolonged by having the defendant in the patrol car while this was done. This action took a few minutes to complete and while it was being done, the officer was free to talk with the defendant "at least up until the moment that all three database checks had been completed." The court went on to conclude that the conversation the two had while the database checks were running provided reasonable suspicion to prolong the stop. It noted that I-85 is a major drug trafficking corridor, the defendant was nervous and had two cell phones, the rental car

was in someone else's name, the defendant gave an illogical account of where he was going, and cash was discovered during the frisk. All of this provided reasonable suspicion of drug activity that justified prolonging the stop shortly after the defendant entered the patrol car. There, as he continued his conversation with the officer, he gave inconsistent statements about his girlfriend and the database check revealed that the defendant had not been truthful about a recent move to North Carolina. This, combined with the defendant's broken eye contact, allowed the officer to extend the stop for purposes of the dog sniff.

After justification for initial seizure was resolved, further detention and request for consent to search while officers possessed defendant's identification was an unlawful extension; denial of motion to suppress reversed

State v. Parker, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 21, 2017). Because the trial court's findings of fact do not support its conclusion that the defendant was legally seized at the time he consented to a search of his person, the court reversed the trial court's order denying the defendant's motion to suppress contraband found on his person. Officers were conducting surveillance on a known drug house. They noticed the defendant leave the residence in a truck and return 20 minutes later. He parked his truck in the driveway and walked toward a woman in the driveway of a nearby residence. The two began yelling at each other. Thinking the confrontation was going to escalate, the officers got out of their vehicle and separated the two. One officer asked the defendant for his identification. The officer checked the defendant's record, verifying that the defendant had no pending charges. Without returning the defendant's identification, the officer then asked the defendant if he had any narcotics on him and the defendant replied that he did not. At the officer's request, the defendant consented to a search of his person and vehicle. Drugs were found in his pants pocket. On appeal, the defendant argued that when the officer failed to return his identification after finding no outstanding warrants and after the initial reason for the detention was satisfied, the seizure became unlawful and the defendant's consent was not voluntary. The court agreed. It noted that the officer failed to return the defendant's identification before pursuing an inquiry into possession of drugs. It found that the trial court's order failed to provide findings of fact which would give rise to a reasonable suspicion that the defendant was otherwise subject to detention. Absent a reasonable suspicion to justify further delay, retaining the defendant's driver's license beyond the point of satisfying the initial purpose of the detention—deescalating the conflict, checking the defendant's identification, and verifying that he had no outstanding warrants—was unreasonable. Thus, the defendant's consent to search his person, given during the period of unreasonable detention, was not voluntary.

Reversing court of appeals, state supreme court holds that stop of defendant's vehicle was supported by reasonable suspicion when defendant's vehicle quickly left the parking lot of an apartment complex known as an open air drug market after a man looked at law enforcement officers and then yelled to the defendant's vehicle

State v. Goins, ___ N.C. ___, 804 S.E.2d 449 (Sept. 29, 2017). For the reasons stated in the dissenting opinion below, the court reversed the decision of the Court of Appeals in *State v. Goins*, ___ N.C. App. ___, 789 S.E.2d 466 (July 5, 2016). In that case, the Court of Appeals held, over a dissent, that a stop of the defendant's vehicle was not supported by reasonable suspicion. Law enforcement officers in a marked patrol car were patrolling an apartment complex in a high-crime area where there had been reports of drug activity. They saw the defendant's vehicle drive slowly through the parking lot. A man standing outside of one of the buildings looked toward the law enforcement vehicle as the defendant's

vehicle approached him. The man then shouted something toward the defendant's car and backed away into the apartment complex. The defendant's vehicle sped up and pulled out of the parking lot. The officers followed and stopped the defendant's vehicle, believing that the defendant and the man outside the apartment building were about to engage in a drug transaction. During the stop, the officers discovered that the defendant had a firearm, marijuana, and drug paraphernalia. The court of appeals majority noted that the defendant's mere presence an area known for criminal drug activity could not, standing alone, provide the necessary reasonable suspicion for the stop. And while headlong flight from law enforcement officers *can* support a finding of reasonable suspicion, the majority determined that the evidence in this case did not establish headlong flight. Among other things, there was no evidence that the defendant saw the police car before leaving the premises and he did not break any traffic laws while leaving. Although officers suspected that the defendant might be approaching a man at the premises to conduct a drug transaction, they did not see the two engage in suspicious activity. The majority reasoned that the officers' suspicion that the defendant was fleeing from the scene, without more, did not justify the stop. The dissenting judge concluded that the officers had reasonable suspicion for the stop. The dissenting judge criticized the majority for focusing on a "fictional distinction" between suspected versus actual flight. The dissenting judge concluded: considering the past history of drug activity at the premises, the time, place, manner, and unbroken sequence of observed events, the defendant's actions upon being warned of the police presence, and the totality of the circumstances, the trial court correctly found that the officers had reasonable suspicion for the stop.

Reversing court of appeals, state supreme court holds that officer had reasonable suspicion to stop defendant's vehicle after seeing it abruptly accelerate, make a sharp turn, and fishtail

State v. Johnson, ___ N.C. ___, 803 S.E.2d 137 (Aug. 18, 2017). The state supreme court reversed the decision below, *State v. James Johnson*, ___ N.C. App. ___, 784 S.E.2d 633 (April 5, 2016), which had held that because a police officer lacked reasonable suspicion for a traffic stop in this DWI case, the trial court erred by denying the defendant's motion to suppress. The defendant was stopped at a red light on a snowy evening. When the light turned green, the officer saw the defendant's truck abruptly accelerate, turn sharply left, and fishtail. The officer pulled the defendant over for driving at an unsafe speed given the road conditions. The court held that the officer had reasonable suspicion to stop the defendant's vehicle. It noted that G.S. 20-141(a) provides that "[n]o person shall drive a vehicle on a highway or in a public vehicular area at a speed greater than is reasonable and prudent under the conditions then existing." The court concluded:

> All of these facts show that it was reasonable for [the] Officer . . . to believe that defendant's truck had fishtailed, and that defendant had lost control of his truck, because of defendant's abrupt acceleration while turning in the snow. It is common knowledge that drivers must drive more slowly when it is snowing, because it is easier to lose control of a vehicle on snowy roads than on clear ones. And any time that a driver loses control of his vehicle, he is in danger of damaging that vehicle or other vehicles, and of injuring himself or others. So, under the totality of these circumstances, it was reasonable for [the] Officer . . . to believe that defendant had violated [G.S.] 20-141(a) by driving too quickly given the conditions of the road.

The Court further noted that no actual traffic violation need have occurred for a stop to occur. It clarified: "To meet the reasonable suspicion standard, it is enough for the officer to *reasonably believe* that a driver has violated the law."

Tip did not have sufficient indicia of reliability to provide reasonable suspicion for vehicle stop

State v. Walker, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). At approximately 5 pm dispatch notified a trooper on routine patrol that an informant-driver reported that another driver was driving while intoxicated. The informant reported that the driver was driving from the Hubert area towards Jacksonville, traveling about 80 to 100 mph while drinking a beer. He also claimed that the driver was driving "very erratically" and almost ran him off the road "a few times." While responding to the dispatch, the informant flagged down the trooper and said that the vehicle in question had just passed through the intersection on US 258, heading towards Richlands. The trooper headed in that direction and stopped the defendant's vehicle within 1/10 of a mile from the intersection. The defendant was arrested and charged with DWI and careless and reckless driving. He was convicted in district court and appealed to superior court, where he filed a motion to suppress. The superior court determined that the trooper lacked reasonable suspicion to make the stop and granted the motion to suppress. The court of appeals affirmed. Although the informant was not anonymous, because the defendant's vehicle was out of sight, the informant was unable to specifically point out the defendant's vehicle to the trooper. The trooper did not observe the vehicle being driven in a suspicious or erratic fashion. Additionally, it is unknown whether the trooper had the vehicle's license plate number before or after the stop and whether the trooper had any vehicle description besides a "gray Ford passenger vehicle." The court distinguished prior case law involving tips that provided enough information so that there was no doubt as to which particular vehicle was being reported. Here, the informant's ambiguous description did not specify a particular vehicle. Additionally, no other circumstances enabled the trooper to further corroborate the tip; the trooper did not witness the vehicle behaving as described by the informant.

Over a dissent, court of appeals holds that officer lacked reasonable suspicion for stop of vehicle in which defendant was a rear-seat passenger

State v. Nicholson, ___ N.C. App. ___, 805 S.E.2d 648 (Sept. 19, 2017), *temporary stay allowed*, ___ N.C. ___, 803 S.E.2d 818 (Sept. 22, 2017). At the suppression hearing the officer testified that at the time of the seizure, he had no evidence of any criminal activity that he could identify. The only specific fact the officer identified was that the defendant was pulling a toboggan down over his head. The State pointed to several factors in support of its argument that reasonable suspicion existed, including the fact that the front passenger seat was empty and the defendant was sitting in the back, directly behind the driver; the vehicle was stationary in the middle of the road; the officer knew that the two had just been in a heated argument; the driver provided inconsistent answers when asked whether everything was okay; and the stop occurred in the early morning hours. However, the officer had already questioned the two individuals twice and released the driver so he could go to work after the officer assessed the situation. Moreover, when asked why he seized the defendant and inquired whether he was armed, the officer stated it was "just a common thing" that he asked everybody who is out in the early morning hours. The court noted that such a basis for seizure would make any individual in the area subject to seizure. Taken together the facts did not provide reasonable suspicion.

Reasonable suspicion supported the late night stop of defendant's vehicle in area that had experienced several break-ins

State v. Sauls, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). At the time of the stop it was very late at night; the defendant's vehicle was idling in front of a closed business; the business and surrounding properties had experienced several break-ins; and the defendant pulled away when the officer approached the car. Considered together, this evidence provides an objective justification for stopping the defendant.

Warrantless Arrests

Trial court did not err by concluding that law enforcement officers had probable cause to arrest the defendant for armed robbery and murder

State v. Messer, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). Among other things, the defendant placed a telephone call using the victim's cell phone about 20 minutes before the victim's death was reported to law enforcement; the defendant spent the previous night at the victim's residence; the victim's son had last seen his father with the defendant; the victim's Smith and Wesson revolver was missing and a Smith and Wesson revolver was found near the victim's body; and the defendant was seen on the day of the victim's death driving an automobile matching the description of one missing from the victim's used car lot.

Probable cause existed to believe defendant committed breaking or entering and motion to suppress illegal arrest was properly denied

State v. Wilkes, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). In this murder case, officers had probable cause to arrest the defendant. Thus, the trial court did not err by denying the defendant's motion to suppress incriminating statements made by the defendant after arrest. After law enforcement discovered a woman's body inside and abandoned, burned car, officers arrested the defendant. During question after arrest, the defendant implicated himself in the woman's murder. He unsuccessfully moved to suppress those incriminating statements and challenged the trial court's denial of his suppression motion on appeal. At the time the officers arrested the defendant, they had already visited the victim's home and found a knife on the chair near a window with the cut screen. When they questioned the victim's boyfriend, he admitted that he was with the defendant at the victim's home on the night of the murder and that, after the victim locked the two men out of her house, the boyfriend cut the screen, entered the house through the window, unlocked the door from the inside, and let the defendant in. These facts and circumstances constituted sufficient, reasonably trustworthy information from which a reasonable officer could believe that the defendant had committed a breaking and entering. Thus, regardless of whether the officers had probable cause to arrest the defendant for murder, they had probable cause to arrest the defendant for that lesser crime.

Warrantless Searches

G.S. 20-16.2(b) (allowing blood draw from an unconscious suspect in an implied consent case) was unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment

State v. Romano, ___ N.C. ___, 800 S.E.2d 644 (June 9, 2017). The court held, in this DWI case, that in light of the U.S. Supreme Court's decisions in *Birchfield v. North Dakota* (search incident to arrest

doctrine does not justify the warrantless taking of a blood sample; as to the argument that the blood tests at issue were justified based on the driver's legally implied consent to submit to them, the Court concluded: "motorists cannot be deemed to have consented to submit to a blood test on pain of committing a criminal offense"), and *Missouri v. McNeely* (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; exigency must be determined on a case-by-case basis), G.S. 20-16.2(b) (allowing blood draw from an unconscious person) was unconstitutional as applied to defendant because it permitted a warrantless search that violates the Fourth Amendment. An officer, relying on G.S. 20-16.2(b), took possession of the defendant's blood from a treating nurse while the defendant was unconscious without first obtaining a warrant. The court rejected the State's implied consent argument: that because the case involved an implied consent offense, by driving on the road, the defendant consented to having his blood drawn for a blood test and never withdrew this statutorily implied consent before the blood draw. It continued:

> Here there is no dispute that the officer did not get a warrant and that there were no exigent circumstances. Regarding consent, the State's argument was based solely on N.C.G.S. § 20-16.2(b) as a per se exception to the warrant requirement. To be sure, the implied-consent statute, as well as a person's decision to drive on public roads, are factors to consider when analyzing whether a suspect has consented to a blood draw, but the statute alone does not create a per se exception to the warrant requirement. The State did not present any other evidence of consent or argue that under the totality of the circumstances defendant consented to a blood draw. Therefore, the State did not carry its burden of proving voluntary consent. As such, the trial court correctly suppressed the blood evidence and any subsequent testing of the blood that was obtained without a warrant.

Protective sweep was proper, but plain view doctrine did not justify seizure of shotgun when its incriminating nature was not immediately apparent

State v. Smith, ___ N.C. App. ___, 804 S.E.2d 235 (Aug. 15, 2017), *temporary stay allowed*, ___ N.C. ___, 803 S.E.2d 164 (Aug. 28, 2017). In this felon in possession of a firearm case, the trial court erred by denying the defendant's motion to suppress. Three officers entered the defendant's apartment to execute arrest warrants issued for misdemeanors. While two officers made the in-home arrest, the third conducted a protective sweep of the defendant's apartment, leading to the discovery and seizure of the stolen shotgun. The shotgun was leaning against the wall in the entry of the defendant's bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. The officer walked past the shotgun when checking the defendant's bedroom to confirm that no other occupants were present. After completing the sweep, the officer secured the shotgun "to have it in . . . control and also check to see if it was stolen." The officer located the serial number on the shotgun and called it into the police department, which reported that the gun was stolen. The officer then seized the weapon. The defendant moved to suppress the shotgun, arguing that the officer lacked authority to conduct a protective sweep and that the seizure could not be justified under the plain view doctrine. The trial court denied the defendant's motion to suppress. (1) The court began by finding that the protective sweep was proper. Specifically, the officer was authorized to conduct a protective sweep, without reasonable suspicion, because the rooms in the apartment—including the bedroom where the shotgun was found--were areas immediately adjoining the place of arrest from which an attack could be

immediately launched. The court rejected the defendant's argument that the bedroom area was not immediately adjoining the place of arrest. The defendant was in the living room when the officers placed him in handcuffs. The third officer immediately conducted the protective sweep of the remaining rooms for the sole purpose of determining whether any occupants were present who could launch an attack on the officers. Every room in the apartment was connected by a short hallway and the apartment was small enough that a person hiding in any area outside of the living room could have rushed into that room without warning. Based on the size and layout of the apartment, the trial court properly concluded that all of the rooms, including the bedroom where the shotgun was found, were part of the space immediately adjoining the place of arrest and from which an attack could have been immediately launched. (2) Over a dissent, the court held that the plain view doctrine could not justify seizure of the shotgun. The defendant argued that the seizure could not be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. He also argued that the officer conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number. The court concluded that observing the shotgun in plain view did not provide the officer with authority to seize the weapon permanently where the State's evidence failed to establish that, based on the objective facts known to him at the time, the officer had probable cause to believe that the weapon was contraband or evidence of a crime. The officers were executing arrest warrants for misdemeanor offenses and were not aware that the defendant was a convicted felon. Before the seizure, the officer asked the other officers in the apartment if the defendant was a convicted felon, which they could not confirm. The court went on to find that the incriminating character of the shotgun became apparent only upon some further action by the officers, here, exposing its serial number and calling that number into the police department. Such action constitutes a search, separate and apart from the lawful objective of the entry. The search cannot be justified under the plain view doctrine because the shotgun's incriminating nature was not immediately apparent. There was no evidence to indicate that the officer had probable cause to believe that the shotgun was stolen. It was only after the unlawful search that he had reason to believe it was evidence of a crime.

Search Warrants

Search warrant affidavit sufficiently linked criminal activity to the defendant's cabin

State v. Worley, ___ N.C. App. ___, 803 S.E.2d 412 (July 18, 2017). The trial court properly denied the defendant's motion to suppress evidence seized during the executions of warrants to search his rental cabin and truck for stolen goods connected to a breaking and entering of a horse trailer. The defendant argued that the search warrant affidavit establish no nexus between the cabin and the criminal activity. The court found however "that under the totality of the circumstances, the accumulation of reasonable inferences drawn from information contained within the affidavit sufficiently linked the criminal activity to defendant's cabin." Among other things, the affidavit established that when one of the property owners hired the defendant to work at their farm, several tools and pieces of equipment went missing and were never recovered; immediately before the defendant moved out of state, someone broke into their daughter's car and stole property; the defendant rented a cabin close to their property around the same time as the reported breaking and entering and larceny; and the defendant had prior convictions for first-degree burglary and felony larceny. Based on this and other evidence discussed in detail in the court's opinion, the affidavit established a sufficient nexus between the criminal activity and the defendant's cabin.

Informant's reliability was established by independent corroboration and the search warrant was therefore supported by probable cause

State v. McPhaul, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). In this attempted murder and robbery case, a search warrant was supported by probable cause. On appeal, the defendant argued that the warrant lacked probable cause because a statement by a confidential informant provided the only basis to believe the evidence might be found at the premises in question and the supporting affidavit failed to establish the informant's reliability. The court disagreed. The detective's affidavit detailed a meeting between an officer and the confidential informant in which the informant stated that he witnessed described individuals running from the crime scene and said that one of them entered the premises in question. The informant's statement corroborated significant matters previously known to the police department, including the general time and location of the offenses, the victim's physical description of his assailants, and the suspect's possession of items similar in appearance to those stolen from the victim. The affidavit therefore demonstrated the informant's reliability.

Identifications

Court of appeals finds improperly suggestive identification procedures violated due process and the identifications should have been suppressed

State v. Malone, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 805 S.E.2d 699 (Nov. 9, 2017). Over a dissent, the court held that identification procedures used with respect to two witnesses, Alvarez and Lopez, violated Due Process. At issue was a meeting between the two eyewitnesses and a legal assistant from the district attorney's office. The legal assistant met with the eyewitnesses and showed them: photographs of the defendant and another individual who already had been convicted for his role in the shooting; a surveillance video, taken from a security camera where the incident occurred; and part of the defendant's recorded interview with police officers. While they were watching the interview, Alvarez was standing near a window and happened to see the defendant exiting a police car. Alvarez directed Lopez to look outside and she too saw the defendant exiting the police car, wearing an orange jumpsuit, in handcuffs, and escorted by an officer. The evidence at trial showed that after the shooting neither Lopez nor Alvarez were able to give detailed descriptions of the defendant or positively identify him. Then, 3 ½ years later, and approximately two weeks prior to trial, the witnesses met with the legal assistant, viewed a video of the defendant's interview, surveillance footage of the incident, and more recent photographs of the defendant. The court stated "It is likely the witnesses would assume [the legal assistant] showed them the photographs and videos because the individuals portrayed therein were suspected of being guilty." The court concluded that the facts do not support the trial court's conclusion that the witnesses' in-court identifications were of independent origin. It noted: the short amount of time they had to view the defendant, their inability to positively identify him two days after the incident, and their inconsistent descriptions demonstrate that it is improbable that 3 ½ years later they could positively identify the defendant with accuracy absent the intervention by the legal assistant. It concluded that the identification procedures were impermissibly suggestive and the identifications were not of independent origin and thus violated the defendant's Due Process rights. The court went on to hold that admission of the identification testimony was not harmless beyond a reasonable doubt and reversed.

Interrogations

Failure to advise a defendant who was confined under a civil commitment order of his *Miranda* rights before questioning rendered statements inadmissible

State v. Hammonds, ___ N.C. ___, 804 S.E.2d 438 (Sept. 29, 2017). Because the defendant was in custody while confined under a civil commitment order, the failure of the police to advise him of his *Miranda* rights rendered inadmissible his incriminating statements made during the interrogation. On December 10, 2012, a Stephanie Gaddy was robbed. On December 11, 2012, after the defendant was taken to a hospital emergency room following an intentional overdose, he was confined pursuant to an involuntary commitment order upon a finding by a magistrate that he was "mentally ill and dangerous to self or others." Officers identified the defendant as a suspect in the robbery and learned he was confined to the hospital under the involuntary commitment order. On December 12 they questioned him without informing him of his *Miranda* rights. The defendant provided incriminating statements. At trial he unsuccessfully moved to suppress the statements made during the December 12th interview. The defendant was convicted and he appealed. Before the Court of Appeals, the majority determined that the trial court properly found that the defendant was not in custody at the time of the interview and that the trial court's findings of fact supported its conclusion of law that the confession was voluntary. A dissenting judge concluded that the trial court's findings of fact were insufficient. The defendant filed an appeal of right with the Supreme Court, which vacated the opinion of the Court of Appeals and instructed and the trial court to hold a new hearing on the suppression motion. After taking additional evidence the trial court again denied the motion. When the case came back before the Supreme Court, it reversed. The court noted, in part, that the defendant's freedom of movement was already severely restricted by the civil commitment order. However the officers failed to inform him that he was free to terminate the questioning and, more importantly, communicated to him that they would leave only after he spoke to them about the robbery. Specifically, they told him that "as soon as he talked, they could leave." The court found that "these statements, made to a suspect whose freedom is already severely restricted because of an involuntary commitment, would lead a reasonable person in this position to believe that he was not at liberty to terminate the interrogation without first answering his interrogators' questions about his suspected criminal activity."

Trial court erred by denying juvenile defendant's motion to suppress his statements to an interrogating officer when the defendant did not knowingly, willingly, and understanding waive his rights

State v. Saldierna, ___ N.C. App. ___, 803 S.E.2d 33 (July 18, 2017), *review allowed*, ___ N.C. ___, 805 S.E.2d 482 (Nov. 1, 2017). The then sixteen-year-old defendant was arrested at his home in South Carolina in connection with incidents involving several homes around Charlotte. Before questioning, the detective read the defendant his rights and asked whether he understood them. After initialing and signing an English version of the Juvenile Waiver of Rights form, the defendant asked to call his mother before undergoing custodial questioning. The call was allowed, but the defendant could not reach his mother. The custodial interrogation then began. During the interrogation the defendant confessed his involvement in the incidents. After he was charged, he unsuccessfully sought to suppress his statements. The court held that his motion should have been granted. The defendant had only an eighth grade education and Spanish was his primary language. He could write in English, but had difficulty reading English and understanding spoken English. The transcript of the audio recording in which the defendant was said to have waived his rights revealed that the detective spoke to the defendant entirely in English and that the defendant gave several "[unintelligible]" or non-responses to the detective's

questions pertaining to whether or not he understood his rights. There was no indication that the defendant had any familiarity with the criminal justice system and the record indicates that the defendant did not fully understand (or might not have fully understood) the detective's questions. The court concluded: "Because the evidence does not support the trial court's findings of fact . . . that defendant understood [the] Detective's . . . questions and statements regarding his rights, we conclude that he did not legitimately waive[] his *Miranda* rights. As a result, we decline to give any weight to recitals, like the juvenile rights waiver form signed by defendant, which merely formalize[d] constitutional requirements." (quotations omitted). It added: "To be valid, a waiver should be voluntary, not just on its face, i.e., the paper it is written on, but in fact. It should be unequivocal and unassailable when the subject is a juvenile." Applying this standard to the case at hand, the court explained:

> Here, the waiver was signed in English only, and defendant's unintelligible answers to questions such as, "Do you understand these rights?" do not show a clear understanding and a voluntary waiver of those rights. Defendant stated firmly to the officer that he wanted to call his mother, even after the officer asked (unnecessarily), "Now, before you talk to us?" Further, defendant reiterated this desire, even in spite of the officer's aside to other officers in the room: "He wants to call his mom." Such actions would show a reasonable person that this juvenile defendant did not knowingly, willingly, and understandingly waive his rights. Rather, his last ditch effort to call his mother (for help), after his prior attempt to call her had been unsuccessful, was a strong indication that he did not want to waive his rights at all. Yet, after a second unsuccessful attempt to reach his working parent failed, this juvenile, who had just turned sixteen years old, probably felt that he had no choice but to talk to the officers. It appears, based on this record, that defendant did not realize he had the choice to refuse to waive his rights, as the actions he took were not consistent with a voluntary waiver. As a result, any "choice" defendant had to waive or not waive his rights is meaningless where the record does not indicate that defendant truly understood that he had a choice at all.
>
> Furthermore, the totality of the circumstances set forth in this record ultimately do not fully support the trial court's conclusions of law, namely, "[t]hat the State carried its burden by a preponderance of the evidence that [d]efendant knowingly, willingly, and understandingly waived his juvenile rights." Here, too much evidence contradicts the English language written waiver signed by defendant, which, in any event, is merely a "recital" of defendant's purported decision to waive his rights. Accordingly, it should not be considered as significant evidence of a valid waiver. (citations and footnote omitted).

Pretrial and Trial Procedure

Discovery

Government's grand jury subpoena for defense team's files quashed in part; crime-fraud exception did not warrant access to opinion work product of attorneys

In Re: Grand Jury Subpoena, 870 F.3d 312 (4th Cir. August 18, 2017). After a trial, government attorneys noticed what appeared to be a forgery in a defense exhibit used at trial. On request, the defense team provided a higher-quality copy of the document to the government. This led the government to seek interviews with the defense attorney and investigator. When the defense team declined to be interviewed, a grand jury issued subpoenas to compel their testimony. The defense team filed a motion to quash on the ground that the government sought privileged work product. After the government agreed to narrow the scope of its questions to (1) where the document was obtained, (2) how it was obtained, and (3) what the witness said to the defense team when providing the document, the district court denied the motion to quash. It found that the crime-fraud exception to the work product privilege applied and ordered the defense team to comply with the subpoena. A divided court of appeals affirmed in part and reversed in part. The court first recognized the distinction between fact and opinion work product. Fact work product is "a transaction of the factual events involved and may be obtained upon a mere showing of both a substantial need and an inability to secure the substantial equivalent of the materials without undue hardship." Opinion work product is "the actual thoughts and impressions of attorneys," which "enjoys near absolute immunity and can only be discovered in very rare and extraordinary circumstances." The crime-fraud exception can operate to pierce the privilege where the government makes a prima facie showing that "(1) the client was engaged in or planning a criminal or fraudulent scheme when he sought the advice of counsel to further that scheme and (2) the documents containing [the privileged materials] . . . bear a close relationship to the client's existing or future scheme to commit a crime or fraud." The crime-fraud exception can apply to both types of work product, but to obtain opinion work product under the exception there must be a showing that the attorney knew of or participated in the crime or fraud. Here, there was no such showing. "Because the government does not claim that the Defense Team was aware of the Defendant's alleged crime or fraud, the reach of the grand jury's subpoena under the crime-fraud exception is limited to fact work product." Reviewing Supreme Court precedent, the court noted that witness interviews fall in the category of opinion work product. "A lawyer's recollection of a witness interview constitutes opinion work product entitled to heightened protections." Thus, the government was foreclosed from asking what the witness said to the attorney when providing the fraudulent document, and the district court order denying the motion to quash was reversed to that extent. As to the first two questions, where and how the document was obtained, the court found that this request sought only fact work product. The government had satisfied its burden both as to the need for the information and the applicability of the crime-fraud exception. The denial of the motion to quash was affirmed as to those inquiries.

Evidence withheld by the Government was not material under *Brady*

Turner v. United States, 582 U.S. ___, 137 S. Ct. 1885 (June 22, 2017). In 1985, a group of defendants were tried together in the Superior Court for the District of Columbia for the kidnaping, armed robbery, and murder of Catherine Fuller. Long after their convictions became final, it emerged that the Government possessed certain evidence that it failed to disclose to the defense. The only question before the Court was whether the withheld evidence was "material" under *Brady*. The Court held it was

not, finding that the withheld evidence as "too little, too weak, or too distant from the main evidentiary points to meet *Brady*'s standards." [Author's note: For a more detailed discussion of the withheld evidence and the Court's reasoning, see my colleague's blog post here].

Trial court did not abuse its discretion by excluding defendant's alibi witness as discovery sanction

State v. Bacon, ___ N.C. App. ___, 803 S.E.2d 402 (July 18, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 460 (Aug. 4, 2017). In this felony larceny case, the trial court did not abuse its discretion by excluding the defendant's witness as a sanction for the defendant's violation of discovery rules, specifically, the defendant's failure to timely file notice that he intended to call the witness as an alibi witness under G.S. 15A-905(c)(1). A voir dire of the witness revealed that his testimony was vague and certain inconsistencies in it made it unreliable and thus of minimal value. The court concluded: "Considering the materiality of [the witness's] proposed testimony, which we find minimal, and the totality of the circumstances surrounding Defendant's failure to comply with his discovery obligations, we cannot find that the trial court abused its discretion in excluding this testimony." The court went on to hold that even if it was error to exclude this testimony, the defendant failed to show prejudice.

Trial court did not err by excluding the testimony of a defense psychiatrist on the basis that the witness's proffered testimony constituted expert opinion testimony that had not been disclosed pursuant to a reciprocal discovery order

State v. Broyhill, ___ N.C. App. ___, 803 S.E.2d 832 (July 18, 2017). (1) In this murder case, the trial court did not err by excluding the testimony of a defense psychiatrist on the basis that the witness's proffered testimony constituted expert opinion testimony that had not been disclosed pursuant to a reciprocal discovery order. The witness, Dr. Badri Hamra, was a psychiatrist with the North Carolina Department of Public Safety who treated the defendant fifteen months after his arrest. On appeal, the defendant argued that Hamra was proffered as a fact witness regarding the issue of premeditation and deliberation. Defendant further argued that as a fact witness, she was outside of the scope of the reciprocal discovery order, which applied only to expert witnesses. The court agreed with the trial court that Hamra intended to offer expert opinion testimony. Hamra testified that the defendant had a psychiatric condition for which the doctor had prescribed medication. He clarified that his decision to prescribe medication was based not merely on his review of the defendant's medical history but on his own evaluation of the defendant. Finally he confirmed he would only have prescribed medication for a legitimate medical reason, dismissing the notion that he would write a prescription simply because the defendant asked him to do so. His testimony was tantamount to a diagnosis, which constitutes expert testimony. (2) The court went on to hold that even if the doctor was not testifying as an expert, the trial court nevertheless acted within its discretion by excluding his testimony under Rule 403.

Protections Against Delay

(1) 4 year delay due in part to State's negligence did not violate defendant's right to speedy trial where defendant failed to demonstrate prejudice; (2) No G.S. 15A-711 violation where prisoner did not comply with the service requirements of a demand for trial under the statute

State v. Armistead, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). (1) In this impaired driving case, the court rejected the defendant's argument that his speedy trial rights were violated due to a four year delay between indictment and trial. Considering the speedy trial factors, the court found that the length of delay weighed in the defendant's favor. The second factor—the reason for the delay—also weighed in

the defendant's favor. Here, the delay could have been avoided by reasonable effort by the State. It was undisputed that on the date the defendant failed to appear in court and on the date four months later when the prosecutor removed the case from the docket, the fact that the defendant was incarcerated was readily discernible by a search of the Department of Public Safety's Offender Public Information website and through other online databases used by prosecutors. Thus, the State's failure to discover the defendant's whereabouts--in its own custody--resulted from the prosecutor's negligence by not checking readily available information. With respect to the third factor—the defendant's assertion of his right—trial counsel acknowledged that there was no record of receipt by the clerk's office of any communication from the defendant until more than three years after the defendant's case was removed from the court docket. Based on the evidence presented, the court rejected the defendant's assertion that he had made prior attempts to assert his right. For example, while he testified that he had asserted his right in a letter to the Clerk, he was unable to produce a copy of the letter and no letter was found in the Clerk's file. In light of the lack of evidence that the defendant's claimed assertions of his speedy trial right reached the proper court officials or the prosecutor until three years after he first failed to appear in court, this factor was neutral. Turning to prejudice, the court concluded that, despite his arguments to the contrary, the defendant was unable to show actual, substantial prejudice. (2) The trial court did not err by denying the defendant's motion to dismiss pursuant to G.S. 15A-711. The State Supreme Court has held that failure to serve a G.S. 15A-711 motion on the prosecutor as required by the statute bars relief for a defendant. The court rejected the defendant's assertion that certain letters he sent were properly filed written requests sufficient to satisfy the statute.

Pleadings

Obtaining property by false pretenses indictment impermissibly vague when the property was identified only as "credit" without specifying the amount or identifying the loans at issue

State v. Everrette, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). An indictment charging obtaining property by false pretenses was defective where it charged the defendant with obtaining an unspecified amount of "credit" secured through the issuance of an unidentified "loan" or "credit card." This vague language failed to describe what was obtained with sufficient particularity to enable the defendant to adequately prepare a defense. A grand jury indicted the defendant on three counts of obtaining property by false pretenses. The indictment for the first count charged that the defendant "obtain[ed] credit, from Weyco." The indictments for the second and third counts charged that the defendant "obtain[ed] credit, from Weyco" and that "this property was obtained by means of giving false information on an application for a loan so as to qualify for said loan which loan was made to defendant." The court concluded:

> [I]ndictments charging a defendant with obtaining "credit" of an unspecified amount, secured through two unidentified "loan[s]" and a "credit card" are too vague and uncertain to describe with reasonable certainty what was allegedly obtained, and thus are insufficient to charge the crime of obtaining property by false pretenses. "Credit" is a term less specific than money, and the principle that monetary value must at a minimum be described in an obtaining-property-by-false-pretenses indictment extends logically to our conclusion that credit value must also be described to provide more reasonable certainty of the thing allegedly obtained in order to enable a defendant adequately to mount a defense. Moreover, although the indictments alleged defendant obtained that credit through "loan[s]" and a "credit card," they lacked basic identifying information,

> such as the particular loans, their value, or what was loaned; the particular credit card, its value, or what was obtained using that credit card.

It continued:

> Because the State sought to prove that defendant obtained by false pretenses a $14,399 secured vehicle loan for the purchase of a Suzuki motorcycle and a $56,736 secured vehicle loan for the purchase of a Dodge truck, the indictments should have, at a minimum, identified these particular loans, described what was loaned, and specified what actual value defendant obtained from those loans. Because the State sought also to prove that defendant obtained the Credit Card by false pretenses, that indictment should have, at a minimum, identified the particular credit card and its account number, its value, and described what defendant obtained using that credit.

Amendment of indictment for trafficking in heroin to trafficking in opiates was a substantial alteration and improperly allowed by trial court

State v. Simmons, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). The trial court erred by allowing the State, at the beginning of trial, to amend the indictment charging the defendant with trafficking in heroin to allege trafficking in opiates. In connection with a drug investigation, an officer and informant waited in a hotel room for the defendant. The defendant arrived in a vehicle and, carrying a child in his arms, approached the room. Events ensued and the defendant admitted having placed a packet of heroin in the child's pants. The defendant was arrested and the car was searched. A search of the car produced: two digital scales; a partially smoked marijuana "blunt;" $800 in cash; a key box under the hood containing balloons of heroin, a pill bottle containing marijuana, crack cocaine and 17 hydrocodone pills; and a revolver wrapped in a sock. The hydrocodone weighed 4.62 grams; the heroin recovered from the child's pants weighed .84 grams; and the heroin found in the car weighed 3.77 grams. The minimum amount for trafficking in heroin is 4 grams; thus, the only way for the State to prove that minimum was to prove that the defendant possessed both the heroin found in the car and the smaller quality of heroin found in the child's pants. At a pretrial hearing, the State dismissed several charges leaving the following charges in place: possession of a firearm by a felon, possession of marijuana, possession with intent to sell or deliver cocaine, trafficking in heroin by transportation, and trafficking in heroin by possession. At this point, defense counsel informed the court that the defendant would admit to the heroin found in the child's pants. The prosecutor then asked to amend the trafficking indictments from trafficking in heroin to trafficking in opiates. The trial court granted the State's motion to amend, over the defendant's objection. The defendant was convicted on the trafficking charges. The court noted that here, the amendment broadened the scope of the original indictment to allege trafficking in "opiates," a category of controlled substances, rather than "heroin," a specific controlled substance. It did so, the court reasoned, for the purpose of bringing an additional controlled substance—hydrocodone—within the ambit of the indictment. Although heroin is an opiate, not all opiates are heroin. Therefore, when the original indictment was amended to include hydrocodone, a new substance was effectively alleged in the indictment. The court found its holding consistent with the proposition that a critical purpose of the indictment is to enable the accused to prepare for trial. Here, the State moved to amend on the morning of trial. Until then, the defendant had justifiably relied on the original indictment in preparing his defense. In fact this concern was expressed by defense counsel in his objection to the motion to amend, specifically arguing that the defendant had no knowledge that the hydrocodone would be included in the trafficking amount. Additionally, the State

sought to amend the indictment only after the defendant informed the trial court of his intention to admit possessing some, but not all, of the heroin. The logical inference of the sequence is that upon learning of the defendant's trial strategy on the morning of trial, the State sought to thwart that strategy by broadening the scope of the indictment. The court stated: "In essence, the State was permitted to change the rules of the game just as the players were taking the field." The court vacated the conviction.

Reversing a unanimous Court of Appeals, Supreme Court holds that separate pleading requirements of G.S. 15A-928 are not jurisdictional and any defect in that regard is waived on appeal without an objection at trial

State v. Brice, ___ N.C. ___, ___ S.E.2d ___ (Nov. 3, 2017). On discretionary review from unanimous decision of the Court of Appeals, ___ N.C. App. ___, 786 S.E.2d 812 (2016), concluding that the habitual misdemeanor larceny indictment was defective, the court reversed. The Court of Appeals concluded that the indictment was defective because it failed to comply with G.S. 15A-928, a defect that was jurisdictional. The indictment alleged that the defendant stole the property after having been previously convicted of misdemeanor larceny on four separate occasions. The court began by holding that the indictment alleged all of the essential elements of habitual misdemeanor larceny. However, it failed to comply with G.S. 15A-928, which provides that when the fact that the defendant has been previously convicted of an offense raises the present offense to a higher grade and thereby becomes an element, the indictment must be accompanied by a special indictment charging the prior convictions or these allegations must be included as a separate count. Thus, the issue before the court was whether the fact that the indictment failed to comply with the separate indictment or separate account requirements set out in G.S. 15A-928 constituted a fatal defect depriving the trial court of jurisdiction. The court concluded that noncompliance with the statute was not a jurisdictional issue and thus could not be raised on appeal where, as here, the defendant raised no objection or otherwise sought relief on the issue before the trial court. The court overruled State v. Williams, 153 N.C. App. 192 (2002), which the Court of Appeals had relied on to conclude that a violation of G.S. 15A-928 was jurisdictional.

Armed robbery indictment that failed to allege presence of dangerous weapon was fatally defective

State v. Murrell, ___ N.C. ___, 804 S.E.2d 504 (Sept. 29, 2017). Affirming an unpublished opinion of the Court of Appeals, the court held that a robbery indictment was fatally defective. The indictment alleged, in relevant part, that the defendant committed the bank robbery "by way of reasonably appearing to the [named] victim . . . that a dangerous weapon was in the defendant's possession, being used and threatened to be used by communicating that he was armed to her in a note." The Court of Appeals had held that the indictment was defective because it failed to name any dangerous weapon that the defendant allegedly employed. The Supreme Court noted that an essential element of armed robbery is that the defendant possessed, used, or threatened use of a firearm or other dangerous weapon. Here, the indictment does not adequately allege this element. The court instructed: an armed robbery indictment "must allege the presence of a firearm or dangerous weapon used to threaten or endanger the life of a person."

Indictment for drug offense that required the defendant be over 21 years old was fatally defective as it failed to allege that the defendant was over 21

State v. Culbertson, ___ N.C. App. ___, 805 S.E.2d 511 (Sept. 19, 2017). As conceded by the State, indictments charging the defendant with possession with intent to sell and deliver marijuana and heroin

within 1000 feet of a park under G.S. 90-95(e)(10) were fatally defective where they failed to allege that he was over the age of 21 at the time of the offenses.

Over a dissent, court holds that citation properly charged defendant with open container violation despite its failure to allege multiple elements of the crime

State v. Jones, ___ N.C. App. ___, 805 S.E.2d 701 (Sept. 5, 2017). Over a dissent, the court held that a citation properly charged the defendant with operating a motor vehicle with an open container of alcohol. The defendant challenged the citation on grounds that it failed to allege that he was operating a motor vehicle while on a public street or highway. The court noted that official commentary to G.S. 15A Article 49 indicates that a citation need only identify the crime charged and that the pleading requirements for a citation are less than is required for other criminal process. It further noted that pursuant to G.S. 15A-922(c), "[t]o the extent there was a deficiency in the citation," the defendant could have objected to trial on the citation. The court went on to hold that the citation properly identified the crime and thus complied with G.S. 15A-302, giving the district court jurisdiction. It stated: "Identifying a crime charged does not require a hyper-technical assertion of each element of an offense, nor does it require the specificity of a "statement of the crime" necessary to issue a warrant or criminal summons." The court acknowledged that G.S. 20-138.7(g) requires a citation charging the offence in question to include additional information, including that the defendant drove a motor vehicle. However, because the citation satisfied the requirements of G.S. 15A-302, thereby establishing the district court's jurisdiction, the defendant's concern regarding the sufficiency of the charging language required an objection to trial on the citation at the district court level under G.S. 15A-922, which he failed to do. Thus, the defendant "was no longer in a position to assert his statutory right to object to trial on citation, or to the sufficiency of the allegations set forth in Section 20-138.7(g)." The court continued, holding that even if the defendant was not required to object below, "the failure to comply with N.C. Gen. Stat. § 15A-924(a)(5) by neglecting to allege facts supporting every element of an offense in a citation is not a *jurisdictional* defect." It reasoned that the North Carolina Constitution does not require a citation charging a misdemeanor to allege each element of the charged offense.

(1) Theory of acting in concert does not have to be alleged; (2) Variance between indictment, jury instructions and verdict sheet as to number of items stolen was not fatal variance; (3) Evidence was sufficient to support acting in concert instruction

State v. Glidewell, ___ N.C. App. ___, 804 S.E.2d 228 (Aug. 15, 2017). (1) In this habitual misdemeanor larceny case, the court rejected the defendant's argument that the trial court created a fatal variance when it instructed the jury on a theory of acting in concert not alleged in the indictment. Citing prior case law, the court held that the theory of acting in concert need not be alleged in the indictment. (2) The court rejected the defendant's argument that a fatal variance existed between the indictment, the jury instructions, and the verdict sheets because each held him accountable for stealing a different number of items. Neither the jury instructions nor the verdict sheet were required to specify the number of items stolen. (3) The evidence was sufficient to support the trial court's instruction on the theory of acting in concert. On appeal, the defendant argued that the State's evidence was insufficient to show that he and his accomplice acted with a common purpose to commit a larceny or that he aided or encouraged his accomplice. According to the defendant, the evidence showed that he was simply present when his accomplice committed the crime. Here, the evidence showed that the defendant rode with his accomplice in the same car to the store; the two entered the store together; they looked at merchandise in the same section of the store; they were seen on surveillance video returning to the

same area behind the clothing rack, stuffing shirts into their pants; and the two left the store within seconds of each other and exited the parking lot in a vehicle driven by the accomplice.

Fatal variance regarding ownership of some of the stolen property did not warrant dismissal of felony larceny charges

State v. Bacon, ___ N.C. App. ___, 803 S.E.2d 402 (July 18, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 460 (Aug. 4, 2017). Although there was a fatal variance between the allegation in a felony larceny indictment as to the owner of the stolen property and the proof of ownership presented at trial, the variance did not warrant dismissal. The indictments alleged that all of the stolen items, a television, gaming system, video games, laptop, camera, and earrings were the personal property of April Faison. The evidence at trial indicated that Faison did not own all of those items. Specifically, her daughter owned the laptop and the camera; the gaming system belonged to a friend. Although the defendant conceded that some of the items listed in the indictment correctly named Faison as property owner, he argued that a fatal variance with respect to the other items required dismissal. The State's evidence would have been sufficient if it had established that Faison, while not the property owner, had some special interest in the items owned by others, for example, as a bailee. However, the State's evidence did not establish that. The court also rejected the argument that Faison had a special custody interest in her child's property because, here, her daughter was an adult who did not live in the home. Thus, while the evidence was sufficient to demonstrate that Faison was the owner of some of the property, there was a fatal variance with respect to ownership of other items. The court however went on to reject the argument that a larceny indictment that properly alleges the owner of certain stolen property, but improperly alleges the owner of additional property, must be dismissed in its entirety. Here, the problematic language was surplusage.

Habitual felon indictment was fatally defective with respect to its allegations as to two of the three prior felonies

State v. Langley, ___ N.C. App. ____, 803 S.E.2d 166 (June 20, 2017), *review allowed*, ___ N.C. ___, 805 S.E.2d 483 (July 6, 2017). For two of the three prior felonies alleged in the habitual felon indictment, the indictment alleged offense dates for armed robbery and then gave conviction dates for common law robbery. The indictment was defective because it did not allege an offense date for the crimes for which the defendant was convicted (common law robbery).

Larceny indictment alleging "Belk's Department Store, an entity capable of owning property" insufficient to identify the victim and thus fatally defective

State v. Brawley, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017), *temporary stay allowed*, ___ N.C. ___, 805 S.E.2d 495 (Nov. 6, 2017). The court held, over a dissent, that the indictment charging the defendant with larceny from a merchant was fatally defective. The indictment, which named the victim as "Belk's Department Stores, an entity capable of owning property," failed to adequately identify the victim. The court stated:

> In specifying the identity of a victim who is not a natural person, our Supreme Court provides that a larceny indictment is valid only if either: (1) the victim, as named, itself imports an association or a corporation [or other legal entity] capable of owning property[;] or, (2) there is an allegation that the victim, as

> named, if not a natural person, is a corporation or otherwise a legal entity capable of owning property[.]" (quotations omitted). It further clarified:
>
> "A victim's name imports that the victim is an entity capable of owning property when the name includes a word like "corporation," "incorporated," "limited," "church," or an abbreviated form thereof." Here, the name "Belk's Department Stores" does not itself import that the victim is a corporation or other type of entity capable of owning property. The indictment did however include an allegation that the store was "an entity capable of owning property."

Thus the issue presented was whether alleging that the store is some unnamed type of entity capable of owning property is sufficient or whether the specific type of entity must be pleaded. The court found that precedent "compel[led]" it to conclude that the charging language was insufficient. The court rejected the State's argument that an indictment which fails to specify the victim's entity type is sufficient so long as it otherwise alleges that the victim is a legal entity

Joinder

Trial court did not err by joining for trial offenses that occurred on different dates

State v. Voltz, ___ N.C. App. ___, 804 S.E.2d 760 (Aug. 15, 2017). The first set of offenses occurred on May 15, 2015 and involved assaults and sexual assaults on B.A. The second set of charges arose from a breaking or entering that occurred approximately eight months later, when the defendant entered a neighbor's home looking for B.A. The defendant argued that certain testimony offered by the neighbor was inadmissible character evidence as to the first set of charges but was essential testimony as to the second set of charges, to establish guilt of another. The court however found that the evidence would not have been admissible for that purpose; to be admissible, guilt of another evidence must do more than create mere conjecture of another's guilt. Here, the evidence was mere speculation that another person committed the crime. Furthermore the testimony was not inconsistent with the defendant's guilt.

Pleas

Where a negotiated plea agreement involving several charges included a plea to a crime later held to be unconstitutional, the entire agreement must be set aside

State v. Anderson, ___ N.C. App. ___, 804 S.E.2d 189 (Aug. 1, 2017). After the jury convicted the defendant of being a sex offender on the premises of a daycare, the defendant pled guilty based on a negotiated plea arrangement to being a sex offender unlawfully within 300 feet of a daycare, failing to report a new address as a sex offender, and three counts of attaining habitual felon status. While his direct appeal was pending, the statute prohibiting a sex offender from being within 300 feet of a daycare was held to be unconstitutional. The court thus held that the defendant's conviction for that offense must be vacated. Having determined that the defendant's guilty plea to violating the unconstitutional statute must be vacated the essential and fundamental terms of the plea agreement became unfulfillable and that the entire plea agreement must be set aside.

Over a dissent, court of appeals held that plea agreement must be set aside where trial court erred by accepting defendant's stipulation to his prior record level

State v. Arrington, ___ N.C. App. ___, 803 S.E.2d 845 (Aug. 1, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 734 (Aug. 18, 2017). Over a dissent, the court held that where the trial court erred by accepting the defendant's stipulation to his prior record level as part of a plea agreement, the plea agreement must be set aside.

Harmless error for trial court to wrongly advise defendant that denial of motion to dismiss for lack of subject matter and personal jurisdiction could be appealed

State v. Rogers, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). The court rejected the defendant's argument that his plea was not knowing and voluntary because the trial court erroneously advised him that he had the right to appeal a denial of the defendant's pro se motion to dismiss. The motion to dismiss was based on lack of subject matter and personal jurisdiction and asserted as its basis the fact that the defendant was a Sovereign Citizen. The defendant agreed to plead guilty pursuant to a plea agreement. The trial court advised him of the maximum possible punishment and the defendant stated that he entered the plea of his own free will. The trial court told the defendant that he would have the right to appeal the ruling denying the pro se motion to dismiss. The court agreed with the defendant that the trial court erroneously advised him that he had the right to appeal the denial of his pro se motion to dismiss after entering his plea. However, the court found that any error was harmless, noting that the defendant's motion to dismiss failed to present a coherent, legally recognized challenge the trial court's jurisdiction.

Right to Counsel

By wrongly advising the defendant that a guilty plea to a drug charge would not result in deportation, counsel rendered ineffective assistance of counsel (IAC) in connection with the defendant's plea

Lee v. United States, 582 U.S. ___, 137 S. Ct. 1958 (June 23, 2017). After he was charged with possessing ecstasy with intent to distribute, the defendant feared that a criminal conviction might affect his status as a lawful permanent resident. His attorney assured him that the Government would not deport him if he pleaded guilty. As a result, the defendant, who had no real defense to the charge, accepted a plea that carried a lesser prison sentence than he would have faced at trial. The defendant's attorney was wrong: The conviction meant that the defendant was subject to mandatory deportation. Before the Court, the Government conceded that the defendant received objectively unreasonable representation when counsel assured him that he would not be deported if he pleaded guilty. The question before the Court was whether the defendant could show prejudice as a result. The Court noted that when an IAC claim involves a claim of attorney error during the course of a legal proceeding—for example, that counsel failed to raise an objection at trial or to present an argument on appeal—a defendant raising such a claim can demonstrate prejudice by showing a reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. This case, however was different. The Court explained:

> But in this case counsel's "deficient performance arguably led not to a judicial proceeding of disputed reliability, but rather to the forfeiture of a proceeding itself." When a defendant alleges his counsel's deficient performance led him to accept a guilty plea rather than go to trial, we do

> not ask whether, had he gone to trial, the result of that trial "would have been different" than the result of the plea bargain. That is because, while we ordinarily "apply a strong presumption of reliability to judicial proceedings," "we cannot accord" any such presumption "to judicial proceedings that never took place."
>
> We instead consider whether the defendant was prejudiced by the "denial of the entire judicial proceeding . . . to which he had a right." As we held in *Hill v. Lockhart*, when a defendant claims that his counsel's deficient performance deprived him of a trial by causing him to accept a plea, the defendant can show prejudice by demonstrating a "reasonable probability that, but for counsel's errors, he would not have pleaded guilty and would have insisted on going to trial." (citations omitted).

The Court rejected the dissent's argument that the defendant must also show that he would have been better off going to trial. It conceded "[t]hat is true when the defendant's decision about going to trial turns on his prospects of success and those are affected by the attorney's error—for instance, where a defendant alleges that his lawyer should have but did not seek to suppress an improperly obtained confession." The Court found that the error at issue was different. Here, the defendant "knew, correctly, that his prospects of acquittal at trial were grim, and his attorney's error had nothing to do with that. The error was instead one that affected [the defendant's] understanding of the consequences of pleading guilty." And here, the defendant argues that he never would have accepted a guilty plea had he known that he would be deported as a result; the defendant insists he would have gambled on trial, risking more jail time for whatever small chance there might be of an acquittal that would let him remain in the United States. Considering this claim, the Court rejected the Government's request for a per se rule that a defendant with no viable defense cannot show prejudice from the denial of his right to trial. Instead it held: "In the unusual circumstances of this case, we conclude that [the defendant] has adequately demonstrated a reasonable probability that he would have rejected the plea had he known that it would lead to mandatory deportation."

Alabama courts' refusal to provide a capital murder defendant with expert mental health assistance was contrary to, or involved an unreasonable application of, clearly established federal law

McWilliams v. Dunn, 582 U.S. ___, 137 S. Ct. 1790 (June 19, 2017). The Court held, in this federal habeas case, that the Alabama courts' refusal to provide a capital murder defendant with expert mental health assistance was contrary to, or involved an unreasonable application of, clearly established federal law. After the jury recommended that the defendant receive the death penalty, the trial court scheduled a judicial sentencing hearing for about six weeks later. It also granted a defense motion for neurological and neuropsychological exams on the defendant for use in connection with the sentencing hearing. Consequently, Dr. John Goff, a neuropsychologist employed by the State's Department of Mental Health, examined the defendant. He filed his report two days before the judicial sentencing hearing. The report concluded, in part, that the defendant presented "some diagnostic dilemmas." On the one hand, the defendant was "obviously attempting to appear emotionally disturbed" and "exaggerating his neuropsychological problems." But on the other hand, it was "quite apparent that he ha[d] some genuine neuropsychological problems," including "cortical dysfunction attributable to right cerebral hemisphere dysfunction." The report added that the defendant's "obvious neuropsychological deficit" could be related to his "low frustration tolerance and impulsivity," and suggested a diagnosis of "organic personality syndrome." Right before the hearing, defense counsel received updated records indicating

that the defendant was taking an assortment of psychotropic medications. Over a defense objection that assistance from a mental health expert was needed to interpret the report and information, the hearing proceeded. The trial court sentenced the defendant to death. It later issued a written sentencing order, finding that the defendant "was not and is not psychotic," and that "the preponderance of the evidence from these tests and reports show [the defendant] to be feigning, faking, and manipulative." It further found that even if his mental health issues "did rise to the level of a mitigating circumstance, the aggravating circumstances would far outweigh this as a mitigating circumstance." The case came before the U.S. Supreme Court on habeas. The Court began by noting that *Ake v. Oklahoma*, 470 U. S. 68 (1985), clearly established that, when certain threshold criteria are met, the State must provide an indigent defendant with access to a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." Here, no one denied that the conditions that trigger application of *Ake* are present: the defendant is and was an indigent defendant, his mental condition was relevant to the punishment he might suffer, and that mental condition—his sanity at the time of the offense—was seriously in question. As a result, *Ake* required the State to provide the defendant with access to a competent psychiatrist who will conduct an appropriate examination and assist in evaluation, preparation, and presentation of the defense. The question before the Court was whether the Alabama courts' determination that the defendant got all the assistance that *Ake* requires was contrary to, or involved an unreasonable application of, clearly established federal law. The defendant urged the Court to answer this question "yes," asserting that a State must provide an indigent defendant with a qualified mental health expert retained specifically for the defense team, not a neutral expert available to both parties. The Court however found that it need not decide whether this claim is correct. It explained:

> *Ake* clearly established that a defendant must receive the assistance of a mental health expert who is sufficiently available to the defense and independent from the prosecution to effectively "assist in evaluation, preparation, and presentation of the defense." As a practical matter, the simplest way for a State to meet this standard may be to provide a qualified expert retained specifically for the defense team. This appears to be the approach that the overwhelming majority of jurisdictions have adopted. It is not necessary, however, for us to decide whether the Constitution requires States to satisfy *Ake*'s demands in this way. That is because Alabama here did not meet even *Ake*'s most basic requirements.

Here, although the defendant was examined by Dr. Goff, neither Goff nor any other expert helped the defense evaluate Goff's report or the defendant's extensive medical records and translate these data into a legal strategy; neither Goff nor any other expert helped the defense prepare and present arguments that might, for example, have explained that the defendant's purported malingering was not necessarily inconsistent with mental illness; and neither Goff nor any other expert helped the defense prepare direct or cross-examination of any witnesses, or testified at the judicial sentencing hearing himself. The Court concluded: "Since Alabama's provision of mental health assistance fell so dramatically short of what *Ake* requires, we must conclude that the Alabama court decision affirming [the defendant's] conviction and sentence was contrary to, or involved an unreasonable application of, clearly established Federal law."

Defendant failed to establish requisite prejudice in connection with alleged improper closure of courtroom

Weaver v. Massachusetts, 582 U.S. ___, 137 S. Ct. 1899 (June 22, 2017). In a case where the defendant failed to preserve a claim of structural error with respect to improper closure of the courtroom and raised it later in the context of an ineffective assistance claim, the Court held that the defendant was not relieved of his burden of establishing prejudice, which he failed to do. During the defendant's state criminal trial, the courtroom was occupied by potential jurors and closed to the public for two days of jury selection. Defense counsel neither objected to the closure at trial nor raised the issue on direct review. The case came to the Court in the context of an ineffective assistance of counsel claims. On the facts presented, the Court held that the defendant had not established prejudice. It explained:

> In the criminal justice system, the constant, indeed unending, duty of the judiciary is to seek and to find the proper balance between the necessity for fair and just trials and the importance of finality of judgments. When a structural error is preserved and raised on direct review, the balance is in the defendant's favor, and a new trial generally will be granted as a matter of right. When a structural error is raised in the context of an ineffective assistance claim, however, finality concerns are far more pronounced. For this reason, and in light of the other circumstances present in this case, petitioner must show prejudice in order to obtain a new trial. As explained above, he has not made the required showing.

(1) Defense counsel was not deficient by failing to give notice of alibi witnesses when the court had not ordered such notice; (2) Defense counsel's failure to object to gang evidence was not ineffective assistance where counsel's strategy focused on gang ties of the victim

State v. Harris, ___ N.C. App. ___, 805 S.E.2d 729 (Sept. 19, 2017). (1) The court rejected the defendant's argument that trial counsel was deficient by failing to give notice to the State of the defendant's intention to offer an alibi witness. The defendant had argued that trial counsel's failure was a violation of the discovery rules and resulted in the trial court declining to give an alibi jury instruction. The court found however that the trial court's decision declining to give an alibi instruction was not due to ineffective assistance but rather to the trial court's error. A defendant only is required to give notice of an alibi witness after being ordered to do so by the trial court. Here, no such order was entered. Therefore, counsel was not deficient in failing to disclose the defendant's intent to offer an alibi witness. The court went on to conclude that even if it were to find that counsel's performance was deficient, the defendant failed to show prejudice. Although the trial court declined to give an instruction on alibi, the alibi evidence--the defendant's own testimony that he was elsewhere with his girlfriend at the time of the offense--was heard and considered by the jury. (2) The court rejected the defendant's claim that his lawyer rendered ineffective assistance by failing to object to the introduction of testimony about street gangs. The court rejected the assertion that there was no strategic reason for trial counsel to fail to object to the evidence. The record clearly established that trial counsel's strategy was to show that the shooting may have been gang related. Counsel's strategy focused on the victim's own criminal record and gang connections, the fact that he was shot again when the defendant was incarcerated, and the connection between where the gun was found and the gang with which the victim was associated. Counsel further asserted in jury argument that the prosecution reflected law enforcement tunnel vision and a failure to explore other possible culprits. The court rejected the defendant's argument that this trial strategy constituted ineffective assistance of counsel.

(1) No abuse of discretion in denying motion to withdraw where no actual conflict existed; (2) Defense counsel was not ineffective for failing to better detail the alleged impasse with his client; (3) Defense counsel was not ineffective for failing to cross-examine a witness for the third time

State v. Curry, ___ N.C. App. ___, 805 S.E.2d 552 (Oct. 17, 2017). (1) The trial court did not abuse its discretion by denying counsel's motion to withdraw. The defendant was indicted for first-degree murder and armed robbery. Just prior to trial, the defendant provided defense counsel with a list of facts that he wished to concede to the jury: that he was at the scene of the crime; that he fired a gun; and that he was part of an attempted robbery. At a closed hearing, counsel advised the trial court that the defendant's new admissions would impact his ability to handle the case. When he contacted the State Bar for guidance, it was suggested that he ask to withdraw because of a "personal conflict." Counsel did so and the trial court denied the motion. Finding no abuse of discretion, the court noted that the personal conflict at issue related to counsel's inability to believe what the defendant told him, in light of the eve of trial admissions. It noted: As the State Bar confirmed, defense counsel did not have an actual conflict, and there is no evidence he breached the rules of professional conduct. Counsel had represented Defendant for nearly three years, and had presumably expended significant time and resources preparing for trial. In addition, there was no disagreement about trial strategy, nor was there an identifiable conflict of interest. Moreover, the court concluded, the defendant could not show prejudice resulting from the denial of the motion to withdraw. (2) The court rejected the defendant's assertion that counsel was ineffective by failing to state for the record details of an absolute impasse between himself and counsel. Although the defendant initially wanted counsel to make certain admissions in opening statements to the jury, after discussing the issue with counsel he informed the court that he would follow counsel's advice. The court noted there was neither disagreement regarding tactical decisions nor anything in the record suggesting any conflict between the defendant and defense counsel. Although counsel made statements to the trial court indicating that he was having difficulty believing things that the defendant told him, the court noted: "Defendant points to no authority which would require a finding of an impasse where defense counsel did not believe what a criminal-defendant client told him." (3) Trial counsel did not provide ineffective assistance when he failed to cross-examine witness Tarold Ratlif for a third time about who shot the victim. The defendant asserted that additional questioning would have supported his theory that someone else killed the victim. The court concluded that even assuming arguendo that the defendant satisfied the first prong of the *Strickland* ineffective assistance of counsel test, he could not--in light of the evidence presented--satisfy the second prong, which requires a showing of prejudice.

(1) No ineffective assistance where defense counsel elicited testimony from officer that another witness for the State was "honest"; no possibility of prejudice in light of the evidence; (2) While officer's testimony expressing an opinion of guilt was improper, counsel's failure to object was not prejudicial, and thus the defendant did not receive ineffective assistance

State v. Meadows, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). (1) In this drug case, the court rejected the defendant's argument that she received ineffective assistance of counsel when defense counsel elicited damaging testimony from a law enforcement officer that a witness was "honest." Declining to address whether counsel's conduct constituted deficient performance, the court concluded that the ineffective assistance of counsel claim failed on the prejudice prong: there was no reasonable probability that in the absence of trial counsel's alleged errors the results of the proceeding would have been different. (2) The defendant did not receive ineffective assistance of counsel when counsel failed to object to a law enforcement officer's testimony that he felt that the defendant should be charged because she was as guilty as her husband. The court noted that because law enforcement officers may

not express an opinion that they believe a defendant to be guilty, admission of the statement was error. However, the defendant failed to show prejudice and thus her ineffective assistance of counsel claim failed.

Insanity defense presented over objection of defendant required new trial; a competent defendant has a right to direct her defense

State v. Payne, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). In a case where the trial court made a pretrial determination of not guilty by reason of insanity (NGRI), the defendant's constitutional right to effective assistance of counsel was violated when the trial court allowed defense counsel to pursue a pretrial insanity defense against her wishes. Against the defendant's express wishes, counsel moved for a pretrial determination of NGRI pursuant to G.S. 15A-959. The State consented and the trial court agreed, purportedly dismissing the charges based on its determination that the defendant was NGRI. The court noted that the issue whether a competent defendant has a right to refuse to pursue a defense of NGRI is a question of first impression in North Carolina. It determined:

> By ignoring Defendant's clearly stated desire to proceed to trial rather than moving for a pretrial verdict of NGRI pursuant to N.C.G.S. § 15A-959(c), the trial court allowed — absent Defendant's consent and over her express objection — the "waiver" of her fundamental rights, including the right to decide "what plea to enter, whether to waive a jury trial and whether to testify in [her] own defense[,]" as well as "the right to a fair trial as provided by the Sixth Amendment[,] . . . the right to hold the government to proof beyond a reasonable doubt[,] . . . [and] the right of confrontation[.]" These rights may not be denied a competent defendant, even when the defendant's choice to exercise them may not be in the defendant's best interests. In the present case, Defendant had the same right to direct her counsel in fundamental matters, such as what plea to enter, as she had to forego counsel altogether and represent herself, even when Defendant's choices were made against her counsel's best judgment. (citations omitted)

It went on to hold:

> [B]ecause the decision of whether to plead not guilty by reason of insanity is part of the decision of "what plea to enter," the right to make that decision "is a substantial right belonging to the defendant." Therefore, by allowing Defendant's counsel to seek and accept a pretrial disposition of NGRI, the trial court "deprived [Defendant] of [her] constitutional right to conduct [her] own defense." We are not called upon to determine how that right should be protected when asserted by a defendant's counsel at trial but, at a minimum, a defendant's affirmative declaration that the defendant does not wish to move for a pretrial determination of NGRI must be respected. (quotation and footnote omitted).

The court went on to reject the State's argument that the defendant could not show prejudice because she was subject to periodic hearings pertaining to her commitment.

Ineffective assistance of counsel claims only apply to criminal matters; since satellite-based monitoring hearings are civil, no ineffective assistance for failure to raise constitutional challenge

State v. Spinks, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). Following precedent, the court rejected the defendant's assertion that counsel rendered ineffective assistance by failing to assert a fourth amendment claim at the hearing where he was ordered to submit to satellite-based monitoring for life. SBM proceedings are civil and ineffective assistance of counsel claims only can be asserted in criminal matters.

Jury Selection

Trial court did not impermissibly restrict defendant's inquiry of prospective jurors

State v. Broyhill, ___ N.C. App. ___, 803 S.E.2d 832 (July 18, 2017). The court rejected the defendant's argument that the trial court erred during jury selection by unduly restricting the defendant's inquiry into whether prospective jurors could fairly evaluate credibility if faced with evidence that a person had lied in the past. The trial court properly sustained objections to the defendant's improper stakeout questions and questions tending to indoctrinate the jurors. Additionally, the trial court did not close the door on the defendant's inquiry into whether the prospective jurors could fairly assess credibility. Rather, the defendant was permitted to ask similar questions in line with the pattern jury instructions, which were an adequate proxy to gauge a prospective juror's ability to fairly assess credibility at trial.

Trial court did not abuse its discretion by declining to declare a mistrial because of a comment by a prospective juror

State v. Lynch, ___ N.C. App. ___, 803 S.E.2d 190 (July 5, 2017). In this drug trafficking case, the trial court did not abuse its discretion by declining to declare a mistrial because of a prospective juror's comment. In the presence of the rest of the jury pool, the prospective juror stated that he had seen the defendant "around" and "I believe she did it." The defendant moved for a mistrial. The trial judge denied the motion but indicated that it would instruct the jury to cure any potential for prejudice. The trial judge immediately dismissed the prospective juror and gave a lengthy curative instruction to the jury pool. The court rejected the defendant's argument that the comment required a mistrial as a matter of law. The court held that in light of the trial court's curative instruction, the trial court acted well within its discretion in denying the defendant's motion for a mistrial.

Closing Argument

Prosecutor's argument that included repeatedly calling the defendant names and referencing her sexual proclivities was improper but not prejudicial in light of overwhelming evidence of guilt; no abuse of discretion to deny motion for mistrial

State v. Madonna, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). In this murder case, the prosecutor's statement that the defendant "can't keep her knees together or her mouth shut" was "improperly abusive." The defendant was charged with murdering her husband, and the State's evidence indicated that she was having an affair with her therapist. However, the trial court did not abuse its discretion by denying the defendant's motion for a mistrial--a "drastic remedy"--on grounds of the prosecutor's improper statements. The prosecutor's statements that the defendant had lied to the jury while testifying at trial were clearly improper, as was the prosecutor's statement referring to the defendant as a narcissist. However, considering the overwhelming evidence of guilt, the prosecutor's

remarks did not render the trial and conviction fundamentally unfair and thus the trial court did not err by failing to intervene ex mero motu.

Reversing a unanimous decision of the court of appeals, the state supreme court held in this murder case that while statements made by the prosecutor in his closing argument were improper, the arguments did not amount to prejudicial error

State v. Huey, ___ N.C. ___, 804 S.E.2d 464 (Sept. 29, 2017). The ADA opened closing arguments in this first-degree murder case by saying "Innocent men don't lie." During his argument, the prosecutor used some variation of the verb "to lie" at least thirteen times. The prosecutor also made negative comments regarding defense counsel and regarding a defense expert witness. Regarding the defense expert, the prosecutor argued that the expert made more than $300,000 per year working for defendants, that he was not impartial and that "he's just a $6,000 excuse man." Defense counsel did not object and the trial court did not intervene ex mero motu. The Court of Appeals held that the trial court erred by failing to intervene ex mero motu, concluding that the defendant's entire defense was predicated on his credibility and on the credibility of his expert witness. The court reversed. It began by holding that there was "no doubt" that the prosecutor's statements directed at the defendant's credibility were improper. However it went on to hold that the statements were not so grossly improper as to result in prejudice, noting that the evidence supports the inference that the defendant's testimony lacked credibility. For example, the defendant gave six different versions of the shooting, five to the police and one to the jury. The court concluded: "While we do not approve of the prosecutor's repetitive and dominant insinuations that defendant was a liar, we do believe sufficient evidence supported the premise that defendant's contradictory statements were untruthful." The court also found that the prosecutor's assertion that the defense expert was "just a $6,000 excuse man" also was improper in that it implied the witness was not trustworthy because he was paid for his testimony. While a lawyer may point out potential bias resulting from payment, it is improper to argue that an expert should not be believed because he would give untruthful or inaccurate testimony in exchange for pay. The court also noted that the prosecutor's use of the word "excuse" amounts to name-calling, "which is certainly improper." Finally, the court agreed that the prosecutor improperly argued that defense counsel should not be believed because he was paid to represent the defendant. Although ultimately concluding that it was not reversible error for the trial court to fail to intervene ex mero motu, the court added:

> Nonetheless, we are disturbed that some counsel may be purposefully crafting improper arguments, attempting to get away with as much as opposing counsel and the trial court will allow, rather than adhering to statutory requirements and general standards of professionalism. Our concern stems from the fact that the same closing argument language continues to reappear before this Court despite our repeated warnings that such arguments are improper. . . . Our holding here, and other similar holdings finding no prejudice in various closing arguments, must not be taken as an invitation to try similar arguments again. We, once again, instruct trial judges to be prepared to intervene ex mero motu when improper arguments are made.

Trial court did not err by failing to intervene ex mero motu during closing argument in a DWI case when the prosecutor speculated about the defendant's alcohol concentration

State v. Younts, ___ N.C. App. ___, 803 S.E.2d 641 (July 18, 2017). In this DWI case, the trial court did not err by failing to intervene ex mero motu when the prosecutor speculated in closing argument about what the defendant's breathalyzer test would have been an hour before she was actually tested. The court found that the argument at issue was not so grossly improper as to require the trial court to intervene ex mero motu.

Judicial Commentary

New trial awarded for improper judicial commentary

U.S. v. Lefsih, 867 F. 3d 459 (4th Cir. 2017). The defendant, an Algerian national, was selected by lottery to receive a permanent residence visa by way of the Diversity Immigrant Visa Program. That program recruits immigrants from countries that typically do not have high rates of migration to the United States in an effort to bolster overall immigration diversity. Immigrants receiving this special visa are not subject to the same restrictions and supervision as, for instance, student-visa holders. One benefit to recipients of the program is the ability to apply for naturalization after five years. The defendant "won" the lottery, immigrated to the U.S., and eventually applied for naturalization. When asked on the naturalization application whether he had ever been "arrested, cited or detained by any law enforcement officer . . . for any reason", the defendant answered negatively, despite having received numerous traffic citations in North Carolina. He was charged with two counts of immigration fraud and two counts of making a false statement on a naturalization form. Both offenses have as an element that the defendant acted knowingly. The defendant maintained that he misunderstood the scope of the question on the form. At trial, the district court judge made several remarks disparaging the immigration program, as well as the people that benefitted from it. In the presence of the jury, the trial court voiced disbelief about the existence of the program, opined that most Americans were probably not aware of the program, and expressed that the program was "incredible." The trial court went on to remark about the educational and skill levels of immigrants in the program, and asked if lottery winners may "drag along [their] ten kids and four wives or what," among other disparaging comments. The defendant did not object to these comments. The judge informed the jury during instructions at the beginning and end of the case that the court was impartial and that jurors were not to consider any questions or comments of the judge as expressing an opinion on the case. The jury convicted on all counts after 30 minutes of deliberation. The Fourth Circuit, applying plain error review, reversed. The court noted that under plain error doctrine, "We may not intervene unless the judge's comments were so prejudicial as to deny the defendant an opportunity for a fair and impartial trial." The court found these comments were prejudicial under this standard. While observing that it is at times proper for the trial judge to comment on evidence or ask clarifying questions in the interest of trial management, it noted that even permissible comments can create prejudice where the comments are directed at only one side and allow the jury to infer bias by the court. Here, the comments did much more than that. "This jury . . . would have no need to deduce from a pattern of interruptions or questions that the district court was skeptical of the defendant; here, the district court conveyed that skepticism directly." Given that this was an immigration fraud case and that the defense turned solely on the defendant's credibility, the trial judge's comments likely gave the jury a negative impression of the program and its participants, including the defendant. The judge's comments had nothing to do with the evidence in the case and served no case management purpose. The remarks were therefore erroneous. As to whether this error was prejudicial, the panel stated that the government's evidence was sufficient but not overwhelming

and noted that the comments of the trial judge came before the defendant testified. It went on to find that this was not a case where a "single [improper] comment" was made, nor were the judge's comments made towards both parties equally, factors that could affect the prejudice analysis. The short time period in which deliberations were concluded indicated a prejudicial impact on the verdict. Finally, the court's curative instructions were insufficient to rectify the error. Those instructions were not given at the time of the improper comments and did not reference the judge's comments. The panel concluded that the trial judge's comments were prejudicial to the point of affecting the integrity of the trial and ordered the conviction vacated.

Continuances

(1) Trial court did not abuse its discretion by denying defendant's motion to continue; (2) Case did not present the type of situation in which prejudice should be presumed from denial of motion and defendant did not demonstrate how he was prejudiced

State v. Moore, ___ N.C. App. ___, 803 S.E.2d 196 (July 18, 2017). (1) The court rejected the defendant's argument that the trial court's denial of his motion to continue constituted an improper overruling or reversal of an earlier order or ruling by another judge. Specifically, the defendant asserted that a statement by the judge who presided over a pretrial hearing constituted a ruling or decision which could not be modified by another judge. The court rejected this argument, finding that the preliminary and informal remark made by the pretrial judge did not constitute an order or ruling continuing the case. (2) With respect to the defendant's argument that the denial of his motion to continue denied him his constitutional right to effective assistance of counsel, the court declined to presume prejudice in this case. And it found that the defendant had not articulated any argument related to the circumstances of the case to explain why defense counsel did not have a sufficient time to prepare for trial.

Preservation

Where motion to dismiss for insufficiency of the evidence addressed only first-degree murder, review of sufficiency of evidence for second-degree murder waived on appeal

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). The defendant failed to preserve for appellate review his contention that the trial court erred by denying defense counsel's motion to dismiss a charge of second-degree murder. Although the defendant made a motion to dismiss the charge of first-degree murder, he neither moved to dismiss the second-degree murder charge nor argued insufficiency of the evidence to establish that offense.

On plain error review, no error to admit evidence of gang involvement where defense requested to be able to cross-examine on the subject; any error was invited error by the defendant

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). In this attempted murder and assault case, any error with respect to admission of testimony regarding gangs was invited. In his motion in limine, the defendant expressly requested that the trial court either exclude all evidence pertaining to gangs or in the alternative allow cross-examination on the subject. The trial court granted the alternative relief sought and the defendant himself cross-examined and elicited testimony with respect to gangs.

Other Procedural Issues

State has no statutory right to appeal an order of expunction

State v. J.C., ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Nov. 27, 2017). In a decision replacing the court's original opinion, issued on September 19, 2017, the court held that the State has no statutory right to appeal an order of expunction made pursuant to G.S. 15A-145.5 and it granted the petitioner's motion to dismiss the appeal. The State appealed from a trial court order granting petitions for expunction pursuant to G.S. 15A-145.5 and -146. On appeal, the State challenged only the portion of the trial court's order granting the petition for expunction pursuant to G.S. 15A-145.5. The court rejected the State's argument that it had jurisdiction over the appeal under G.S. 7A-27, concluding that G.S. 15A-1445 determines its jurisdiction because the trial court's expunction order pursuant to G.S. 15A-145.5 is part of a criminal proceeding. The court then reasoned that because G.S. 15A-1445 "clearly does not include any reference to a right of the State to appeal from an order of expunction under N.C. Gen. Stat. § 15A-145.5, we are compelled to conclude that the General Assembly did not intend to bestow such a right at the time the statute was adopted." The court went on to note that it has, on occasion, reviewed expunctions pursuant to the granting of a petition for writ of certiorari. Here, the State filed such a petition only after the original opinion was issued; the court reviewed the petition and in its discretion denied it.

Dismissal with leave order entered after pretrial NGRI hearing was not an acquittal for purposes of double jeopardy and did not preclude further prosecution

State v. Payne, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). On the particular facts of the case, the trial court's erroneous entry of judgment of not guilty by reason of insanity did not create a jeopardy bar to further proceedings. The trial court's order did not constitute an acquittal to which jeopardy attached. Its order, which dismissed the charges with leave, was more akin to a procedural dismissal than a substantive ruling.

(1) Admission into evidence of defendant's affidavit of indigency showing a large, unposted bond did not violate defendant's right to a fair trial; (2) Affidavit of indigency admitted to show defendant's birthday violated defendant's right against self-incrimination and was reversible error

State v. Diaz, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). (1) In a case where the defendant was found guilty of abduction of a child, statutory rape and second-degree sexual exploitation, the trial court rejected the defendant's argument that his constitutional right to a fair trial was violated when the State admitted into evidence his affidavit of indigency, which indicated that he was under a secured bond of $500,000 which had not been posted. Specifically, the defendant argued he was prejudiced by the jurors knowing that he was in custody and that the information on the affidavit violated the presumption of innocence. The court held that even if the jurors had inferred that the defendant was in custody and unable to pay the bond, his right to a fair trial was not violated. It noted that although there was some evidence that the defendant was in custody, he was not shackled or handcuffed in the courtroom. (2) The defendant's right against self-incrimination was violated where the State admitted into evidence the defendant's affidavit of indigency which contained his date of birth. A defendant cannot be required to surrender one constitutional right in order to assert another. Here, the defendant cannot be required to complete an affidavit of indigency to receive his right to counsel and then have the State use the affidavit against him, violating his constitutional right against self-incrimination. The abduction of a child offense required the child to be at least four years younger than the defendant; the statutory rape

charges required proof that the defendant was more than four but less than six years older than the victim. The trial court erred by admitting the affidavit of indigency which showed the defendant's age—an element of the charges. The court went on to conclude that the State failed to establish that the error was harmless beyond a reasonable doubt and granted the defendant a new trial on these charges.

Evidence

Rule 106

Trial court did not abuse its discretion by excluding the defendant's statements from earlier custodial interviews while admitting statements from a later interview

State v. Broyhill, ___ N.C. App. ___, 803 S.E.2d 832 (July 18, 2017). The trial court did not abuse its discretion by excluding statements from the defendant's custodial interviews on April 23rd and 25th while admitting statements from a third custodial interview on April 26th. On appeal the defendant argued that his prior statements should have been admitted under Rule 106 because they would have enhanced the jury's understanding of the third statement. The defendant failed to demonstrate that the third statement was out of context when it was introduced and that the two prior statements were either explanatory of or relevant to the third.

Trial court did not abuse its discretion by admitting a more complete version of a detective's notes after the defendant opened the door by asking about one portion of those notes

State v. Hensley, ___ N.C. App. ____, 802 S.E.2d 744 (June 20, 2017). The trial court did not abuse its discretion by admitting a more complete version of a detective's notes after the defendant opened the door by asking about one portion of those notes. The court rejected the defendant's argument that it was improper to admit the notes under Rule 106 (remainder of or related writings or recorded statements) because the State's request to do so was not done contemporaneously with the original cross-examination of the detective. The court went on to find that the trial court did not abuse its discretion under Rule 403 in admitting the notes.

Rule 404(b)

Affirming and modifying in part decision of court of appeals, state supreme court holds that trial court committed reversible error by admitting 404(b) evidence of a dissimilar alleged sexual assault and by failing to give limiting instruction requested by defendant

State v. Watts, ___ N.C. ___, 802 S.E.2d 905 (Aug. 18, 2017) (per curiam). The court modified in part and affirmed the lower court's decision in *State v. Watts*, ___ N.C. App. ___, 783 S.E.2d 266 (April 5, 2016). In this child sexual assault case, the Court of Appeals held, over a dissent, that the trial court committed reversible error by admitting 404(b) evidence. The charges at issue arose from the defendant's alleged sexual assault on an eleven-year-old girl to whom defendant was like a "grandpa." The State sought to introduce at trial 404(b) evidence. Specifically a witness to testify that the defendant had forced his way into her apartment and raped her in 2003. Those alleged events resulted in indictments for rape and breaking or entering against the defendant, but those charges were dismissed in 2005. The trial court allowed the 404(b) evidence to be admitted. After the witness testified, defense counsel moved to strike the testimony, for limiting instruction, or in the alternative a mistrial. The trial court denied the

defendant's motions. The Court of Appeals held that admission of this evidence was prejudicial error. It reasoned that the trial court erred by determining that the evidence was relevant to show opportunity and that the evidence was not sufficiently similar to show common plan or scheme. The Court of Appeals further concluded that "[a]dding to the prejudicial nature" of the testimony was the fact that the trial court did not instruct the jury to consider the evidence only for the 404(b) purpose for which it was admitted. The Supreme Court rejected the State's argument that defense counsel's motion did not constitute a request for a limiting instruction. It went on to hold:

> Our General Statutes provide that "[w]hen evidence which is admissible . . . for one purpose but not admissible . . . for another purpose is admitted, the court, upon request, *shall* restrict the evidence to its proper scope and instruct the jury accordingly." N.C.G.S. § 8C-1, Rule 105 (2015) (emphasis added). "Failure to give the requested instruction must be held prejudicial error for which [a] defendant is entitled to a new trial." Accordingly, because defendant was prejudiced by the trial court's failure to give the requested limiting instruction, we affirm, as modified herein, the opinion of the Court of Appeals that reversed defendant's convictions and remanded the matter to the trial court for a new trial. (citations omitted).

404(b) evidence properly admitted to show common scheme or plan to assault young females despite dissimilar sexual acts

State v. Spinks, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). In this child sexual assault case, the trial court did not err by admitting Rule 404(b) evidence regarding a sexual assault perpetrated by the defendant on another child, Katy. The case being tried involved vaginal intercourse and other acts with a child victim. The 404(b) evidence involved in anal intercourse with Katy. The State offered Katy's testimony to establish that the defendant had a common scheme or plan to commit assaults on young females. The trial court allowed the evidence for that purpose. On appeal, the court rejected the defendant's argument that the acts were too dissimilar, noting: both the victim and Katy are the same sex; the defendant allegedly had forcible intercourse with both victims; the assaults took place in the early morning; and in both incidents, the defendant was a guest in the homes where the children were staying, he entered their bedrooms after midnight, and later bribed them for their silence. The court went on to hold that the evidence was admissible under Rule 403, rejecting the defendant's argument that testimony of anal intercourse of a child by an adult improperly inflamed the jury.

Corpus Delicti

Trial court did not err by denying the defendant's motion to dismiss a charge of armed robbery asserting that the State failed to establish the corpus delicti of the crime

State v. Messer, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The defendant argued that the State relied solely on his uncorroborated confession, which, under the corpus delicti rule, was insufficient to establish guilt. Rejecting the defendant's argument, the court also rejected the notion that the corpus delicti rule requires non-confessional evidence of every element of a crime. Citing prior case law, it concluded that the State need only show corroborative evidence tending to establish the reliability of the confession. Here, the State presented evidence that aligned with the defendant's confession, including, among other things, the medical examiner's determination as to cause of death; the recovery of a firearm at the scene; and DNA evidence.

Sufficient corroborative evidence was presented to show that the crime occurred, satisfying the corpus delecti rule

State v. Sawyers, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). In this case involving impaired and reckless driving, the court rejected the defendant's argument that the State presented insufficient evidence to establish that he was driving the vehicle, in violation of the corpus delicti rule. The court found that the State presented substantial evidence to establish that the cause the car accident was criminal activity, specifically reckless or impaired driving. Among other things: three witnesses testified that immediately before the crash, the driver was speeding and driving in an unsafe manner on a curvy roadway; an officer testified that when he arrived at the scene, he detected alcohol from both occupants; and two motorists who stopped to assist saw the defendant exit the driver side of the vehicle seconds after the crash.

Drug Identification

Trial court erred in allowing lay opinion testimony identifying substance as crack cocaine based on visual identification, but error was not prejudicial

State v. Carter, ___ N.C. App. ___, 803 S.E.2d 464 (Aug. 15, 2017). In this drug case, the court held that although the trial court erred by allowing lay opinion testimony identifying the substance at issue as crack cocaine based on a visual identification, the error was not prejudicial where the State presented expert testimony, based on a scientifically valid chemical analysis, that the substance was a controlled substance. The trial court allowed the arresting officer, a Special Agent Kluttz with the North Carolina Department of Alcohol Law Enforcement, to identify the substance as crack cocaine. Agent Kluttz based his identification on his training and experience and his perceptions of the substance and its packaging. He was not tendered as an expert. The State also introduced evidence in the form of a Lab report and expert testimony by a chemical analyst with the North Carolina State Crime Laboratory. This witness testified that the results of testing indicated that the substance was consistent with cocaine. North Carolina Supreme Court precedent establishes two rules in this area: First, the State is required to present either a scientifically valid chemical analysis of the substance in question or some other sufficiently reliable method of identification. And second, testimony identifying a controlled substance based on visual inspection—whether presented as an expert or lay opinion—is inadmissible. Applying this law, the court agreed with the defendant that Agent Kluttz's identification of the substance as crack cocaine was inadmissible lay opinion testimony. However given the other admissible evidence that identified the substance as a controlled substance based on a chemical analysis, the defendant failed to demonstrate prejudice and therefore to establish plain error.

Trial court committed plain error by allowing officer to identify drugs based on visual inspection

State v. Alston, ___ N.C. App. ____, 802 S.E.2d 753 (June 20, 2017). In this drug case, the trial court committed plain error by allowing a law enforcement officer to testify that pills found at the defendant's home were Alprazolam and Oxycodone, where the identification was based on a visual inspection of the pills and use of a website, drugs.com. Under North Carolina law, pills cannot be identified as controlled substances by visual identification.

Opinions – Child Sex Cases

State supreme court affirmed opinion by court of appeals holding that interviewer from child abuse clinic and social worker did not improperly vouch for victim's credibility and that improper vouching by pediatrician was not prejudicial

State v. Crabtree, ___ N.C. ___, 804 S.E.2d 183 (Sept. 29, 2017). The court per curiam affirmed the decision below, *State v. Crabtree*, ___ N.C. App. ___, 790 S.E.2d 709 (Sept. 6, 2016). In this child sexual assault case, the Court of Appeals held that neither a child interviewer from the Child Abuse Medical Evaluation Clinic nor a DSS social worker improperly vouched for the victim's credibility; however, the court of appeals held, over a dissent, that although a pediatrician from the clinic improperly vouched for the victim's credibility, no prejudice occurred. In the challenged portion of the social worker's testimony, the social worker, while explaining the process of investigating a report of child sexual abuse, noted that the pediatrician and her team "give their conclusions or decision about those children that have been evaluated if they were abused or neglected in any way." This statement merely described what the pediatrician's team was expected to do before sending a case to DSS; the social worker did not comment on the victim's case, let alone her credibility. In the challenged portion of the interviewer's testimony, he characterized the victim's description of performing fellatio on the defendant as "more of an experiential statement, in other words something may have actually happened to her as opposed to something [seen] on a screen or something having been heard about." This testimony left the credibility determination to the jury and did not improperly vouch for credibility. However, statements made by the pediatrician constituted improper vouching. Although the pediatrician properly described the five-tier rating system that the clinic used to evaluate potential child abuse victims, she ventured into improper testimony when she testified that "[w]e have sort of five categories all the way from, you know, we're really sure [sexual abuse] didn't happen to yes, we're really sure that [sexual abuse] happened" and referred to the latter category as "clear disclosure" or "clear indication" of abuse in conjunction with her identification of that category as the one assigned to the victim's interview. Also, her testimony that her team's final conclusion that the victim "had given a very clear disclosure of what had happened to her and who had done this to her" was an inadmissible comment on the victim's credibility. However, the defendant was not prejudiced by these remarks.

Expert witness's testimony about what child told her about his injuries and who caused them did not constitute improper vouching for the victim

State v. Prince, ___ N.C. App. ___, 805 S.E.2d 304 (Sept. 5, 2017). In this child abuse case, the expert witness's testimony did not constitute improper vouching for the victim. At trial Holly Warner, a nurse practitioner, testified as an expert. Warner had evaluated the victim after he was placed in foster care. At trial she related what the victim told her about his injuries and what she observed during her evaluation of him before she gave her medical opinion. When she related the victim's disclosure about how his injury occurred and who caused them, Warner was describing her process for gathering necessary information to make a medical diagnosis and was not commenting on the victim's credibility. In neither her direct examination nor cross-examination did Warner state that the child was believable, credible or telling the truth.

Trial court did not err by allowing social work expert to testify about the frequency of and the reasons for children's delayed disclosure of sexual abuse

State v. Shore, ___ N.C. App. ___, 804 S.E.2d 606 (Sept. 5, 2017). In this child sexual abuse case the court applied the new *Daubert* standard and concluded that the trial court did not err by admitting certain expert testimony. At trial Kelli Wood testified as an expert in clinical social work, specializing in child sexual abuse cases. The defendant argued that the trial court abused its discretion by allowing Wood to testify that it is not uncommon for children to delay the disclosure of sexual abuse and by allowing Wood to provide possible reasons for delayed disclosures. According to the defendant, Wood's testimony was unreliable because she had not conducted on research herself and instead relied on studies conducted by others. The court found that this argument—that the trial court abused its discretion by admitting Wood's testimony based on a review of research on delayed disclosures combined with her professional experience— to "directly conflict[]" with Rule 702. It noted that experience alone or experience combined with knowledge and training is sufficient to establish a proper foundation for expert testimony. Here, Wood testified that her testimony on delayed disclosures was grounded in 200 hours of training, 11 years of forensic interviewing experience, conducting over 1200 forensic interviews with 90% of those focusing on sex abuse allegations, and reviewing over 20 articles on delayed disclosures. The court noted that similar testimony had been admitted under an earlier version of Rule 702, and that case law was still good law. The court also rejected the defendant's argument that the testimony was inadmissible because it was not the product of reliable principles and methods. The defendant argued that the research Wood relied on was flawed in a number of respects. The court noted that these concerns were addressed in examination and cross-examination of Wood and that Wood was able to provide detailed explanations for each of these concerns.

Trial court did not err by permitting doctor to testify in statutory rape case that the results of her examination of the victim were suspicious but not conclusive for vaginal penetration

State v. Dye, ___ N.C. App. ____, 802 S.E.2d 737 (June 20, 2017). In this statutory rape case, the court rejected the defendant's argument that the trial court erred by allowing the State's witness, Dr. Rothe, to improperly bolster the victim's credibility. Rothe made no definitive diagnosis that the victim had experienced sexual abuse. Instead, Rothe detailed her examination of the victim, and testified that the absence of the victim's hymen in the 5-7 o'clock area was "suspicious" for vaginal penetration and that "having an absent hymen in that section of posterior rim is very suspicious for sexual abuse." Rothe appropriately cautioned that her findings, while suspicious for vaginal penetration and sexual abuse, were not conclusive; Rothe explained that "the only time . . . a clinical provider . . . can say sexual abuse happened is if we see that hymen within three days of the sexual abuse[.]" Since Rothe had not examined the victim within three days of the alleged sexual abuse, she explained that the "nomenclature becomes difficult." Rothe readily conceded on cross-examination that the gap of eight months between the alleged abuse and the examination would "affect [her] ability to determine some results" of her examination; that there is "a lot of variation in what one would consider normal in what a hymen of a prepubescent or pubescent girl looks like" and the appearance of the victim's hymen could fall within that normal variation; and that conclusive results were not possible without a "baseline" examination conducted before the alleged abuse. Rothe further testified on cross that the results of the victim's examination were "suspicious but not conclusive" for vaginal penetration. It is clear that Rothe did not opine that sexual abuse had in fact occurred. Rothe's testimony that the results of the victim's examination were "suspicious" of vaginal penetration and sexual abuse is consistent with testimony the court has found to be permissible, including an expert's opinion that the results of an examination are "consistent with" sexual abuse.

(1) Introductory paragraph of medical expert's report with words "child sexual abuse by [victim's] disclosure" was not an opinion that abuse occurred or otherwise improper vouching and; (2) no plain error to admit medical expert's opinion that the victim's disclosures were "compelling."

State v. Spinks, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). (1) In this child sexual assault case, the trial court did not err by admitting an assessment in a report by the State's medical expert, Dr. Thomas, of "Child sexual abuse." Thomas testified to general characteristics of abused children. She did not offer an opinion that the victim had been sexually abused or that the victim fell into the category of children who have been sexually abused but showed no physical symptoms of abuse. The report in question includes a statement: "Chief Concern: Possible child sexual abuse." The statement at issue in the report was in a paragraph entitled Assessment and Recommendations, which began with the following sentence: "Child sexual abuse by [victim's] disclosure." The court rejected the argument that Thomas opined that the victim had been sexually abused. It concluded that the phrase at issue merely introduced the paragraph of the report dealing with the victim's disclosure.
(2) No plain error occurred with respect to admission of certain statements made by the State's medical expert, Dr. Thomas, alleged by the defendant to impermissibly bolster and vouch for the victim's credibility. In her written report, Thomas wrote that the victim's disclosures have been "consistent and compelling" and that she "agree[s] with law enforcement in this compelling and concerning case." It is not improper for an expert to testify to a victim's examination being "consistent" with the victim's statements of abuse. Here, the defendant argued that "compelling" was the problematic word. Assuming arguendo that admission of the statements was error, it did not rise to the level of plain error.

Photographs and Video

Trial court erred by admitting video without adequate foundation but error was not prejudicial

State v. Moore, ___ N.C. App. ___, 803 S.E.2d 196 (July 18, 2017). Although admission of video evidence was error, it was not prejudicial error. An officer testified that the day after the incident in question he asked the manager of a convenience store for a copy of the surveillance video made by store cameras. The manager allowed the officer to review the video but was unable to copy it. The officer used the video camera function on his cell phone to make a copy of the surveillance footage, which was copied onto a computer. At trial, he testified that the copy of the cell phone video accurately showed the contents of the video that he had seen at the store. The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he had observed on the day in question. The transcript reveals no testimony concerning the type of recording equipment used to make the video, its condition on the day in question, or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. As such, the State failed to offer a proper foundation for introduction of the video as either illustrative or substantive evidence. The court went on to find that introduction of the video was not prejudicial.

Trial court did not commit plain error by admitting for illustrative purposes a Facebook picture of the defendant and an accomplice in which the defendant's middle finger was extended

State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (June 20, 2017). At trial the State called a detective who testified that the victim showed him a picture of the defendant and the accomplice on the defendant's Facebook page for identity purposes. The detective printed that picture and it was admitted at trial for illustrative purposes, over the defendant's objection. The trial court properly

admitted the photograph pursuant to G.S. 8-97 to illustrate the detective's testimony that the victim used the photograph to identify the defendant and his accomplice. The photograph was properly authenticated and the trial court gave a limiting instruction as to its use.

Rape Shield

Trial court did not err by excluding evidence of victim's sexual history under Rule 403

State v. West, ___ N.C. App. ___, 804 S.E.2d 225 (Aug. 15, 2017). When a trial court properly determines, pursuant to Evidence Rule 403, that the probative value of evidence about a victim's sexual history is substantially outweighed by its potential for unfair prejudice, the trial court does not err by excluding the evidence, regardless of whether it falls within the scope of the Rape Shield Rule. The defendant was convicted of second-degree sexual offense. On appeal he argued that the trial court erred by denying his ability to cross-examine the victim regarding the victim's commission of sexual assault when he was a child. Specifically, the victim had told an officer that he had sexually assaulted his half-sister when he was eight or nine years old and thereafter was placed in a facility until he reached 18 years old. The defendant asserted that the victim's statement about this assault was admissible for impeachment because it was inconsistent with the victim's previous statements to law enforcement about how and when he was removed from his home as a child. The trial court found that the victim's statement about sexually assaulting his sister was evidence of prior sexual behavior protected by the Rape Shield Law and also was inadmissible because any probative value is substantially outweighed by the likelihood of unfair prejudice and confusion to the jury. The court declined to address the defendant's argument that a prior sexual assault committed by a victim is not protected under the Rape Shield law, concluding instead that the trial court properly excluded the evidence under Rule 403. The sexual behavior at issue occurred more than a decade earlier and involved no factual elements similar to the charges in question. The incident is disturbing and highly prejudicial and the circumstances of the victim's removal from his family home as a child are of remote relevance to the offense charged. Moreover, other evidence, including testimony that the defendant's DNA matched a swab taken from the victim shortly after the assault, render the victim's inconsistent statements about facts less relevant to the contested factual issues at trial, namely the defendant's denial that any sexual encounter occurred. The court also rejected the defendant's argument that exclusion of this evidence impermissibly prevented the jury from hearing evidence that the victim was not a virgin of the time of the offense, contrary to his statement to the defendant that he was a virgin.

Confrontation

Statements made by an anonymous 911 caller informing the police of a possible incident involving a firearm and describing the suspect were nontestimonial

State v. McKiver, ___ N.C. ___, 799 S.E.2d 851 (June 9, 2017). Reversing the Court of Appeals, the Supreme Court held that the statements made by an anonymous 911 caller informing the police of a possible incident involving a firearm and describing the suspect were nontestimonial. The circumstances surrounding the caller's statements objectively indicate that the primary purpose was to enable law enforcement to meet an ongoing emergency. The primary purpose of the call was to inform the police of a possible dispute involving an unidentified man brandishing a firearm outside the caller's home on a public street in a residential subdivision. The caller reacted by going to her home and staying away from the window and an officer retrieved his patrol rifle before entering the scene. "As is evident from the precautions taken by both the caller and the officers on the scene, they believed the unidentified

suspect was still roving subdivision with a firearm, posing a continuing threat to the public and law enforcement." To address this threat, an officer requested that the dispatcher place a reverse call to the caller to get more information about the individual at issue and, once received, quickly relayed that information to other officers to locate and apprehend the suspect.

Trial court erred by admitting, in murder trial, testimony from a law enforcement officer regarding what the murder victim told him during an earlier domestic abuse investigation

State v. Miller, ___ N.C. App. ____, 801 S.E.2d 696 (June 20, 2017), *review allowed*, ___ N.C. ___, 802 S.E.2d 731 (Aug. 17, 2017). In a case in which the defendant was charged with killing his estranged wife and injuring her boyfriend, the trial court erred by admitting evidence in violation of the defendant's confrontation clause rights. At trial, a law enforcement officer testified to what the defendant's wife told him during an earlier domestic abuse investigation. The victim's statements to the officer in that earlier incident were made after she fled from the defendant in her car and called the police from a safe location. The purpose of the officer's questions was to determine what happened, not what was happening. The court held: "These statements to the officer plainly addressed what happened, not what was happening, and they were not made during any immediate threat or ongoing emergency. Thus, we agree with [the defendant] that these statements were testimonial in nature and thus subject to the Confrontation Clause." The court went on to reject the State's argument that the defendant had a prior opportunity to cross-examine his wife at an earlier trial, noting that there was no evidence in the record that the wife made the statements at the prior trial or that if she did, the defendant was afforded an opportunity for cross-examination. The court also rejected the State's argument that the mere fact that he killed his wife constituted a forfeiture of his confrontation rights, noting: forfeiture requires some showing that the defendant killed the witness at least in part to prevent the witness from testifying.

Over a dissent, court of appeals holds that trial court erred by admitting pretrial deposition testimony from a witness who did not testify at trial

State v. Clonts, ___ N.C. App. ____, 802 S.E.2d 531 (June 20, 2017), *temporary stay allowed*, ___ N.C. ___, 800 S.E.2d 668 (July 7, 2017). (1) The trial court's findings were insufficient to establish that the witness was unavailable for purposes of the Rule 804(b)(1) hearsay exception and the Confrontation Clause. The entirety of the trial court's findings on this issue were: "The [trial court] finds [the witness] is in the military and is stationed outside of the State of North Carolina currently. May be in Australia or whereabouts may be unknown as far as where she's stationed." The trial court made no findings that would support more than mere inference that the State was unable to procure her attendance; made no findings concerning the State's efforts to procure the witness's presence at trial; and made no findings demonstrating the necessity of proceeding to trial without the witness's live testimony. The trial court did not address the option of continuing trial until the witness returned from deployment. It did not make any finding that the State made a good-faith effort to obtain her presence at trial, much less any findings demonstrating what actions taken by the State could constitute good-faith efforts. It thus was error for the trial court to grant the State's motion to admit the witness' deposition testimony in lieu of her live testimony at trial. (2) The court went on to find that even if the trial court's findings of fact and conclusions had been sufficient to support its ruling, the evidence presented to the trial court was insufficient to support an ultimate finding of "unavailability" for purposes of Rule 804. It noted in part that the State's efforts to "effectuate [the witness's] appearance" were not "reasonable or made in good faith." (3) A witness's pretrial deposition testimony, taken in preparation of the criminal case, was clearly testimonial for purposes of the Confrontation Clause. (4) The court found that the facts of the case did not support a finding that the witness was unavailable under the Confrontation Clause. In this

respect, the court noted that no compelling interest justified denying the defendant's request to continue the trial to allow for the witness's live testimony. It added: "The mere convenience of the State offers no such compelling interest." It continued: "We hold that . . . in order for the State to show that a witness is unavailable for trial due to deployment, the deployment must, *at a minimum*, be in probability long enough so that, with proper regard to the importance of the testimony, the trial cannot be postponed." (quotation omitted).

Impeachment

The trial court did not abuse its discretion by sustaining the State's objection to the introduction of an unauthenticated screenshot to impeach the victim's credibility

State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (June 20, 2017). Although it was permissible for counsel to ask the defendant questions about the screenshot, he could not impeach the victim's credibility with extrinsic evidence to prove the contents of the screenshot where no foundation had been laid and the materiality of the post had not been demonstrated.

Experts

Error to admit fingerprint expert testimony where expert witness failed to demonstrate reliable application of methodology in violation of Daubert, but no prejudice in light of other evidence of guilt

State v. McPhaul, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). In this attempted murder and robbery case, the court applied the new *Daubert* test for expert testimony and held that trial court abused its discretion by allowing the State's expert witness to testify that latent fingerprints found on the victim's truck and on evidence seized during a home search matched the defendant's known fingerprint impressions. The court held that the witness's testimony failed to satisfy Rule 702(a)(3). To meet the requirements of the rule, an expert witness must be able to explain not only the abstract methodology underlying the opinion, but also that the witness reliably applied that methodology to the facts of the case. Here, the witness testified that during an examination, she compares the pattern type and minutia points of the latent print and known impressions until she is satisfied that there are "sufficient characteristics in sequence of the similarities" to conclude that the prints match. However, she provided no such detail in testifying about how she arrived at her actual conclusions in this case. The court concluded: without further explanation for her conclusions, the expert implicitly asked the jury to accept her expert opinion that the prints matched. Since she failed to demonstrate that she applied the principles and methods reliably to the facts of the case as required by Rule 702(a)(3) the trial court abused its discretion by admitting this testimony. The court went on to find that the error was not prejudicial.

Rule 702(a1) does not require the trial court to explicitly recognize a law enforcement officer as an expert witness pursuant to Rule 702(a) before he can testify to the results of a HGN test

State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (June 9, 2017). Reversing the Court of Appeals, the court held that Evidence Rule 702(a1) does not require the trial court to *explicitly* recognize a law enforcement officer as an expert witness pursuant to Rule 702(a) before he can testify to the results of a HGN test. Rather, the court noted, prior case law establishes that an implicit finding will suffice. Reviewing the record before it, the court found that here, by overruling the defendant's objection to the witness's testimony, the trial court implicitly found that the officer was qualified to testify as an expert.

The court noted however that its ability to review the trial court's decision "would have benefited from the inclusion of additional facts supporting its determination" that the officer was qualified to testify as an expert.

Trial court did not commit plain error by allowing law enforcement officer who was not tendered as an expert to testify about the results of the HGN test he administered

State v. Sauls, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 19, 2017). The trial court did not commit plain error by allowing a trooper to testify at trial about the HGN test he administered on the defendant during the stop where the State never formally tendered the trooper as an expert under Rule 702. The court noted that during the pendency of the appeal the state Supreme Court decided *State v. Godwin*, ___ N.C. ___, ___ 800 S.E.2d 47, 48 (2017) (Evidence Rule 702(a1) does not require a law enforcement officer to be recognized explicitly as an expert witness pursuant to Rule 702 before the officer may testify to the results of a HGN test), which controls this case. As in *Godwin*, the defendant was not arguing that the officer was unqualified to testify as an expert, but only that he had to be formally tendered as such. Under *Godwin* "it was simply unnecessary for the State to make a formal tender of the trooper as an expert on HGN testing."

(1) Trial court did not err by allowing the State to question the defendant's expert witness about fees he received for testifying in criminal cases; (2) Trial court did not err by allowing the State's expert to testify about the defendant's state of mind at the time of the shooting

State v. Coleman, ___ N.C. App. ___, 803 S.E.2d 820 (July 18, 2017). (1) In this homicide case, the trial court did not err by allowing the State to question the defendant's expert witness on automatism regarding the amount of fees he received for testifying in other, unrelated criminal cases. The challenged evidence was relevant to "test partiality towards the party by whom the expert was called." It explained: "From the large sums of money that [the defendant]'s expert earned by testifying solely on behalf of criminal defendants, a reasonable jury could infer that the expert had an incentive to render opinions favorable to the criminal defendants who employ him." (2) Trial court did not err by allowing the State's expert witness on automatism to testify to the defendant's state of mind at the time of the shooting. The expert endocrinologist testified that based on his experience with hypoglycemia and his review of the defendant's medical records and account of what had occurred on the day of the shooting, the defendant's actions were "not caused by automatism due to hypoglycemia." The court rejected the defendant's argument that this testimony, while couched in expert medical testimony, was merely speculation about the defendant state of mind at the time of the shooting. Here, the expert testified that in his opinion the defendant was not in a state of automatism at the time because he did not suffer from amnesia, a key characteristic of the condition. The trial court acted well within its discretion by admitting this testimony.

Pursuant to Rule 702(a1), the State is not required to establish the reliability of HGN testing in order for an expert to testify about HGN results at trial

State v. Younts, ___ N.C. App. ___, 803 S.E.2d 641 (July 18, 2017). In this DWI case to which the amended version of Evidence Rule 702 applied, the court held that a trial court does not err when it admits expert testimony regarding the results of a Horizontal Gaze Nystagmus (HGN) test without first determining that HGN testing is a product of reliable principles and methods as required by subsection (a)(2) of the rule. Evidence Rule 702(a1) obviates the State's need to prove that the HGN testing method is sufficiently reliable.

Crimes

Participants in Crimes

Trial court did not err by denying defendant's motion to dismiss a charge of aiding and abetting larceny

State v. Cannon, ___ N.C. App. ___, 804 S.E.2d 199 (Aug. 1, 2017). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of aiding and abetting larceny. The charges arose out of the defendant's involvement with store thefts. A Walmart loss prevention officer observed Amanda Eversole try to leave the store without paying for several clothing items. After apprehending Eversole, the loss prevention officer reviewed surveillance tapes and discovered that she had been in the store with William Black, who had taken a number of items from store shelves without paying. After law enforcement was contacted, the loss prevention officer went to the parking lot and saw Black with the officers. Black was in the rear passenger seat of an SUV, which was filled with goods from the Walmart. A law enforcement officer testified that when he approached Black's vehicle the defendant asked what the officers were doing. An officer asked the defendant how he knew Black and the defendant replied that he had only just met "them" and had been paid $50 to drive "him" to the Walmart. The defendant also confirmed that he owned the vehicle. Citing this and other evidence, the court held that the trial court did not err by denying the motion to dismiss.

Obtaining Property by False Pretenses

Doctrine of recent possession applies to obtaining property by false pretenses

State v. Street, ___ N.C. App. ____, 802 S.E.2d 526 (June 20, 2017). The doctrine of recent possession applies to obtaining property by false pretenses. Thus, the trial court did not err by instructing the jury on this doctrine.

Abduction of a Child

Defendant's statement to child that she should accompany him or would never see him again was sufficient evidence of inducement taken in the light most favorable to the State

State v. Diaz, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of abduction of a child under G.S. 14-41. The defendant, who had a sexual relationship with the child victim, argued that the evidence showed that the child voluntarily left her home. The court rejected this argument, noting in part that the defendant induced the child to leave with him by telling her that if she didn't come with him she would never see him again.

Animal Cruelty

Adopting an unpublished opinion by the court of appeals over a dissent, no error in trial court refusing to instruct on lesser offense of misdemeanor animal cruelty where no evidence supported that theory of culpability

State v. Wilson, ___ N.C. ___, 805 S.E.2d 480 (Nov. 3, 2017) (per curiam). On appeal from an unpublished decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 794 S.E.2d 921 (2016), finding no error in this animal cruelty case, the court per curiam affirmed. The defendant appealed from her conviction for felony cruelty to animals, contending that the trial court erred by refusing to instruct the jury on the lesser included offense of misdemeanor cruelty to animals. The Court of Appeals held that because no evidence was presented from which a jury could find that the defendant intentionally injured the dog by dragging him behind her vehicle but did so without malice, the trial court was not required to instruct on the lesser included offense.

Assault

Evidence was insufficient to establish that the officer sustained serious bodily injury from the defendant's bites

State v. Williams, ___ N.C. App. ___, 804 S.E.2d 570 (Aug. 15, 2017). The trial court erred by denying the defendant's motion to dismiss charges of assault inflicting serious bodily injury where there was insufficient evidence that the officer sustained serious bodily injury from the defendant's bites. There was insufficient evidence of a permanent or protracted condition that causes extreme pain. Although there was evidence that the bite caused swelling and bruising that resolved in about one month, there was no evidence that the injury continued to cause the officer significant pain subsequent to his initial hospital treatment. Furthermore there was insufficient evidence of serious, permanent disfigurement, notwithstanding discoloration at the site of the bite.

Error to sentence defendant for Class C assault and Class F assault for same conduct

State v. McPhaul, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). The trial court erred by imposing sentences for assault with a deadly weapon with intent to kill inflicting serious injury and assault inflicting serious bodily injury based on the same incident. The statute proscribing the lesser of the two offenses, a Class F felony, includes the following prefatory language: "Unless the conduct is covered under some provision of law providing greater punishment." Here, the defendant was also convicted of the more serious assault, a Class C felony. Thus multiple punishment is precluded.

Conspiracy

Divided Court of Appeals holds evidence supported multiple conspiracies where robberies occurred at random and no evidence supported a single, ongoing agreement

State v. Stimpson, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). In a case in which the defendant was charged with five indictments alleging five separate offenses of conspiracy to commit robbery arising from five separate incidents, the court held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss four of the charges. On appeal, the defendant argued that there was only

one agreement and thus only one conspiracy charge was proper. The majority disagreed, concluding, in part, that the random nature and happenstance of the robberies did not indicate a one-time, pre-planned conspiracy. It noted that the victims and crimes committed arose at random and by pure opportunity.

Impaired Driving

Prior DWI convictions that occurred on the same day were properly used as predicate offenses for habitual impaired driving prosecution

State v. Mayo, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). For habitual impaired driving, the three prior impaired driving convictions need not be from different court dates. On appeal, the defendant alleged that the indictment for habitual impaired driving was facially invalid because two of the underlying impaired driving convictions were from the same court date. The indictment alleged the following prior charges: impaired driving on November 26, 2012, with a conviction date of September 30, 2015 in Johnson County; impaired driving on June 22, 2012, with a conviction date of December 20, 2012 in Wake County; and impaired driving on June 18, 2012, with a conviction date of December 20, 2012 in Wake County. The statute contains no requirement regarding the timing of the three prior impaired driving convictions, except that they occur within 10 years of the current charge.

Trooper's testimony that he was "certified" to administer breath test and followed correct procedures established sufficient foundation for admission of results

State v. Squirewell, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). The trial court did not err by allowing a state trooper to testify about the results of a chemical analysis of the defendant's breath. On appeal, the defendant argued that the State failed to provide an adequate foundation for this testimony. Specifically, the court found that the requirements of G.S. 20-139.1 were satisfied. Here, the trooper testified: that he was certified by the Department of Human Resources to perform chemical breath analysis using the ECIR2 machine; that the defendant's breath analysis was conducted on the ECIR2 machine; that he set up the ECIR2 machine in preparation for the defendant's test according to the procedures established by the Department; about those specific procedures and that he followed the procedures in this instance; and that the machine worked properly and produced a result for defendant's breath test. The court noted:

> Although the trooper did not explicitly state that he had a Department issued permit to conduct chemical analysis on the day he conducted defendant's breath test, which is certainly best practice, we hold the trooper's testimony that he was certified to conduct chemical analysis by the Department and that he performed the chemical analysis according to the Department's procedures was adequate in this case to lay the necessary foundation for the admission of chemical analysis results.

Retrograde extrapolation evidence inadmissible under Rule 702 where expert assumed defendant was in post-absorptive state without evidence supporting assumption; prejudicial error to admit

State v. Hayes, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). Following its decision in *State v. Babich*, ___ N.C. App. ___, 797 S.E.2d 359 (2017), in this DWI case the court held that the State's expert testimony regarding retrograde extrapolation was inadmissible under *Daubert* and Rule 702. The expert used the defendant's .06 BAC 1 hour and 35 minutes after the traffic stop to determine that the

defendant had a BAC of .08 at the time of the stop. To reach this conclusion the expert assumed that the defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was in the process of being eliminated from his bloodstream and that his BAC was in decline. The expert admitted that while there were no facts to support this assumption, it was required so that he could complete his retrograde extrapolation analysis. The State conceded error under *Babich* and argued only that the error was not prejudicial. The court found otherwise and reversed and remanded for a new trial.

Sexual Assault

Reversing court of appeals, state supreme court holds that evidence was sufficient to support defendant's conviction for attempted first-degree rape of a child

State v. Baker, ___ N.C. ___, 799 S.E.2d 816 (June 9, 2017). The Court of Appeals had reversed the defendant's conviction finding, in part, that the evidence supported only a conviction for completed rape, not an attempted rape. Citing precedent, the Supreme Court held that evidence of a completed rape is sufficient to support an attempted rape conviction.

Conversion

Evidence was insufficient to convict defendant of felony conversion when State failed to prove that alleged victim owned the vehicle allegedly entrusted to the defendant

State v. Falana, ___ N.C. App. ___, 802 S.E.2d 582 (July 5, 2017). Where there was insufficient evidence as to the ownership of the property in question, a vehicle, the evidence was insufficient to convict the defendant of felony conversion under G.S. 14-168.1. The indictment alleged that the vehicle was owned by a natural person named as Ezuma Igwe but the State failed to provide substantial evidence that Igwe owned the vehicle. North Carolina law defines a vehicle owner as the person holding legal title to it but here, Igwe never received title to the vehicle in question.

Drugs

Over a dissent, court holds a single instance of drugs in the vehicle was sufficient to support maintaining a vehicle conviction in light of the circumstances of the case

State v. Dunston, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). Over a dissent, the court held that the trial court did not err by denying the defendant's motion to dismiss a charge of maintaining a vehicle for keeping or selling controlled substances. The court disagreed with the defendant's argument that case law establishes a bright-line rule that one incident of keeping or selling controlled substances always is insufficient to sustain a conviction for maintaining a vehicle. The determination, the court said, is based on the totality of the circumstances. Here, the defendant was in the vehicle at a location known for a high level of illegal drug activity. He was observed by officers unwrapping cigars and rerolling them after manipulating them. Based on the officer's training and experience, the defendant's actions were consistent with those used in distributing marijuana. The driver was observed in hand-to-hand exchange of cash with another person. When searched by officers, the driver was discovered to have marijuana and the defendant was no longer in possession of the "cigars." Additionally, the defendant possessed a trafficking quantity of heroin along with plastic bags, two sets of digital scales, three cell phones, and $155 in cash. Additionally, the defendant's ex-girlfriend testified that she was concerned about his negative influence on his nephew because she "knew the lifestyle."

Reversing court of appeals, state supreme court rejected the defendant's as-applied challenge to the constitutionality of statute barring his possession of pseudoephedrine based on his prior conviction

State v. Miller, ___ N.C. ___, 800 S.E.2d 400 (June 9, 2017). Reversing a unanimous decision of the Court of Appeals, *State v. Miller*, ___ N.C. App. ___, ___, 783 S.E.2d 512 (2016), the court rejected the defendant's as-applied challenge to the constitutionality of G.S. 90-95(d1)(1)(c) (felony to possess a pseudoephedrine product when the defendant has a prior conviction for possession or manufacture of methamphetamine). After holding that the General Assembly intended the statute to be a strict liability offense, the Court of Appeals had gone on to hold that the statute was unconstitutional "as applied to a defendant in the absence of notice to the subset of convicted felons whose otherwise lawful conduct is criminalized thereby or proof beyond a reasonable doubt by the State that a particular defendant was aware that his possession of a pseudoephedrine product was prohibited by law." The Supreme Court began by noting that, as a general rule, ignorance of the law or a mistake of law is no defense to a criminal prosecution. In *Lambert v. California*, 355 U.S. 225 (1957), however, the United States Supreme Court sustained and as applied challenge to a municipal ordinance making it unlawful for any individual who had been convicted of a felony to remain in Los Angeles for more than five days without registering with the Chief of Police. In that case the defendant had no actual knowledge of the registration requirement and the ordinance did not require proof of willfulness. The issue presented was whether the registration act violated due process when applied to a person who has no actual knowledge of the duty to register, and where no showing is made of the probability of such knowledge. Acknowledging the rule that ignorance of the law is no excuse, the U.S. Supreme Court pointed out that due process conditions the exercise of governmental authority on the existence of proper notice where a person, wholly passive and unaware of any criminal wrongdoing, is charged with criminal conduct. Because the ordinance at issue in *Lambert* did not condition guilt on "any activity" and there were no surrounding circumstances which would have moved a person to inquire regarding registration, actual knowledge of the duty to register or proof of the probability of such knowledge and subsequent failure to comply were necessary before a conviction under the ordinance could stand consistent with due process. *Lambert* thus carves out a narrow exception to the general rule that ignorance of the law is no excuse. The subsequent *Bryant* decision from this court establishes that if the defendant's conduct is not "wholly passive," because it arises either from the commission of an act or failure to act under circumstances that reasonably could alert the defendant to the likelihood that inaction would subject him or her to criminal liability, *Lambert* does not apply. Turning to the facts of the case, the court noted that the defendant actively procured the pseudoephedrine product at issue. Moreover, the defendant never argued that he was ignorant of the fact that he possessed a pseudoephedrine product or that he had previously been convicted of methamphetamine possession. His conduct thus differs from that at issue in *Lambert* and in this court's *Bryant* decision in that it was not a "wholly passive" failure to act. The court found no need to determine whether the surrounding circumstances should have put the defendant on notice that he needed to make inquiry into his ability to lawfully purchase products containing pseudoephedrine and that his as applied challenge failed. And it went on to conclude that the issue of whether the statute was a strict liability offense was not properly before it.

Sufficient evidence of constructive possession of paraphernalia where driver possessed marijuana and admitted to possession of the pipe

State v. Sawyers, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). In this possession of marijuana paraphernalia case, the State presented sufficient evidence to establish that the defendant constructively possessed a marijuana pipe. The pipe was found in a crashed vehicle; the defendant and one other person were in the vehicle at the time. Although the defendant did not have exclusive

possession of the vehicle, sufficient incriminating circumstances existed to establish constructive possession, including: evidence that the defendant was driving the vehicle immediately before the accident; the pipe was found on the driver's side floorboard; a small amount of marijuana was found on the defendant's person; and the defendant admitted the contraband belonged to him.

Homicide

Evidence that the defendant voluntarily shot and killed his wife was sufficient to prove voluntary manslaughter

State v. Coleman, ___ N.C. App. ___, 803 S.E.2d 820 (July 18, 2017). The evidence was sufficient with respect to the defendant's voluntary manslaughter conviction. The defendant was charged with first-degree murder. At trial the defendant admitted that he shot and killed his wife. He argued however that as a result of diabetes, his blood sugar was dangerously low at the time of the shooting, causing him to act in a manner that was not voluntary. The defendant moved for a directed verdict on the first-degree murder charges as well as the lesser charges of second-degree murder and voluntary manslaughter. The judge denied this motion and the jury found him guilty of voluntary manslaughter. The court rejected the defendant's argument that acting in the "heat of passion" was an element of voluntary manslaughter, noting that for this offense the State need only prove that the defendant killed the victim by an intentional and unlawful act and that the defendant's act was a proximate cause of death. Here, the defendant admitted that he shot his wife. His sole defense was that he did not act voluntarily due to low blood sugar, which put him in a state of automatism. The State presented expert testimony that he was not in such a state. Thus, there was substantial evidence from which the jury could reject the defendant's automatism defense and conclude that the defendant intentionally shot and killed his wife—the only elements necessary to prove voluntary manslaughter.

(1) The State presented sufficient evidence of premeditation and deliberation in first-degree murder prosecution; (2) The State presented evidence that the killing was not in self-defense sufficient to survive defendant's motion to dismiss

State v. Madonna, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). (1) In this murder case, there was sufficient evidence of premeditation and deliberation. The evidence showed that the victim suffered from a heart condition and other ailments. In the months before his death, the defendant and the victim--who were married--were arguing about financial issues. The defendant began a romantic relationship with her therapist and planned to ask the victim for divorce. A search of the home computer discovered Internet searches including "upon death of the veteran," "can tasers kill people," "can tasers kill people with a heart condition," "what is the best handgun for under $200," "death in absentia USA," and "declare someone dead if missing 3 years." On the date of death, the defendant visited her nephew, expressed concern about her safety due to break-ins in her neighborhood, and received from her nephew a gun and a knife. Shortly after that, she returned home and asked the victim to go on a drive with her. The defendant took the gun and knife in the car and used the weapons to kill the victim, shooting him and stabbing him approximately 12 times. Later in the day, the defendant messaged her therapist "it's almost done" and "it got ugly." After the incident, the defendant got rid of her bloodstained clothing, threw away the victim's medications and identification, and said that he had either gone to Florida or was at a rehabilitation center. (2) The court rejected the defendant's argument that the trial court should have granted the defendant's motion to dismiss because the State failed to present substantial evidence that the defendant did not act in self-defense. Ample evidence contradicted the defendant's claim of self-defense, including that the victim had medical issues and was

so frail that the VA had approved a plan to equip the victim and the defendant's home with a wheelchair lift, ramps, and a bathroom modification; the defendant was physically active; after the victim was twice wounded by gunshots, the defendant stabbed him 12 times; and the victim suffered minimal injuries compared to the nature and severity of the victim's injuries.

There was sufficient evidence of lying in wait for first-degree murder despite defendant's announcement of his presence at the scene; denial of motion to dismiss for insufficiency affirmed

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). The trial court did not err by denying the defendant's motion to dismiss a first-degree murder charge based on the theory of lying in wait. The defendant asserted that no ambush occurred because the defendant announced his presence. The evidence showed that the victim was in his residence with friends when the defendant arrived after dark. The victim went outside to speak with the defendant. There was no evidence that the defendant threatened or directed harm at the victim. The victim returned to his trailer, unharmed, after speaking with the defendant. The defendant waited for the victim to go back inside and then fired his weapon into the trailer, killing the victim. The victim had no warning that the defendant intended any harm. When the defendant spoke with the victim, the defendant told the victim to send another person outside, indicating that he only had an issue with the other person. Therefore, the court concluded, the victim was taken by complete surprise and had no opportunity to defend himself.

Larceny

Reversing court of appeals, state supreme court finds sufficient evidence to support conviction for felony larceny where defendant deposited payroll check that was 100 times what he was owed, was asked not to remove funds, and did so anyway

State v. Jones, ___ N.C. ___, 800 S.E.2d 54 (June 9, 2017). The evidence was sufficient to support the defendant's convictions for three counts of felony larceny. The defendant, a truck driver who worked as an independent contractor, was overpaid because a payroll processor accidentally typed "$120,000" instead of "$1,200" into a payment processing system, resulting in an excess deposit in the defendant's bank account. Although the defendant was informed of the error and was asked not to remove the excess funds from his bank account, he made a series of withdrawals and transfers totaling over $116,000. In connection with one of the withdrawals, the defendant went to a bank branch. The teller who assisted him noted the large deposit and asked the defendant about it. The defendant replied that he had sold part of the business and requested further withdrawals. Because of the defendant's actions, efforts to reverse the deposit were unsuccessful. The defendant was convicted of three counts of larceny on the basis of his three withdrawals of the erroneously deposited funds. The Court of Appeals vacated the defendant's convictions, finding that he had not committed a trespassory taking. The Supreme Court reversed. The court noted that to constitute a larceny, a taking must be wrongful, that is, it must be "by an act of trespass." A larcenous trespass however may be either actual or constructive. A constructive trespass occurs when possession of the property is fraudulently obtained by some trick or artifice. However the trespass occurs, it must be against the possession of another. Like a larcenous trespass, another's possession can be actual or constructive. With respect to construing constructive possession for purposes of larceny, the court explicitly adopted the constructive possession test used in drug cases. That is, a person is in constructive possession of the thing when, while not having actual possession, he has the intent and capability to maintain control and dominion over that thing. The court found that the depositor retained constructive possession of the excess funds even after they had been transferred to the defendant's account. Specifically, the depositor had the intent and capability to

maintain control and dominion over the funds by affecting a reversal of the deposit. The fact that the reversal order was not successful does not show that the depositor lacked constructive possession. The court went on to conclude that the defendant did not simultaneously have possession of the funds while they were in his account, a fact that would have precluded a larceny conviction. The court concluded that the defendant "was simply the recipient of funds that he knew were supposed to be returned in large part. He therefore had mere custody of the funds, not possession of them." It reasoned that when a person has mere custody of a property, he or she may be convicted of larceny when the property is appropriated to his or her own use with felonious intent.

(1) As conceded by the State, the evidence was insufficient to establish misdemeanor larceny where the defendant was in lawful possession of the property at the time she removed it; (2) Evidence was insufficient for purposes of charge of misdemeanor injury to personal property to show that the defendant intentionally damaged the property

State v. Bradsher, ___ N.C. App. ___, 805 S.E.2d 191 (Sept. 19, 2017). (1) After eviction proceedings were instituted against the defendant at one residence, she moved into a new home. Because the new home did not have appliances, she moved the appliances from her original home into the new home, having made plans to return them before the date she was required to be out the first residence. However she was arrested and charged with larceny of the appliances before that date expired; (2) The trial court erred by denying the defendant's motion to dismiss a charge of misdemeanor injury to personal property. First, the State failed to present sufficient evidence showing that the defendant intended to cause injury to the personal property. The property in question was appliances, owned by the defendant's landlord, that the defendant was alleged to have damaged while moving them from one home to another. The only evidence on point was the defendant's own testimony, in which she acknowledged that the damage could have occurred during moving. This was insufficient to show that the defendant intentionally caused the damage. Second, the evidence was insufficient to establish that the defendant was the person who damaged the appliances.

Evidence was sufficient to convict the defendant of larceny of a firearm

State v. Rogers, ___ N.C. App. ___, 805 S.E.2d 172 (Sept. 5, 2017). The court rejected the defendant's argument that the evidence was insufficient to show that he intended to permanently deprive the victim of a firearm, noting: "Generally, where a defendant takes property from its rightful owner and keeps it as his own until apprehension, the element of intent to permanently deny the rightful owner of the property is deemed proved." Here, the defendant was apprehended by law enforcement officers with the stolen pistol hidden in the spare tire well of his vehicle.

Trial court erred by failing to dismiss charge of felony larceny when State presented no evidence of value of stolen items

State v. Bacon, ___ N.C. App. ___, 803 S.E.2d 402 (July 18, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 460 (Aug. 4, 2017). Because there was insufficient evidence to establish that the value of the stolen items exceeded $1000, the trial court erred by failing to dismiss a charge of felonious larceny. The items in question, stolen during a home break-in, included a television and earrings. Although the State presented no specific evidence concerning the value of the stolen items, the trial court ruled that their value was a question of fact for the jury. This was error. A jury cannot estimate the value of an item without any evidence put forward to establish a basis for that estimation. Although certain property

may, by its very nature, be of value obviously greater than $1000 the television and earrings in this case are not such items.

Resist, Delay, Obstruct

Evidence that the defendant provided an incorrect driver's license number to an officer investigating her for attempting to steal items from a Walmart was sufficient to sustain a conviction for resisting, delaying, and obstructing an officer

State v. Peters, ___ N.C. App. ___, 804 S.E.2d 811 (Sept. 5, 2017). The officer responded to a Walmart store, where a loss prevention officer had detained the defendant for theft. When the officer asked the defendant for an identification card, the defendant produced a North Carolina ID. The officer then radioed dispatch, asking for information related to the license number on the identification. Dispatch reported that the name associated with the identification number different from the one listed on the identification card. The officer asked the defendant if the numbers were correct, and the defendant confirmed that they were. Upon further questioning the defendant noted that there may have been a missing "8" at the end of the identification number. The defendant confirmed that no other numbers were missing. However dispatch again reported that the name did not match the new identification number. The officer then asked dispatch to search using the defendant's name and date of birth. The search revealed that the defendant's identification number also included a "0." The defendant was charged with RDO based on verbally giving an incorrect driver's license identification number. The evidence showed that the defendant's conduct delayed the officer and that she intended such a delay. The court noted, in part, that the officer testified, based on his experience, that individuals being investigated for charges similar to those at issue scratch numbers off the of their identification cards to create difficulty in identification.

Weapons Offenses

Constitutional challenges to possession of firearm by felon rejected under federal and state constitutions

State v. Fernandez, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). In a case where the defendant was convicted of felon in possession of a firearm, the court rejected his argument that the felony possession statute was unconstitutional as applied to him. The court began by rejecting the defendant's federal constitutional claim, noting that because he is a convicted felon he cannot show that he is a law-abiding, responsible citizen under the test articulated in Hamilton v. Pallozzi, 848 F.3d 614, 623 (4th Cir. 2017). Turning to the defendant's state constitutional claim, the court applied the *Britt* analysis. It noted that the defendant's prior felony conviction was for possessing a sawed-off shotgun in 2005, a weapon of mass destruction. It noted that although his felony conviction occurred 11 years ago, the court has held the statute is constitutional as applied to a defendant where there was a span of 18 years between the prior conviction and the possession charge. With respect to the defendant's history of law-abiding conduct, the court noted that the defendant has been convicted of driving while impaired, simple assault, assault on a female, driving without an operator's license, being intoxicated and disruptive, felony possession of a weapon of mass destruction, and fishing without a license. With respect to the defendant's history of lawful possession, the record established that the defendant had been unlawfully possessing at least one firearm since 2005. He thus could not establish compliance with the statute.

Considering the *Britt* factors, the court concluded that the statute was not unconstitutional as applied to the defendant.

Defenses

Trial court did not err by instructing the jury that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force

State v. Holloman, ___ N.C. ___, 799 S.E.2d 824 (June 9, 2017). Reversing the court of appeals, the state supreme court held that the trial court's self-defense instructions were not erroneous. The court began by considering whether "North Carolina law allows an aggressor to regain the right to utilize defensive force based upon the nature and extent of the reaction that he or she provokes in the other party." Although historically North Carolina law did not allow an aggressor using deadly force to regain the right to exercise self-defense when the person to whom his or her aggression was directed responds by using deadly force in defense, changes in statutory law allow aggressor to regain the right to utilize defensive force under certain circumstances. But, G.S. 14-51.4(2)(a), allowing an aggressor to regain that right under certain circumstances, does not apply where the aggressor initially uses deadly force against the person provoked. Thus, the trial court did not err by instructing that a defendant who was the aggressor using deadly force had forfeited the right to use deadly force and that a person who displays a firearm to his opponent with the intent to use deadly force against him or her and provokes the use of deadly force in response is an aggressor. The court continued, noting that it also must determine whether the trial court erred by failing to instruct the jury, in accordance with the defendant's request, that he might have regained the right to use defensive force based on the victim's reaction to any provocative conduct in which the defendant might have engaged. The court concluded that a defendant "could have only been entitled to the delivery of such an instruction to the extent that his provocative conduct involved non-deadly, rather than deadly, force." Here, there was a complete absence of any evidence tending to show that the defendant used non-deadly force.

Defendant not entitled to self-defense instruction in felony-murder case when defendant testified he did not shoot to kill

State v. Fitts, ___ N.C. App. ___, 803 S.E.2d 654 (Aug. 1, 2017). In this felony-murder case where the underlying felony was discharging a firearm into an occupied vehicle, the trial court did not err by declining to instruct on self-defense. The court rejected the defendant's argument that a reasonable jury could have found that the shooting constituted perfect self-defense. Viewing the facts in the light most favorable to the defendant, the first three elements of self-defense were present: the defendant testified that he believed two individuals were about to shoot him or another person; a reasonable person would have so concluded; and until he fired, the defendant had not attacked or threatened the victim in any way. However, the defendant's own testimony indicated that he did not shoot to kill. "Such an intent is required for a trial court to instruct a jury on perfect self-defense."

Defendant who testified that he fired his gun because he was scared and with no intent to kill or injure the police officer who was kicking in his bedroom door was not entitled to self-defense instruction

State v. Cook, ___ N.C. App. ____, 802 S.E.2d 575 (June 20, 2017). In this assault on a law enforcement officer case, the court held, over a dissent, that the trial court did not err by denying the defendant's

request for a self-defense instruction. While executing a warrant for the defendant's arrest at his home an officer announced at a bedroom door that he was a police officer and that he was going to kick in the door. The officer's foot went through the door on the first kick. The defendant fired two gunshots from inside the bedroom through the still-unopened door and the drywall adjacent to the door, narrowly missing the officer. The charges at issue resulted. The defendant testified that he was asleep when the officer arrived at his bedroom door; that when his girlfriend woke him, he heard loud banging and saw a foot come through the door "a split second" after waking up; that he did not hear the police announce their presence but did hear family members "wailing" downstairs; that he was "scared for [his] life . . . thought someone was breaking in the house . . . hurting his family downstairs and coming to hurt [him] next;" and that he when fired his weapon he had "no specific intention" and was "just scared." Rejecting the defendant's appeal, the court explained: "our Supreme Court has repeatedly held that a defendant who fires a gun in the face of a perceived attack is *not* entitled to a self-defense instruction *if he testifies* that he did not intend to shoot the attacker when he fired the gun." Under this law, a person under an attack of deadly force is not entitled to defend himself by firing a warning shot, even if he believes that firing a warning shot would be sufficient to stop the attack; he must shoot to kill or injure the attacker to be entitled to the instruction. This is true even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker.

No error for trial court to refuse jury instruction on duress; duress is not a defense to first-degree murder

State v. Faulk, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 7, 2017). The trial court did not err by failing to instruct the jury on duress as a defense to a charge of first-degree murder on the basis of premeditation and deliberation. Duress is not a defense to such a charge.

Jury Instructions

Trial court did not err by denying the defendant's request for a special jury instruction explaining that results of a chemical breath test are not conclusive evidence of impairment

State v. Godwin, ___ N.C. ___, 800 S.E.2d 47 (June 9, 2017). In this DWI case, the trial court did not err by denying the defendant's request for a special jury instruction explaining that results of a chemical breath test are not conclusive evidence of impairment. Following the pattern jury instructions for DWI, the trial court explained to the jury that impairment could be proved by an alcohol concentration of .08 or more and that a chemical analysis was "deemed sufficient evidence to prove a person's alcohol concentration." The trial court also inform the jury that they were the sole judges of the credibility of each witness and the weight to be given to each witness's testimony. This statement signaled to the jury that it was free to analyze the weight and effect of the breathalyzer evidence, along with all the evidence presented at trial. Therefore, the standard jury instruction on credibility was sufficient and the trial court adequately conveyed the substance of the defendant's request instructions to the jury.

Where no evidence supported a heat of passion killing, no error for trial court to refuse instruction on voluntary manslaughter

State v. Allbrooks, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). In this case where the defendant was convicted of first-degree murder, the trial court did not err by failing to instruct the jury on the lesser included offense of voluntary manslaughter. On appeal, the defendant argued that he acted in the

heat of passion. The defendant did not testify at trial, nor did any witness testify on his behalf. The State's evidence indicated that the defendant was the initial aggressor and that he was the only one to make any threats or perform any violent acts. The court determined that there "simply [was] no evidence" to support heat of passion.

Instruction that "After five days of testimony and less than 5 hours of deliberation, these folks deserve better," was not unduly coercive to deadlocked jury in light of circumstances

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). The court rejected the defendant's argument that the trial court erred by giving a coercive instruction after the jury indicated that it was deadlocked. Concluding that the trial court's instructions to continue deliberations were in accord with G.S. 15A-1235(b), the court disagreed. The jury informed the trial court three times that it was unable to reach a unanimous verdict. Each time the trial court gave an instruction consistent with the statute. After the jury had deliberated less than five hours in a single day, and after its third note to the trial court stating that it was deadlocked, the trial court informed the jury that it was sending them back to further deliberate with the same instructions previously given. However, in this instance, the trial court added: "after five days of testimony and less than 5 hours of deliberations, these folks deserve better." The defendant argued that this comment was impermissibly coercive and left the jurors with the impression that the judge was irritated with them for not reaching a verdict. The court found otherwise, noting that the judge was polite, patient, and accommodating. The trial court properly gave an *Allen* charge each time the jury stated that it was deadlocked. Prior to its final comment, the jury received a lunch break, recess and a meal. After the third impasse, the trial court gave the jury a choice to continue to deliberate that day or to go home and continue deliberations the next day. Considering the totality of the circumstances, the trial court's comment was not coercive.

Juror Misconduct

Although juror misconduct occurred, the defendant's challenge failed because the error was invited

State v. Langley, ___ N.C. App. ____, 803 S.E.2d 166 (June 20, 2017), *review allowed*, ___ N.C. ___, 805 S.E.2d 483 (July 6, 2017). After it was reported to the judge that a juror did an internet search of a term used in jury instructions, the judge called the jurors into court and instructed them to disregard any other information and to follow the judge's instructions. When the defendant moved for mistrial, the trial court offered to continue the inquiry, offering to interview each juror. The defendant did not respond to the trial judge's offer. The court held: "Defendant is not in a position to repudiate the action and argue that it is grounds for a new trial since he did not accept the trial court's offer to continue the inquiry when the judge offered to do so. Therefore, if any error took place, Defendant invited it."

Sentencing

Virginia Supreme Court did not unreasonably apply *Graham v. Florida* in determining that Virginia's geriatric release statute satisfied *Graham*'s requirement of parole for juvenile offenders.

Virginia v. LeBlanc, 582 U.S. ___, 137 S. Ct. 1726 (June 12, 2017). In a per curiam decision, the Court held that the Virginia Supreme Court's ruling, holding that Virginia's "geriatric release" provision satisfies *Graham v. Florida* was not an objectively unreasonable application of *Graham*. In 1999, the defendant, who was 16 years old at the time, raped a 62-year-old woman. In 2003, a state court sentenced him to

life in prison. At the time, Virginia had abolished traditional parole. However it had a geriatric release parole program which allowed older inmates to receive conditional release under some circumstances. Specifically, the statute provided: "Any person serving a sentence imposed upon a conviction for a felony offense . . . (i) who has reached the age of sixty-five or older and who has served at least five years of the sentence imposed or (ii) who has reached the age of sixty or older and who has served at least ten years of the sentence imposed may petition the Parole Board for conditional release." Seven years after the defendant was sentenced, the Court decided *Graham,* holding that the Eighth Amendment prohibits juvenile offenders convicted of non-homicide offenses from being sentenced to life without parole. *Graham* held that while a "State is not required to guarantee eventual freedom to a juvenile offender convicted of a nonhomicide crime," it must give defendants "some meaningful opportunity to obtain release based on demonstrated maturity and rehabilitation." The *Graham* Court left it to the States, "in the first instance, to explore the means and mechanisms for compliance" with the *Graham* rule. The defendant then sought to vacate his sentence in light of *Graham.* The Virginia courts rejected this motion, holding that Virginia's geriatric release statute satisfied *Graham*'s requirement of parole for juvenile offenders. The defendant then brought a federal habeas action. The federal district court held that "there is no possibility that fairminded jurists could disagree that the state court's decision conflicts wit[h] the dictates of *Graham*." The Fourth Circuit affirmed. The Supreme Court reversed, noting in part:

> The Court of Appeals for the Fourth Circuit erred by failing to accord the state court's decision the deference owed under AEDPA. Graham did not decide that a geriatric release program like Virginia's failed to satisfy the Eighth Amendment because that question was not presented. And it was not objectively unreasonable for the state court to conclude that, because the geriatric release program employed normal parole factors, it satisfied Graham's requirement that juveniles convicted of a nonhomicide crime have a meaningful opportunity to receive parole.

Where evidence supported depraved-heart theory of malice in murder case (the class B2 variety of second-degree murder), a general verdict by the jury of second-degree murder was ambiguous, and the trial court erred in sentencing the defendant as a class B1 felon

State v. Mosley, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). In this second-degree murder case, the trial court erred by sentencing the defendant as a Class BI felon. The jury unanimously convicted the defendant of second-degree murder. The verdict however was silent as to whether the second-degree murder was a Class BI or B2 offense. The court held that the jury's general verdict of guilty of second-degree murder was ambiguous for sentencing purposes because, in this case, there was evidence of depraved-heart malice to support a verdict of guilty of a Class B2 second-degree murder. Specifically, there was evidence of the defendant's reckless use of a rifle. The court distinguished the case from *State v. Lail*, ___ N.C. App. ___, 795 S.E.2d 401 (2016). And it went on to state:

> In order to avoid such ambiguity in the future, we recommend two actions. First, the second degree murder instructions contained as a lesser included offense in N.C.P.I.--Crim. 206.13 should be expanded to explain all the theories of malice that can support a verdict of second degree murder, as set forth in N.C.P.I.--Crim. 206.30A. Secondly, when there is evidence to support more than one theory of malice for second degree murder, the trial court should present a special verdict form that requires the jury to specify the theory of malice found to support a second degree murder conviction.

Resolving conflicting case law, court of appeals holds claims related to sentencing not preserved for appellate review without objection at sentencing

State v. Meadows, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 17, 2017). Reconciling conflicting cases, the court held that the requirements of North Carolina Rule of Appellate Procedure 10(a)(1) apply to sentencing hearings. The court went on to hold that the defendant waived any argument that the sentencing hearing should not have been conducted at that particular time or in front of that particular judge, by failing to either object to the commencement of the hearing or request a continuance of that hearing. The court also held that by failing to object to trial as required by Rule 10(a)(1), the defendant waived her argument that imposition of consecutive sentences of 70 to 93 months on a 72-year-old first offender for single drug transaction violated her eighth amendment rights. Assuming arguendo that the defendant preserved her argument that the trial court abused its discretion in sentencing her to two consecutive sentences and only consolidating the third conviction for sentencing, the court rejected the defendant's claim on appeal, finding that she failed to show the sentence imposed constituted an abuse of discretion.

Court of appeals vacated judgment and remanded for resentencing because the trial court failed to consider defendant's eligibility for conditional discharge pursuant to G.S. 90-96

State v. Dail, ___ N.C. App. ___, 805 S.E.2d 737 (Sept. 19, 2017). The defendant pleaded guilty to driving while impaired and possession of LSD. According to the plea agreement, the defendant stipulated to his prior record level for each offense, and that he would be placed on probation. In exchange, the State agreed to dismiss additional drug possession charges against the defendant. Pursuant to the plea agreement, the defendant received suspended sentences. On appeal, the defendant argued that the trial court erred by granting a suspended sentence rather than a conditional discharge. The trial court had denied this request, concluding that the defendant was asking for something beyond the scope of his plea agreement. The Court of Appeals agreed with the defendant, noting that defense counsel asked for such a discharge during the plea hearing and that the conditional discharge statute was mandatory for eligible defendants. The court rejected the State's argument that the defendant failed to present evidence that he was qualified for conditional discharge, concluding instead that the burden is on the State to establish that the defendant is not eligible for conditional discharge by proving the defendant's prior record. Here, the trial court did not afford either party the opportunity to establish whether or not the defendant was eligible for conditional discharge. The court therefore vacated the judgment and remanded for a new sentencing hearing, directing the trial court to follow the procedure for the consideration of eligibility for conditional discharge.

Trial court's mathematical error in calculating defendant's prior record level was not prejudicial as defendant's sentence fell within the presumptive range for the correct level

State v. Harris, ___ N.C. App. ___, 805 S.E.2d 729 (Sept. 19, 2017). The trial court erred in calculating the defendant's prior record level points. Specifically, it made an arithmetic error, finding that the points totaled 18 when in fact they totaled 17. This error lead the trial court to sentence the defendant as a prior record level VI offender instead of as a record level V offender. The State conceded the mathematical error but argued the error was harmless. The court agreed, noting that it has repeatedly held that an erroneous prior record level calculation does not prejudice the defendant if the trial court's sentence is within the presumptive range at the correct level, as it was here.

(1) Trial court did not err by concluding that the defendant's South Carolina conviction for criminal sexual conduct in the third degree was substantially similar to the North Carolina Class C felonies of second-degree forcible rape and second-degree forcible sex offense; (2) Trial court erred by concluding that the defendant's South Carolina conviction for criminal sexual conduct in the first degree was substantially similar to the North Carolina Class BI felonies of statutory rape of a child by an adult and statutory sex offense with the child by an adult.

State v. Bryant, ___ N.C. App. ___, 804 S.E.2d 563 (Aug. 15, 2017). (1) In calculating prior record level, the trial court did not err by concluding that the defendant's South Carolina conviction for criminal sexual conduct in the third degree was substantially similar to the North Carolina Class C felonies of second-degree forcible rape and second-degree forcible sex offense. The court rejected the defendant's argument that the South Carolina conviction could be a violation of either second-degree forcible rape or second-degree forcible sexual offense, but not both because North Carolina's rape statute only applies to vaginal intercourse and the sexual offense statute specifically excludes vaginal intercourse. This argument was "a distinction without a difference." (2) Over a dissent, the court held that the trial court erred by concluding that the defendant's South Carolina conviction for criminal sexual conduct in the first degree was substantially similar to the North Carolina Class BI felonies of statutory rape of a child by an adult and statutory sex offense with the child by an adult. These offenses are not substantially similar due to their disparate age requirements. Specifically, although both North Carolina statutes require that the offender be at least 18 years old, a person of any age may violate the South Carolina statute. Also, the North Carolina statutes apply to victims under the age of 13, while South Carolina's protects victims who are less than 11 years old. Thus, the North Carolina and South Carolina statutes apply to different offenders and different victims and are not substantially similar.

New sentencing hearing required when trial court failed to make statutory findings addressing mitigating factors before sentencing juvenile defendant to life imprisonment without possibility of parole

State v. May, ___ N.C. App. ___, 804 S.E.2d 584 (Aug. 15, 2017). (1) Because the trial court failed to make statutorily required findings of fact addressing statutory mitigating factors prior to sentencing the juvenile defendant to life imprisonment without the possibility of parole, a new sentencing hearing was required. The defendant was convicted of first-degree murder and attempted robbery with a dangerous weapon. The trial court sentenced the defendant to life imprisonment without the possibility of parole on the murder charge. Immediately after judgment was entered, the defendant gave oral notice of appeal. Almost one month later, the trial court entered an order making findings of fact based on G.S. 15A-1340.19B to support its determination that the defendant should be sentenced to life imprisonment without the possibility of parole, as opposed to a lesser sentence of life imprisonment with the possibility of parole. The court agreed with the defendant that the trial court erred by sentencing him to life imprisonment without the possibility of parole, where it failed to make findings of fact and conclusions of law in support of the sentence. (2) Because the trial court had no jurisdiction to enter findings of fact after the defendant gave notice of appeal, the court vacated the order entered upon these findings. Once the defendant gave notice of appeal, the trial court's jurisdiction was divested. Note: one judge concurred, but wrote separately to note concern about how the trial courts are addressing discretionary determinations of whether juvenile should be sentenced to life imprisonment without the possibility of parole.

Trial court improperly sentenced defendant as a habitual felon based solely on defendant's stipulation to habitual felon status

State v. Cannon, ___ N.C. App. ___, 804 S.E.2d 199 (Aug. 1, 2017). The State conceded, and the court held, that the trial court should not have sentenced the defendant as a habitual felon where the issue was not submitted to the jury and no formal guilty plea was made. Here, the defendant only stipulated to habitual felon status.

Defendant's stipulation to prior record level was invalid as it attempted to resolve a question of law

State v. Arrington, ___ N.C. App. ___, 803 S.E.2d 845 (Aug. 1, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 734 (Aug. 18, 2017). Over a dissent, the court held that the defendant's stipulation to his prior record level was invalid. The defendant purported to stipulate in his prior record level worksheet and during his plea colloquy both to the existence of several prior convictions and to his designation as a Level V offender. One of the convictions contributing to his total points was a 1994 second-degree murder conviction, which the defendant stipulated was a Class BI felony. On appeal, the defendant argued that the calculation of his prior record level was incorrect because the 1994 conviction should have counted as a Class B2 felony, for which only six points should have been assessed. At the time of the 1994 conviction, the murder statute placed all second-degree murder convictions in the same felony class. However, between 1994 and the date of the offenses in question, the statute was amended dividing the offense into two classes: B1 and B2, based on the type of malice involved. Thus, the amended version of the statute—creating two classes of second-degree murder—controlled classification of the 1994 conviction for prior record level purposes. The defendant's stipulation went beyond the factual admission that the 1994 conviction existed and constituted a stipulation as to whether that conviction should be treated as a Class B1 or B2 felony. Because the defendant's stipulation involved a question of law, it should not have been accepted by the trial court. The court went on to emphasize that the case "constitutes a narrow exception the general rule regarding a defendant's ability to stipulate to matters in connection with his prior record level." It explained:

> A stipulation as to the classification of a prior conviction is permissible so long as it does not attempt to resolve a question of law. In the great majority of cases in which a defendant makes such a stipulation, the stipulation will be valid because it does not concern an issue requiring legal analysis. The present case falls within a small minority of cases in which the stipulation did concern a question of law. Here, because Defendant's purported stipulation that his prior conviction was a B1 felony went beyond a factual admission that the 1994 Conviction existed and instead constituted a stipulation as to the legal issue of how that conviction should be treated under the current version of N.C. Gen. Stat. § 14- 17, the stipulation should not have been accepted by the trial court . . . .

Trial court erred by finding that the defendant had "gang affiliation" and ordering gang restrictions in the judgment without evidence to support such a finding

State v. Thompson, ___ N.C. App. ____, 801 S.E.2d 689 (June 20, 2017). G.S. 14-50.25 provides that when a defendant is found guilty of a criminal offense relevant to the statute "the presiding judge shall determine whether the offense involved criminal street gang activity." If the judge makes this

determination, then he "shall indicate on the form reflecting the judgment that the offense involved criminal street gang activity." Here, the judge made a judicial, not clerical error, where there was no evidence to support such a finding. The court declined to reach the defendant's argument that the statute was unconstitutional under the *Apprendi* line of cases (holding that any fact other than a prior conviction that elevates a sentence must be submitted to the jury).

Probation and Post-Release Supervision

Trial court did not err by revoking the defendant's probation for willfully absconding from supervision without explicitly stating standard of proof

State v. Trent, ___ N.C. App. ___, 803 S.E.2d 224 (Aug. 1, 2017), *temporary stay allowed*, ___ N.C. ___, 802 S.E.2d 725 (Aug. 11, 2017). The trial court did not err by revoking the defendant's probation based on its finding that he willfully absconded from supervision. In so ruling, the court rejected the defendant's argument that the trial court abused its discretion by making its oral findings of fact without explicitly stating the legal standard of proof. Noting that it has held that a trial court's failure to state the standard of proof underlying its findings may constitute reversible error when certain protected interests are involved, it has never so held in the context of a probation hearing. The court noted that "Although the trial court failed to employ the best practice and explicitly state the legal standard of proof," the totality of the trial court's statements indicate that it was reasonably satisfied in light of all the evidence presented that a willful violation had occurred. Reviewing the facts of the case, the court also rejected the defendant's argument that there was insufficient evidence that he willfully absconded from supervision.

Trial court lacked jurisdiction to revoke defendant's probation for alleged violations

State v. Johnson, ___ N.C. App. ___, 803 S.E.2d 827 (July 18, 2017). Here, the defendant did not waive his right to notice of his alleged probation violations and the State failed to allege a revocation-eligible violation. Thus, the trial court lacked jurisdiction to revoke.

Sex Offender Registration and Monitoring

North Carolina's statute, G.S. 14–202.5, making it a felony for a registered sex offender to gain access to a number of websites, including common social media websites like Facebook and Twitter, violates the First Amendment.
Packingham v. N.C., 582 U.S. ___, 137 S. Ct. 1730 (June 19, 2017). After the defendant, a registered sex offender, accessed Facebook, he was charged and convicted under G.S. 14-202.5. The Court of Appeals struck down his conviction, finding that the statute violated the First Amendment. The N.C. Supreme Court reversed. The U.S. Supreme Court granted certiorari and reversed North Carolina's high court. Noting the case "is one of the first this Court has taken to address the relationship between the First Amendment and the modern Internet," the Court noted that it "must exercise extreme caution before suggesting that the First Amendment provides scant protection for access to vast networks in that medium." The Court found that even assuming that the statute is content neutral and thus subject to intermediate scrutiny, it cannot stand. In order to survive intermediate scrutiny, a law must be narrowly tailored to serve a significant governmental interest. Considering the statute at issue, the Court concluded:

> [T]the statute here enacts a prohibition unprecedented in the scope of First Amendment speech it burdens. Social media allows users to gain access to information and communicate with one another about it on any subject that might come to mind. By prohibiting sex offenders from using those websites, North Carolina with one broad stroke bars access to what for many are the principal sources for knowing current events, checking ads for employment, speaking and listening in the modern public square, and otherwise exploring the vast realms of human thought and knowledge. These websites can provide perhaps the most powerful mechanisms available to a private citizen to make his or her voice heard. They allow a person with an Internet connection to "become a town crier with a voice that resonates farther than it could from any soapbox."
>
> In sum, to foreclose access to social media altogether is to prevent the user from engaging in the legitimate exercise of First Amendment rights. It is unsettling to suggest that only a limited set of websites can be used even by persons who have completed their sentences. Even convicted criminals—and in some instances especially convicted criminals—might receive legitimate benefits from these means for access to the world of ideas, in particular if they seek to reform and to pursue lawful and rewarding lives. (citations omitted).

The Court went on to hold that the State had not met its burden of showing that "this sweeping law" is necessary or legitimate to serve its preventative purpose of keeping convicted sex offenders away from vulnerable victims. The Court was careful to note that its opinion "should not be interpreted as barring a State from enacting more specific laws than the one at issue." It continued: "Though the issue is not before the Court, it can be assumed that the First Amendment permits a State to enact specific, narrowly tailored laws that prohibit a sex offender from engaging in conduct that often presages a sexual crime, like contacting a minor or using a website to gather information about a minor."

Evidence was insufficient to support defendant's conviction for being a sex offender on the premises of a daycare

State v. Anderson, ___ N.C. App. ___, 804 S.E.2d 189 (Aug. 1, 2017). (1) The evidence was insufficient to support a conviction under G.S. 14-208.18(a)(1), for being a sex offender on the premises of a daycare. The defendant was seen in a parking lot of a strip mall containing a daycare, other businesses, and a restaurant. Next-door to the daycare was a hair salon; next to the hair salon was a tax business. The three businesses shared a single building as well as a common parking lot. A restaurant in a separate, freestanding building shared the same parking lot. None of the spaces in the parking lot were specifically reserved or marked as intended for the daycare. The daycare, including its playground area, was surrounded by a chain-link fence. The court agreed with the defendant that the State failed to present sufficient evidence that the shared parking lot was part of the premises of the daycare. It stated: "[T]he shared parking lot is located on premises that are not intended primarily for the use, care, or supervision of minors. Therefore, we conclude that a parking lot shared with other businesses (especially with no designation(s) that certain spaces "belong" to a particular business) cannot constitute "premises" as set forth in subsection (a)(1) of the statute." (2) The defendant's guilty plea to unlawfully being within 300 feet of a daycare must be vacated in light of a Fourth Circuit's decision holding G.S. 14-208.18(a)(2) to be unconstitutional. The defendant was indicted and pled guilty to violating G.S. 14-208.18(a)(2), which prohibits certain persons from being within 300 feet a location intended primarily for the use, care, or

supervision of minors. While his direct appeal was pending, the Fourth Circuit held that statute to be unconstitutionally overbroad in violation of the First Amendment. Thus the conviction must be vacated.

Trial court erred by requiring satellite-based monitoring for thirty years

State v. Dye, ___ N.C. App. ____, 802 S.E.2d 737 (June 20, 2017). The trial court erred by imposing satellite-based monitoring for a period of thirty years due to a violation of G.S. 14-208.40A. Here, the Static-99 revealed a risk assessment of four points, which translated into a "Moderate-High" risk category. Pursuant to existing law, the "Moderate-High" risk category is insufficient to support a finding that the highest possible level of supervision and monitoring was required.

Where no Grady objection to satellite-based monitoring order made at hearing, appellate review of order waived

State v. Spinks, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 21, 2017). The defendant waived his right to direct appeal review of any fourth amendment challenge to the trial court's order requiring him to enroll in a satellite-based monitoring for life, by failing to raise the constitutional challenge at trial. The court declined to invoke Rule 2 to issue a writ of certiorari to review the defendant's unpreserved argument.

Where the State failed to present evidence of the reasonableness of satellite-based monitoring at hearing, the petition to impose SBM should have been dismissed, and the State is not entitled to a remand

State v. Greene, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 3, 2017). The court reversed the trial court's order denying the defendant's motion to dismiss the State's application for lifetime SBM. In the trial court, the defendant filed a motion to dismiss the State's application for SBM. At the SBM hearing, the State presented evidence establishing that the defendant had a prior conviction of misdemeanor sexual battery in addition to his new conviction of two counts of taking indecent liberties with a child. The State offered no evidence other than the defendant's criminal record. The defendant countered, challenging the constitutionality of imposition of lifetime SBM under *Grady*, arguing that the State had not met its burden of establishing the reasonableness of the SBM. The trial court rejected the defendant's argument. On appeal, the defendant argued that the trial court erred by ordering lifetime SBM where the State's evidence was insufficient to establish that imposition of SBM constituted a reasonable Fourth Amendment search. The State conceded this point but argued that it should have a chance to supplement its evidence upon the remand from the Court of Appeals. The court disagreed and reversed without a remand.