John Rubin, 919.962.2498, rubin@sog.unc.edu
Shea Denning, 919.843.5120, denning@sog.unc.edu
Phil Dixon, 919.966.4248, dixon@sog.unc.edu

Criminal Case Law Update
2018 Summer Criminal Law Webinar

Cases covered include reported decisions from North Carolina, the Fourth Circuit, and the U.S. Supreme Court decisions decided between November 7, 2017 and May 1, 2018.The summaries of state and U.S. Supreme Court criminal cases were prepared primarily 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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Search and Seizure

Investigative Stops

NC Supreme Court affirms Court of Appeals that reasonable suspicion existed to extend stop 14 minutes for canine sniff

State v. Downey, ___ N.C. ___, 809 S.E.2d 566 (Mar. 2, 2018). The court per curiam affirmed a divided decision of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 517 (2017) (here), affirming an order denying the defendant's motion to suppress. Over a dissent, the court of appeals had held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court of appeals rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances, the court of appeals held, constituted reasonable suspicion to extend the duration of stop.

Officer was engaged in the scope of the traffic stop mission 14 minutes into stop; no improper extension

State v. Campola, ___ N.C. App. ___, 812 S.E.2d 681 (Mar. 6, 2018). An officer had reasonable suspicion to prolong the traffic stop. A six-year officer who had received training in identification of drugs and had participated in 100 drug arrests pulled into the parking lot of a Motel 6, a high crime area. When he entered the lot, he saw two men sitting in a car. After the officer passed, the vehicle exited the lot at high speed. The officer stopped the car after observing a traffic violation. The vehicle displayed a temporary license tag. When the officer approached for the driver's information, the driver was "more nervous than usual." The officer asked why the two were at the motel, and the driver stated that they did not enter a room there. The passenger—the defendant—did not have any identifying documents but gave the officer his name. The officer went to his patrol car to enter the information in his computer and called for backup, as required by

department regulations when more than one person is in a stopped vehicle. While waiting for backup to arrive, he entered the vehicle's VIN number in a 50-state database, not having a state registration to enter. He determined that the vehicle was not stolen. Although neither the driver nor the passenger had outstanding warrants, both had multiple prior drug arrests. Shortly after, and 12 minutes after the stop began, the backup officer arrived. The two discussed the stop; the stopping officer told the backup officer that he was going to issue the driver a warning for unsafe movement but asked the backup officer to approach the defendant. The two approached the vehicle some 14 minutes after the stop was initiated. The stopping officer asked the driver to step to the rear the vehicle so that they could see the intersection where the traffic violation occurred while the officer explained his warning. The officer gave the driver a warning, returned his documents and asked to search the vehicle. The driver declined. While the stopping officer was speaking with the driver, the backup officer approached the defendant and saw a syringe in the driver's seat. He asked the defendant to step out of the car and the defendant complied, at which point the officer saw a second syringe in the passenger seat. Four minutes into these conversations, the backup officer informed the stopping officer of the syringe caps. The stopping officer asked the driver if he was a diabetic and the driver said that he was not. The stopping officer then searched the vehicle, finding the contraband at issue. On appeal, the court held that the stop was not improperly extended. It noted that the stopping officer was engaged in "conduct within the scope of his mission" until the backup officer arrived after 12 minutes. Database searches of driver's licenses, warrants, vehicle registrations, and proof of insurance all fall within the mission of a traffic stop. Additionally the officer's research into the men's criminal histories was permitted as a precaution related to the traffic stop, as was the stopping officer's request for backup. Because officer safety stems from the mission of the traffic stop itself, time devoted to officer safety is time that is reasonably required to complete the mission of the stop. Even if a call for backup was not an appropriate safety precaution, here the backup call did not actually extend the stop because the stopping officer was still doing the required searches when the backup officer arrived. By the time the backup officer arrived, the stopping officer had developed a reasonable suspicion of criminal activity sufficient to extend the stop. The stopping officer was a trained officer who participated 100 drug arrests; he saw the driver and passenger in a high crime area; after he drove by them they took off at a high speed and made an illegal turn; the driver informed the officer that the two were at the motel but did not go into a motel room; the driver was unusually nervous; and both men had multiple prior drug arrests. These facts provided reasonable suspicion to extend the stop. Even if these facts were insufficient, other facts support a conclusion that reasonable suspicion existed, including the men's surprise at seeing the officer in the motel lot; the titling of the vehicle to someone other than the driver or passenger; the driver's statement that he met a friend at the motel but did not know the friend's name; and the fact that the officer recognized the defendant as someone who had been involved in illegal drug activity. Finally, drawing on some of the same facts, the court rejected the defendant's argument that any reasonable suspicion supporting extension of the stop was not particularized to him. The court also noted that an officer may stop and detain a vehicle and its occupants if an officer has reasonable suspicion that criminal activity is afoot.

Continued detention of driver was an illegal extension of the traffic stop where no reasonable suspicion existed

State v. Reed, ___ N.C. App. ___, 810 S.E.2d 245 (Jan. 16, 2018), *temp. stay granted*, __ N.C. __, 809 S.E.2d 130 (Feb. 2, 2018). On remand from the Supreme Court of North Carolina for consideration in light of *State v.*

Bullock, 370 N.C. 256 (2017), the court held—over a dissent—that the trial court erred by denying the defendant's motion to suppress evidence obtained during a traffic stop. Finding itself bound by *Bullock*, the court concluded that the officer's actions requiring the defendant to exit his car, frisking him, and making him sit in the patrol car while the officer ran records checks and questioned the defendant, did not unlawfully extend the stop under *Rodriguez*. However, the court went on to find that the case was distinguishable from *Bullock* because here, after the officer returned the defendant's paperwork and issued the warning ticket, the defendant remained unlawfully seized in the patrol car. The court explained:

> [A] reasonable person in Defendant's position would not believe he was permitted to leave. When Trooper Lamm returned Defendant's paperwork, Defendant was sitting in the patrol car. Trooper Lamm continued to question Defendant as he sat in the patrol car. When the trooper left the patrol car to seek [the passenger's] consent to search the rental car, he told Defendant to "sit tight." At this point, a second trooper was present on the scene, and stood directly beside the passenger door of Trooper Lamm's vehicle where Defendant sat. Moreover, at trial Trooper Lamm admitted at this point Defendant was not allowed to leave the patrol car.

Because a reasonable person in the defendant's position "would not feel free to leave when one trooper told him to stay in the patrol car, and another trooper was positioned outside the vehicle door," the defendant remained seized after his paperwork was returned. Thus, reasonable suspicion was required for the extension of the stop. Here, no such suspicion existed. Although the defendant appeared nervous, the passenger held a dog in her lap, dog food was scattered across the floorboard of the vehicle, and the car contained air fresheners, trash, and energy drinks, this is "legal activity consistent with lawful travel." And, while the officer initially had suspicions concerning the rental car agreement, he communicated with the rental company which confirmed that everything was fine. (Shea Denning blogged about this case here.)

Extension of traffic stop was not supported by reasonable suspicion

U.S. v. Bowman, 884 F.3d 200, 2018 WL 1093942 (4th Cir. 2018). DEA agents had notified local authorities in the western district of North Carolina that they believed two suspects would be travelling through the area and may be transporting methamphetamine. The DEA provided a general description of the vehicle ("a red, older model Lexus") and a license plate number. At 3:40am, a State Trooper saw the vehicle and began following it, ultimately stopping the car on suspicion of impaired driving based on speeding and crossing the fog line. The defendant was driving and, according to the officer, both occupants exhibited nervousness—the defendant's hands were shaking when he handed the officer his license, the passenger did not make eye contact with the officer but stared straight ahead, and the carotid arteries of each occupant were noticed by the officer—all of which the trooper thought suspicious. The car was also messy with energy drinks, fast food wrappers, scattered clothes and luggage, which to the trooper indicated a long period of travel. The defendant was asked to exit the car and sit with the trooper in the patrol car. While in the patrol car, the trooper noticed the passenger was moving around and looking back at the defendant and officer, behavior that again raised the suspicions of the trooper. The defendant was not impaired. The defendant explained that he did not realize he was speeding and that he had only recently purchased the vehicle. When he was twice asked about his travel plans, the defendant explained that he had picked up the passenger from a

friend's home a few minutes earlier. The defendant could not provide the address or name of the friend, but indicated the address was in the GPS device in his vehicle. When asked what he did for a living, the defendant mentioned he was currently unemployed but sometimes buys automobiles off Craigslist. The trooper gave the defendant a warning ticket for speeding and unsafe movement and asked permission to question the defendant further, to which the defendant agreed. The trooper then asked to speak to the passenger. The defendant responded "okay." As the trooper exited the vehicle to speak to the passenger, he told the defendant "just hang tight right there, okay." Slip op. at 6. Upon speaking with the passenger, the officer determined the two stories of the defendant and passenger were not consistent. Shortly thereafter, a K-9 unit arrived on the scene, which hit on the vehicle. Scales, ammunition, and methamphetamine were discovered within the car, leading to the defendant's conviction. The magistrate judge recommended that the motion be denied. While he agreed that the defendant was not free to leave at the point that the trooper began questioning the passenger, he determined that the trooper had developed independent reasonable suspicion at that juncture to justify extending the detention. That suspicion was supported by: 1) the nervous behavior of the occupants, 2) the fact that the appearance of the car indicated they had been travelling longer than the defendant said, 3) that the defendant did not know where the friend lived, and 4) that the defendant claimed to have recently purchased the vehicle despite his lack of current employment. The district court agreed and denied the motion. The Fourth Circuit unanimously reversed. Under *U.S. v. Rodriguez*, a traffic stop cannot be extended longer than is necessary to accomplish the purpose of the stop without consent or reasonable suspicion of a crime. Here, the court agreed that at the point the trooper asked the defendant for permission to ask additional questions, the encounter remained consensual. However, at the point that the trooper told the defendant to "just hang tight right there", the encounter lost its consensual character. That the defendant responded "okay" to this remark did not make the continued detention consensual, nor was the fact that the trooper phrased the remark as a question determinative of consent. "[The trooper] said "hang tight" *as he was exiting* the patrol car and [the defendant] was not given an opportunity to decline [the trooper's] request to extend the stop so he could question [the passenger]." The trooper's own testimony at the suppression hearing supported the fact that the defendant was not free to leave at this point. Because the encounter was no longer consensual, the continued detention could only be justified if the trooper had developed reasonable suspicion of criminal wrongdoing.

The court analyzed the factors argued by the government in support of reasonable suspicion individually and collectively. Notably, the parties agreed that the DEA tip would not be considered as a part of the analysis. As to the nervousness of the occupants, the court noted, "Although nervous, *evasive* behavior is relevant to the determination of reasonable suspicion, mere nervousness is of limited value to reasonable suspicion analyses." Here, the signs of nervousness by the defendant and passenger were nothing out of the ordinary: Even assuming the defendant's hands were shaking when he handed his license to the trooper, the dash cam video showed that the defendant "appeared and sounded calm for the remainder of the traffic stop." As to the trooper's observation of the carotid arteries of the men, the trooper admitted he had no specialized medical training and that there were many other reasons that an artery could throb. The court did not credit the passenger's lack of eye contact as supporting reasonable suspicion, pointing out that the government has at times argued that sustaining eye contact with an officer was suspicious. The trooper's testimony that the defendant "was unable to remain still while he sat in the patrol car" was not connected to any reason why this was suspicious. The court therefore rejected that the nervousness shown here supported reasonable

suspicion. As to the appearance of the car, the court stated that the presence of the luggage, clothes and food wrappers in the car was "without more, utterly unremarkable." As to the failure of the defendant to recall the address of his passenger's friend, the court observed that the defendant repeatedly told the officer that he found the address by way of his GPS device, which the trooper did not check. Neither this fact nor the appearance of the car was connected to any suspicion of criminal activity. As to the trooper's suspicions about the defendant's purchase of vehicles, the court found the suspicions were based on "unsubstantiated assumptions." The trooper assumed that since the defendant had no current steady job, he must not have been able to afford to purchase another car recently through legitimate means. This factor, like the other three identified by the government, is "entitled to little weight." Even combining all of these factors together under the totality of the circumstances, the court found no reasonable, articulable suspicion existed. "[T]he facts, in their totality, should eliminate a substantial portion of innocent travelers. The factors present in this case do not." Thus, the denial of the motion to suppress was reversed, the defendant's conviction vacated, and the matter remanded for further proceedings (Phil Dixon blogged about a separate issue in the case here).

Search Warrants

Despite lack of proven reliability of informant, divided Court of Appeals holds search warrant supported by probable cause where informant's statement was against penal interest; decision affirmed per curiam

State v. Jackson, 370 N.C. 337 (Dec. 8, 2017). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 791 S.E.2d 505 (2016) (here), the court affirmed in a per curiam opinion. Over a dissent, the Court of Appeals had held that the search warrant was supported by sufficient probable cause. At issue was the reliability of information provided by a confidential informant. Applying the totality of the circumstances test, and although the informant did not have a "track record" of providing reliable information, the court found that the informant was sufficiently reliable. The court noted that the information provided by the informant was against her penal interest (she admitted purchasing and possessing marijuana); the informant had a face-to-face communication with the officer, during which he could assess her demeanor; the face-to-face conversation significantly increase the likelihood that the informant would be held accountable for a tip that later proved to be false; the informant had first-hand knowledge of the information she conveyed; the police independently corroborated certain information she provided; and the information was not stale (the informant reported information obtained two days prior) (Jeff Welty blogged about this case here).

Search warrant supported search of vehicles but lacked sufficient nexus to home where it contained no information about the defendant's connection to the residence

State v. Lewis, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018), *temp. stay granted*, ___ N.C. ___, 812 S.E.2d 856 (May 17, 2018). In this robbery and kidnapping case, the court held that although the warrant application and accompanying affidavit contained sufficient information to establish probable cause to search two vehicles, it did not contain sufficient information to establish probable cause to search a residence where the defendant was arrested. The case involved a string of robberies of dollar stores. After the defendant was arrested, officers obtained a search warrant to search the premises where the defendant was arrested as well as two vehicles—a Nissan Titan and Kia Optima—at the premises. The defendant unsuccessfully moved

to suppress evidence seized as a result of the warrant. The court began by finding that the warrant application contained sufficient facts to establish probable cause to search the vehicles. The affidavit established that the same suspect committed four robberies, the first while driving a dark blue Nissan Titan and the fourth while driving a Kia Optima. The defendant was arrested on the day of the fourth robbery; the Nissan Titan and Kia Optima were parked at the premises where the defendant was arrested. The court held that these facts were "more than sufficient for the magistrate to conclude that . . . there was probable cause to believe those vehicles contained evidence connected to the robberies." The court went on to agree with the defendant that the affidavit did not establish probable cause to search the home. Although the defendant resided at the home, the affidavit did not state that. The only information in the affidavit tying the defendant to the home is a statement that officers observed a dark blue Nissan Titan at the residence while arresting the defendant. The court concluded: "this statement is sufficient to establish that [the defendant] was found at that location; but it does not follow from that statement that [the defendant] also must reside at that location." "Indeed," it continued, "from the information in the affidavit, [the home] could have been someone else's home with no connection to [the defendant] at all." It concluded: "That [the defendant] visited that location, without some indication that he may have stowed incriminating evidence there, is not enough to justify a search of the home." (Jeff Welty blogged about the case here.)

On rehearing, Fourth Circuit affirms earlier decision denying qualified immunity for sexually invasive search of minor plaintiff, and reverses dismissal of 18 U.S.C. 2255(a) claim

Sims. v. Labowitz, 885 F.3d 254 (4th 2018) (4th Cir. 2018). In a December, 2017 opinion, the court reversed the district court's grant of qualified immunity to the defendant, allowing the plaintiff's Fourth Amendment claim to proceed (that opinion was previously summarized here). The plaintiff was suspected of sending a nude video of himself to his fifteen-year old girlfriend in the eastern district of Virginia. The detective obtained a search warrant to photograph the minor suspect nude, specifically including his erect penis. In attempting to execute the warrant, the minor was instructed to manipulate himself to obtain an erection, although the minor was ultimately unable to do so. The minor sued under 42 U.S.C. § 1983, alleging a civil rights violation under the Fourth Amendment, among other claims. On cross motions for rehearing after the court's December 2017 decision, the court issued largely the same opinion as to the Fourth Amendment claim and qualified immunity issue. However, in the earlier opinion, the court had rejected the plaintiff's claim under 18 U.S.C. § 2255(a), affirming the district court's dismissal. That statute allows the victim of child pornography to seek civil damages from the offender. The earlier opinion had determined that, while the process of taking the images here was inappropriate, the images were not produced for a "lascivious" purposes (as required to qualify as child pornography), but were instead produced for investigatory purposes. On rehearing, the court reversed itself on this issue, finding that 18 U.S.C. § 2255(a) provides for a claim for damages independent of the 42 U.S.C. § 1983 claim, and that the district court erred in dismissing it. The case was remanded for the trial court to consider the § 2255(a) claim and for the Fourth Amendment claim to move forward.

Search warrant supported by probable cause based on purchase of drugs by informant's unknown middleman

State v. Frederick, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this case involving drug trafficking and related charges, the court held, over a dissent, that the search warrant of the defendant's residence was supported by probable cause. The warrant was supported by the following information: A detective received information from a reliable confidential source regarding a mid-level drug dealer who sold MDMA, heroin, and crystal methamphetamine. The source had previously provided truthful information that the detective could corroborate, and the source was familiar with the packaging and sale of the drugs in question. The source had assisted the detective with the purchase of MDMA one week prior to the issuance of the search warrant. For that purchase, the detective gave the source money to purchase the drugs. The source met a middleman with whom he then traveled to the defendant's residence. The detective saw the middleman enter the residence and return to the source after approximately two minutes. The detective found this conduct indicative of drug trafficking activity based on his training and experience. The source then met with the detective, and provided him with MDMA. A subsequent purchase of drugs occurred 72 hours prior to the issuance of the search warrant. The details of that transaction were very similar, except that the officer also saw two males enter the residence and exit approximately two minutes later, conduct he believed to be indicative of drug trafficking activity. This was sufficient to establish probable cause (Jeff Welty blogged about the case here).

Other Searches

Court declines to treat flash drive as a single container for purposes of private search doctrine; remanded for consideration of probable cause without taking information that exceeded the scope of the private search into account

State v. Terrell, ___ N.C. App. ___, 810 S.E.2d 719 (Feb. 6, 2018), *temp. stay granted*, __ N.C. __, 809 S.E.2d 499 (Feb. 23, 2018). In this peeping and sexual exploitation of a minor case, and with one judge dissenting in part, the court held that the trial court erred by concluding that an officer's warrantless search of the defendant's thumb drive was lawful. While examining a thumb drive belonging to the defendant, the defendant's girlfriend saw an image of her nine-year-old granddaughter sleeping without a shirt. Believing the image was inappropriate, she contacted law enforcement and gave them the thumb drive. The thumb drive was placed in an evidence locker. Later, an officer conducted a warrantless search of the thumb drive to locate the image in question. During this search he discovered images of other partially or fully nude minors that the girlfriend never saw. Using this information in a warrant application, the officer obtained a search warrant to forensically examine the contents of the thumb drive for "contraband images of child pornography and evidence of additional victims and crimes." The executed warrant yielded 12 incriminating images located in a different subfolder than the original image. After the defendant was charged, he unsuccessfully moved to suppress the contents of the thumb drive. The trial court determined that the girlfriend's private viewing of the thumb drive defeated the defendant's expectation of privacy in its contents and thus that the officer's warrantless search was lawful under the private search exception to the warrant requirement. After conviction, the defendant appealed. The court held that the trial court erred by concluding that the girlfriend's thumb drive search effectively frustrated the defendant's expectation of

privacy in its entire contents. Distinguishing a prior ruling in a case involving a videotape and citing the U.S. Supreme Court's *Riley* case (declining to extend the search-incident-to-arrest exception to police searches of digital data on cell phones), the court found that with respect to this search of digital data on an electronic storage device, the defendant retained an expectation of privacy in the information not revealed by his girlfriend's search. In so ruling the court held that an electronic storage device should not be viewed as a single container for Fourth Amendment purposes. It then turned to whether the trial court's findings supported its conclusion that the officer's search remained within the permissible scope of the girlfriend's prior search and whether it was reasonable under the circumstances, and was, therefore, a valid warrantless search under the private-search doctrine. In this respect it held: The officer's warrantless search was not authorized under the private-search doctrine, since the trial court's findings establish that he did not conduct his warrantless search with the requisite "virtual certainty" that the thumb drive contained only contraband, or that his inspection of its data would not reveal anything more than what the girlfriend already told him. However, finding the record insufficient to determine whether the trial court would have determined that the search warrant was supported by probable cause without the tainted evidence from the unlawful search, the court remanded to the trial court to determine the validity of the search warrant. (Shea Denning blogged about this case here.)

(1) Reasonable suspicion existed to support pen register order under the Stored Communications Act; (2) Fourth Amendment issue not raised at the trial court waived on appeal

State v. Forte, ___ N.C. App. ___, 810 S.E.2d 339 (Jan. 16, 2018). (1) The trial court properly issued an order authorizing a pen register for the defendant's phone. The order was issued pursuant to the Stored Communications Act (SCA). The SCA requires only reasonable suspicion for issuance of an order for disclosure. The order in question was based on information provided by a known drug dealer informant, Oliver. The court found that there were "multiple indications of reliability" of Oliver's statements, including that he made substantial admissions against his penal interest. Also, Oliver provided a nickname, general description of the defendant, background information from dealing with him previously, and current travel information of the suspect. Oliver spoke with the officer, and the two spoke more than once, adding to the reliability of his tip. These facts met the standard under the SCA. (2) Because the defendant did not present any constitutional argument before the trial court, he waived appellate review of whether his Fourth Amendment rights were violated when the trial court allowed the State to retrieve location information from his cell phone without a search warrant. The court concluded: "Defendant's only argument before the trial court was that law enforcement did not have sufficient evidence to support issuance of the pen register order. The trial court ruled on this issue only, and this is the only argument we may consider on appeal." (Jeff Welty blogged about this case here.)

(1) Search of defendant's person was justified as search incident to arrest; (2) Checking the interior of the defendant's waistband in private was not a roadside strip search and was not unreasonable under the circumstances

State v. Fuller, ___ N.C. App. ___, 809 S.E.2d 157 (Dec. 19, 2017). (1) In this drug case, a search of the defendant's person was a proper search incident to arrest. An officer stopped the defendant's vehicle for driving with a revoked license. The officer had recognized the defendant and knew that his license was suspended. The officer arrested the defendant for driving with a revoked license, handcuffed him and placed

him in the police cruiser. The officer then asked the defendant for consent to search the car. According to the officer the defendant consented. The defendant denied doing so. Although an initial search of the vehicle failed to locate any contraband, a K-9 dog arrived and "hit" on the right front fender and driver's seat cushion. When a second search uncovered no contraband or narcotics, the officer concluded that the narcotics must be on the defendant's person. The defendant was brought to the police department and was searched. The search involved lowering the defendant's pants and long johns to his knees. During the search the officer pulled out, but did not pull down, the defendant's underwear and observed the defendant's genitals and buttocks. Cocaine eventually was retrieved from a hidden area on the fly of the defendant's pants. The defendant unsuccessfully moved to suppress the drugs and was convicted. On appeal, the court rejected the defendant's argument that the strip search could only have been conducted with probable cause and exigent circumstances. The court noted however that standard applies only to roadside strip searches. Here, the search was conducted incident to the defendant's lawful arrest inside a private interview room at a police facility. (2) The search of the defendant's person, which included observing his buttocks and genitals, was reasonable. The defendant had argued that even if the search of his person could be justified as a search incident to an arrest, it was unreasonable under the totality of the circumstances. Rejecting this argument, the court noted that the search was limited to the area of the defendant's body and clothing that would have come in contact with the cushion of the driver's seat where the dog alerted; specifically, the area between his knees and waist. Moreover, the defendant was searched inside a private interview room at the police station with only the defendant and two officers present. The officers did not remove the defendant's clothing above the waist. They did not fully remove his undergarments, nor did they touch his genitals or any body cavity. The court also noted the suspicion created by, among other things, the canine's alert and the failure to discover narcotics in the car. The court thus concluded that the place, manner, justification and scope of the search of the defendant's person was reasonable.

Identifications

Where officer had personal knowledge of the defendant's appearance and the defendant altered his appearance before trial, no error to allow officer to identify the defendant from surveillance video

State v. Weldon, ___ N.C. App. ___, 811 S.E.2d 683 (Feb. 20, 2018). In this felon in possession of a firearm case, the trial court did not abuse its discretion by allowing an officer to identify a person depicted in a surveillance video as being the defendant. The officer testified that while he had never had any direct contact with the defendant he knew who the defendant was. On appeal the defendant argued that the officer was in no better position than the jury to identify the defendant in the surveillance footage. Rejecting this argument, the court noted that the officer had seen the defendant in the area frequently and knew who he was. In one instance, the officer saw the defendant coming out of a house that the officer was surveilling; the officer could identify the defendant because he recognized the defendant's face and the defendant was wearing a leg brace and limping. These encounters would have sufficiently allowed the officer to acquire the requisite familiarity with the defendant's appearance so as to qualify him to testify to the defendant's identity. Additionally, the defendant had altered his appearance significantly between the date in question and the date of trial. The length and style of the defendant's hair was distinctive during the period that the officer became familiar with the defendant and matched that of the individual shown on the surveillance footage. However, the defendant had a shaved head at trial. Thus, by the time of trial the jury was unable to

perceive the distinguishing nature of the defendant's hair at the time of the shooting. Thus the officer was better qualified than the jury to identify the defendant in the videotape. Because the officer was familiar with the defendant's appearance and because the defendant had altered his appearance by the time of trial, the trial court did not abuse its discretion by allowing the officer to testify to his opinion that the defendant was the individual depicted shooting a weapon in the surveillance video (Jessica Smith blogged about the case here).

Unduly suggestive identification procedures violated due process; new trial granted

State v. Malone, ___ N.C. App. ___, 807 S.E.2d 639 (Nov. 7, 2017), *review granted*, ___ N.C. ___, 809 S.E.2d 586 (Mar. 1, 2018). (1) 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. (Jeff Welty blogged about this case here.)

Criminal Offenses

Aiding and Abetting

Where the defendant stated that he was paid to drive co-defendants to Wal-Mart, the car was filled with stolen goods, and other circumstantial evidence of guilt existed, motion to dismiss for insufficiency of evidence was properly denied

State v. Cannon, ___ N.C. ___, 809 S.E.2d 567 (March 2, 2018). The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 804 S.E.2d 199 (2017) (here). Over a dissent, the court of appeals

had 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 of appeals held that the trial court did not err by denying the motion to dismiss.

Assaults

Where different conduct supported each assault, no error to sentence the defendant for assault on female and assault by strangulation, notwithstanding limitation in G.S. 14-33

State v. Harding, ___ N.C. App. ___, 813 S.E.2d 254 (Mar. 6, 2018), *temp. stay granted*, 811 S.E.2d 601 (Apr. 11, 2018). The trial court did not err by sentencing the defendant for both of assault on a female and assault by strangulation. Prefatory language in G.S. 14-33(c) provides that "Unless the conduct is covered under some other provision of law providing greater punishment," assault on a female is punished as a Class AI misdemeanor. Here, the defendant was also punished for the higher class offense of assault by strangulation. The prefatory clause of G.S. 14-33(c) only applies when both assaults are based on the same conduct. Here, the assaults were based on different conduct. The defendant's act of pinning down the victim and choking her to stop her from screaming supported the assault by strangulation conviction. His acts of grabbing her hair, tossing her down a rocky embankment, and punching her face and head multiple times supported the assault on a female conviction. The two assaults were sufficiently separate and distinct. First, they required different thought processes. The defendant's decision to grab the victim's hair, throw her down the embankment and repeatedly punch her required a separate thought process from his decision to pin her down and strangle her to quiet her screaming. Second the assaults were distinct in time. After the defendant's initial physical assault and then the strangulation, he briefly ceased his assault when she stopped screaming and resisting. But when she resumed screaming and he again hit her in the head multiple times. Third, the victim sustained injuries to different parts of her body.

Error to sentence defendant for AWDWIKISI and AISBI based on the same conduct

State v. McPhaul, ___ N.C. App. ___, 808 S.E.2d 294 (Nov. 7, 2017), *review granted*, ___ N.C. ___, 812 S.E.2d 847 (May 9, 2018). 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. Multiple punishments were thus precluded.

Obstruction of Justice

(1) Motion to dismiss one count of obstruction properly denied where evidence supported mother's efforts to encourage daughter to recant abuse allegations; (2) Error to deny motion to dismiss obstruction charge based on denial of access of daughter to investigative agencies when mother in fact allowed multiple interviews

State v. Ditenhafer, ___ N.C. App. ___, 812 S.E. 2d 896 (Mar. 20, 2018). (1) Although the trial court properly denied a motion to dismiss one count of obstruction of justice, it erred by failing to dismiss a second count. The defendant was convicted of two counts of felony obstruction of justice and felony accessory after the fact to sexual activity by a substitute parent, William. It was alleged that William sexually assaulted the defendant's biological daughter. The trial court properly denied the defendant's motion to dismiss the first count of felony obstruction of justice, which alleged that the defendant pressured her daughter to recant statements regarding the sexual abuse. The defendant argued that there was insufficient evidence of willful intent to obstruct justice by encouraging the daughter to recant. Specifically, the defendant argued that she acted only with the purpose of getting the daughter to tell what the defendant believed was the truth and that the evidence did not support a conclusion that she was encouraging the daughter to recant with the willful intent to hinder the investigation of the daughter's allegations. The court disagreed. It found that the evidence showed that the defendant did more than simply encourage the daughter to tell the truth, an act which would not constitute obstruction of justice on its own. Among other things, the defendant directed the daughter to specifically state that William had not abused her. When the daughter did not do so, the defendant punished her, verbally abused her, and turned immediate family members against her. The defendant did so even after admitting to others that she believed the daughter had been abused. The defendant coached the daughter on what to say in person, on the telephone and in emails in order to recant. This evidence was sufficient to allow a reasonable juror to infer that the defendant's conduct was designed to achieve a particular outcome: the end of the criminal trial and administrative investigation that the defendant believed was destroying her family and would cause them to lose money. Even after the defendant witnessed William's abuse of the daughter, she declined to report it because it would cost them money and time, describing the investigation as a "nightmare." The court also rejected the defendant's argument that the evidence was insufficient to establish that her actions were committed with deceit and intent to defraud, facts necessary to elevate the charges to a felony. (2) The trial court erred by denying the defendant's motion to dismiss a second count of obstruction of justice, alleging that the defendant denied the Sheriff's Department and County Child Protective Services access to her daughter during the investigation. The defendant argued that she never denied any request from these entities for an interview with her daughter. The State presented no evidence of a specific incident in which the defendant expressly denied a request by these entities to interview the daughter. In fact, it showed that the defendant allowed individuals from these entities to speak with her daughter on multiple occasions. The court rejected the State's argument that the entities were denied "full access" because the defendant was present in many of the interviews, concluding: "the delineation between "access" as alleged in the indictment and "full access" as advanced by the State on appeal would create an unworkable distinction in our jurisprudence."

Drugs and Drug Paraphernalia

Defendant's unsworn admission to the nature of the alleged controlled substance was sufficiently reliable method of identification where no lab result was presented; motion to dismiss was properly denied

State v. Bridges, ___ N.C. App. ___, 810 S.E.2d 365 (Feb. 6, 2018). The evidence was sufficient to sustain the defendant's conviction for possession of methamphetamine. After the police discovered a white crystalline substance in a vehicle, they arrested the defendant who had been sitting in the driver's seat of the car. While being transported to a detention center the defendant admitted to a detective that she had "a baggie of meth hidden in her bra." Upon arrival at the detention center, an officer found a bag of "crystal-like" substance in the defendant's bra. At trial an officer testified without objection to the defendant's statement regarding the methamphetamine in her bra. Additionally, the actual substance retrieved from her bra was admitted as an exhibit. However, the State did not present any other evidence regarding the chemical composition of the substance. On appeal, the defendant argued that the State failed to present evidence of the chemical nature of the substance in question. Under *Ward*, some form of scientifically valid chemical analysis is required unless the State establishes that another method of identification is sufficient to establish the identity of a controlled substance beyond a reasonable doubt. Citing the state Supreme Court's opinions in *Nabors* and *Ortiz-Zape*, the court held that the defendant's admission constitutes sufficient evidence that the substance was a controlled substance (Phil Dixon blogged about the case here.)

NC Supreme Court reverses Court of Appeals to hold evidence of constructive possession of marijuana plants was sufficient despite others having access to the property

State v. Chekanow, ___ N.C. ___, 809 S.E.2d 546 (Mar. 2, 2018). The court reversed a unanimous, unpublished decision of the Court of Appeals and held, in this drug case, that the State presented sufficient evidence of constructive possession of marijuana. While engaged in marijuana eradication operations by helicopter, officers saw marijuana plants growing on a three-acre parcel of land owned by the defendants. When the officers arrived at the home they found the defendant Chekanow leaving the house by vehicle. They directed her back to the home, and she complied. She was the only person at the residence and she consented to a search of the area where the plants were located, the outbuildings, and her home. The officers found 22 marijuana plants growing on a fenced-in, ½ acre portion of the property. The area was bordered by a woven wire fence and contained a chicken coop, chickens and fruit trees. The fence was approximately 4 feet high. The single gate to the area was adjacent to the defendants' yard. At trial, an officer testified that a trail leading from the house to the plants was visible from the air. The plants themselves were located 60-70 yards beyond the gate; 50-75 yards from the defendant's home; and 10-20 yards from a mowed and maintained area with a trampoline. The plants and the ground around them were well-maintained. An officer testified that the plants appeared to have been started individually in pots and then transferred into the ground. No marijuana or related paraphernalia was found in the home or outbuildings; however officers found pots, shovels, and other gardening equipment. Additionally, they found a "small starter kit," which an officer testified could be used for starting marijuana plants. The officer further testified that the gardening equipment could have been used for growing marijuana or legitimate purposes, because the defendants grew regular plants on the property. One of the shovels, however, was covered in dirt that was similar to that at the base of the marijuana plants, whereas dirt in the garden was brown. The

State's case relied on the theory of constructive possession. The defendants were found guilty and appealed. The court of appeals found for the defendant, concluding that the evidence was insufficient as to constructive possession. The Supreme Court reversed. It viewed the case as involving a unique application of the constructive possession doctrine. It explained: "The doctrine is typically applied in cases when a defendant does not have actual possession of the contraband, but the contraband is found in a home or in a vehicle associated with the defendant; however, in this case we examine the doctrine as applied to marijuana plants found growing on a remote part of the property defendants owned and occupied." Reviewing the law, the court noted that unless a person has exclusive possession of the place where drugs are found, the State must show other incriminating circumstances before constructive possession can be inferred. Here, both defendants lived in the home with their son and they allowed another individual regular access to their property to help with maintenance when they were away. The court noted that the case also involves consideration of a more sprawling area of property, including a remote section where the marijuana was growing and to which others could potentially gain access. Against this backdrop, the court stated: "Reiterating that this is an inquiry that considers all the circumstances of the individual case, when there is evidence that others have had access to the premises where the contraband is discovered, whether they are other occupants or invitees, or the nature of the premises is such that imputing exclusive possession would otherwise be unjust, it is appropriate to look to circumstances beyond a defendant's ownership and occupation of the premises." It continued: "Considering the circumstances of this case, neither defendant was in sole occupation of the premises on which the contraband was found, defendants allowed another individual regular access to the property, and the nature of the sprawling property on which contraband was found was such that imputing exclusive control of the premises would be unjust." The court thus turned to an analysis the additional incriminating circumstances present in the case. The court first noted as relevant to the analysis the close proximity of the plants to an area maintained by the defendants, the reasonably close proximity of the defendants' residence to the plants, and one defendant's recent access to the area where the plants were growing. Second, the court found multiple indicia of control, including, among other things, the fact that the plants were surrounded by a fence that was not easily surmountable. Third, the court considered evidence of suspicious behavior in conjunction with discovery of the marijuana, including the fact that defendant Chekanow appeared to flee the premises when officers arrived. Finally, the court considered evidence found in the defendants' possession linking them to the contraband, here the shovel with dirt matching that found at the base of the plants and the "starter kit." The court held that notwithstanding the defendants' nonexclusive possession of the location where the contraband was found, there was sufficient evidence of constructive possession.

Discovery of more than an ounce of marijuana in the engine block of defendant's vehicle and marijuana crumbs throughout the car sufficient to support inference of "keeping" for purposes of maintaining a vehicle for controlled substances

State v. Rousseau, 370 N.C. 268 (Nov. 3, 2017). On appeal from an unpublished decision of a divided panel of the Court of Appeals which had found no error with respect to the defendant's maintaining a vehicle conviction, the court affirmed per curiam. The defendant was convicted for maintaining a vehicle for the purpose of keeping a controlled substance. Before the Court of Appeals, he unsuccessfully argued that the trial court erred by denying his motion to dismiss for insufficiency of the evidence. Specifically, the defendant argued that to prove the "keeping" element of the offense, the State must show that the vehicle was used

over time for the illegal activity. The Court of Appeals found the cases cited by the defendant distinguishable, noting that here 29.927 grams of marijuana was found in a plastic bag, tucked in a sock, and placed in a vent inside the vehicle's engine compartment outside of the passenger area and remnants of marijuana were found throughout the vehicle's interior. The Court of Appeals noted, in part, that a jury may infer "keeping" from the remnants of the controlled substance found throughout the interior space of the vehicle and a storage space in it for the keeping of controlled substances in the engine compartment.

Breaking or Entering and Related Offenses

Where the defendant exceeded the scope of girlfriend's consent to enter the garage, evidence was sufficient to support convictions for misdemeanor breaking or entering and domestic criminal trespass

State v. Vetter, ___ N.C. App. ___, 810 S.E.2d 759 (Feb. 6, 2018). (1)The evidence was sufficient to support a conviction for misdemeanor breaking or entering. Although the defendant had consent to enter the home's garage, he did not have consent to enter the residence itself, which he did by breaking down a door. (2) The evidence was sufficient to support a conviction for domestic criminal trespass. The court rejected the defendant's argument that the owner, his former girlfriend, never forbade him from entering her residence. The girlfriend ended her relationship with the defendant and ordered him to leave her residence. She affirmed that directive by locking the door and activating her alarm system upon discovering the defendant in her driveway. The court also rejected the defendant's argument that because he had permission to enter a portion of the premises, he had permission to enter the residence itself. The girlfriend granted the defendant limited permission to enter the garage to collect his belongings, but this consent did not extend to the inside of the residence. Thus, the fact that the defendant initially entered a portion of the premises with the owner's consent did not render him incapable of later trespassing upon a separate part of the premises where his presence was forbidden. Finally, the court rejected the defendant's argument that because the girlfriend was not physically present when he entered the interior of her home, the statute's requirement that the premises be "occupied" at the time of the trespass was not satisfied. The court held that this offense does not require the victim to be physically present at the time of the trespass.

Defendant trespassed from Belk Stores subsequently found committing larceny at Belk was properly convicted of felony breaking or entering

State v. Allen, ___ N.C. App. ___, 812 S.E.2d 192 (Mar. 6, 2018). The evidence was sufficient to convict the defendant of felony breaking or entering. After detaining the defendant for larceny, a Belk loss prevention associate entered the defendant's name in a store database. The associate found an entry for the defendant's name at Belk Store #329 in Charlotte, along with a photograph that resembled the defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, the defendant had been banned from Belk stores for a period of 50 years pursuant to a Notice of Prohibited Entry following an encounter at the Charlotte store. The notice contained the defendant's signature. On appeal, the defendant argued that the evidence was insufficient because it showed he entered a public area of the store during regular business hours. Deciding an issue of first impression, the court disagreed. In order for an entry to be unlawful, it must be without the owner's consent. Here, Belk did not consent to the defendant's entry. It had issued a Notice expressly prohibiting him "from re-entering the premise[s] of any property or facility under the control and ownership of Belk wherever located"

for a period of 50 years. The loss prevention associate testified that the Notice had not been rescinded, that no one expressly allowed the defendant to return to store property, and that no one gave the defendant permission to enter the store on the date in question. (Prior to this decision, Alyson Grine and John Rubin had blogged about related issues here and here.)

Habitual Offenses

NC Supreme Court approves habitual felon conviction predicated on misdemeanor marijuana possession charge, elevated to a felony based on recidivist provision in G.S. 90-95(e)(3), reversing Court of Appeals

State v. Howell, ___ N.C. ___, 811 S.E.2d 570 (April 6, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 792 S.E.2d 898 (2016), the court held that G.S. 90-95(e)(3), which provides that a Class 1 misdemeanor "shall be punished as a Class I felon[y]" when the misdemeanant has committed a previous offense punishable under the controlled substances act, establishes a separate felony offense rather than merely serving as a sentence enhancement of the underlying misdemeanor. The trial court treated the conviction as a Class I felony because of the prior conviction, and then elevated punishment to a Class E felony because of the defendant's habitual felon status. The defendant appealed to the Court of Appeals, which reversed, reasoning that while the Class 1 misdemeanor was punishable as a felony under the circumstances presented, the substantive offense remained a misdemeanor to which habitual felon status could not apply. The State sought discretionary review. The Supreme Court reversed, holding that 90-95(e)(3) creates a substantive felony offense which may be subject to habitual felon status. (John Rubin blogged about the Court of Appeals decision here).

Error for court to accept stipulation to habitual felon status absent a plea or jury verdict

State v. Cannon, ___ N.C. ___, 809 S.E.2d 567 (March 2, 2018). Defendant's stipulation to having achieved habitual felon status was insufficient sustain a conviction for that offense. Per G.S. 14-75, the issue of whether a defendant is a habitual felon must be determined by the jury or by the defendant's guilty plea to that offense; a defendant may not be sentenced as a habitual felon by stipulation only.

Accessory After the Fact

Failure to report a crime does not constitute personal assistance to the felon for purposes of accessory after the fact

State v. Ditenhafer, ___ N.C. App. ___, 812 S.E.2d 896 (Mar. 20, 2018). Over a dissent, the court held that the trial court erred by denying the defendant's motion to dismiss a charge of accessory after the fact to sexual activity by a substitute parent. This charge was based on the allegation that the defendant was an accessory after the fact by not reporting her husband Williams's sexual abuse of her daughter. To support a conviction of accessory after the fact the State must prove that a felony was committed; the defendant knew that the person assisted was the person who committed the felony; and the accused rendered assistance to the felon personally. Here, the defendant argued that the evidence was insufficient as to the third element. Specifically, she argued that merely failing to report a crime is insufficient evidence of this element. The court agreed. However, it was careful to note that it did not address whether the defendant's affirmative acts, such

as destroying physical evidence of the perpetrator's sexual activity with the daughter and of telling investigators that a report of abuse was just "lies" by her daughter, as those activities were not alleged in the indictment.

Impaired Driving

Motion to dismiss should have been granted where evidence raised only a conjecture that the defendant drove while impaired

State v. Eldred, ___ N.C. App. ___ (May 1, 2018). The trial court erred by denying the defendant's motion to dismiss in this impaired driving case. Responding to a report of a motor vehicle accident, officers found a Jeep Cherokee on the side of the road. The vehicle's right side panel was damaged and the officer saw approximately 100 feet of tire impressions on the grass leading from the highway to the stopped vehicle. The first ten feet of impressions led from the highway to a large rock embankment that appeared scuffed. Beyond the embankment, the impressions continued to where the vehicle was stopped. No one was in the vehicle or at the scene. An officer checked the vehicle's records and found it was registered to the defendant. The officer then set out in search of the defendant, who he found walking alongside the road about 2 or 3 miles away. The officer saw a mark on the defendant's forehead and noticed that he was twitching and unsteady on his feet. When asked why he was walking along the highway, the defendant responded: "I don't know, I'm too smoked up on meth." The officer handcuffed the defendant for safety purposes and asked if he was in pain. When the defendant said that he was, the officer called for medical help. During later questioning at the hospital, the defendant confirmed that he had been driving the vehicle and said that it had run out of gas. He added that he was hurt in a vehicle accident that occurred a couple of hours ago. Upon inquiry, the defendant said that he had not used alcohol but that he was "on meth." The officer didn't ask the defendant or anyone else at the hospital whether the defendant had been given any medication. The defendant appeared dazed, paused before answering questions, and did not know the date or time. The officer informed the defendant that he would charge him with impaired driving and read the defendant his Miranda rights. Upon further questioning the officer did not ask the defendant when he had last consumed meth, when he became impaired, whether he had consumed meth prior to or while driving, or what the defendant did between the time of the accident and when he was found on the side of the road. At trial the State presented no lab report regarding the presence of an impairing substance in the defendant's body. The court agreed with the defendant that the State failed to present substantial evidence of an essential element of DWI: that the defendant was impaired *while* he was driving. Contrasting the case from one where the evidence was held to be sufficient, the court noted, in part, that the State presented no evidence regarding when the first officer encountered the defendant on the side of the road. The officer who spoke with him at the hospital did not do so until more than 90 minutes after the accident was reported, and at this time the defendant told the officer he had been in an accident a couple of hours ago. Moreover, the State presented no evidence of how much time elapsed between the vehicle stopping on the shoulder and the report of an accident being made. And, there was no testimony by any witness who observed the defendant driving the vehicle at the time of the accident or immediately before the accident. The court concluded that although there was evidence that the defendant owned the vehicle and the defendant admitted driving and wrecking the vehicle, he did not admit to being on meth or otherwise impaired when he was driving the vehicle. And

the State presented no evidence, direct or circumstantial, to establish that essential element of the crime (Shea Denning blogged about the case here).

Prior DWI convictions occurring on the same day were properly counted as predicates for purposes of habitual impaired driving

State v. Mayo, ___ N.C. App. ___, 807 S.E.2d 654 (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. (Shea Denning blogged about this case here.)

Findings of fact supported probable cause to arrest for DWI where defendant had an open container, admitted to heavy drinking earlier, had alcohol on his breath, was speeding, and made an unsafe movement while stopping; grant of motion to suppress reversed

State v. Daniel, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). Over a dissent, the court held that because an officer had probable cause to arrest the defendant for impaired driving, the trial court erred by granting the defendant's motion to suppress. Here, the trooper "clocked" the defendant traveling at 80 miles per hour in a 65 mile per hour zone on a highway. As the trooper approached the defendant's vehicle, the defendant abruptly moved from the left lane of the highway into the right lane, nearly striking another vehicle before stopping on the shoulder. During the stop, the trooper noticed a moderate odor of alcohol emanating from the defendant and observed an open 24-ounce container of beer in the cup-holder next to the driver's seat. The defendant told the trooper that he had just purchased the beer, and was drinking it while driving down the highway. The defendant admitted that he had been drinking heavily several hours before the encounter with the trooper. The trooper did not have the defendant perform any field sobriety tests but did ask the defendant to submit to two Alco-sensor tests, both of which yielded positive results for alcohol. The court noted that while swerving alone does not give rise to probable cause, additional factors creating dangerous circumstances may, as was the case here. The dissenting judge would have upheld the trial court's order of suppression.

Other Motor Vehicle Offenses

Hit and run resulting in injury is a lesser-included offense of hit and run resulting in death; no error to instruct jury on lesser over defendant's objection

State v. Malloy, ___ N.C. App. ___, 809 S.E.2d 14 (Dec. 19, 2017). Hit and run resulting in injury is a lesser included offense of hit and run resulting in death. The defendant was indicted for a felonious hit and run resulting in death. At trial the State requested that the jury be instructed on the offense of felonious hit and run resulting in injury. Over the defendant's objection, the trial court agreed to so instruct the jury. The jury

found the defendant guilty of that offense. On appeal, the court held that, because felonious hit and run resulting in injury is a lesser included offense of hit and run resulting in death, no error occurred.

Error to refuse to instruct the jury on guilty knowledge of license revocation in DWLR case where defendant' evidence indicated he lacked knowledge of revocation

State v. Green, ___ N.C. App. ___, 811 S.E.2d 666 (Feb. 20, 2018). In this driving while license revoked case, because the defendant introduced evidence that he did not receive actual notice from the DMV that his license was revoked, the trial court erred by refusing to instruct the jury that it could find the defendant guilty only if he had knowledge of his revocation. The State's evidence included copies of four dated letters from the DMV addressed to the defendant stating that his license had been suspended. However, the defendant testified that he never received any of those letters and was unaware that his license had been suspended. He suggested that his father might have received and opened the letters because he lived at the same address as the defendant. At trial, the defendant requested the instruction that to be guilty he must have had knowledge of the revocation. The trial court denied this request. To prove driving while license revoked, the State must prove that the defendant had actual or constructive knowledge of the revocation. If the State presents evidence that the DMV mailed notice of the defendant's license revocation to the address on file for the defendant at least four days prior to the incident, there is a prima facie presumption that the defendant received the notice. However, the defendant can rebut the presumption. If the defendant presents some evidence that he or she did not receive the notice or some other evidence sufficient to raise the issue, the trial court must instruct the jury that guilty knowledge is necessary for conviction. Here, the defendant testified that he did not receive the notice and offered an explanation as to why it may not have reached him. He was thus entitled to an instruction that he must have knowledge of the revocation. The court went on to hold that the error was prejudicial.

Sexual Assaults

Reversing Court of Appeals, state Supreme Court holds evidence of restraint was sufficient to sustain kidnapping conviction where restraint went beyond that which was inherent to the sexual offense

State v. China, ___ N.C. ___, 811 S.E.2d 145 (April 6, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 797 S.E.2d 324 (2017), the court reversed, holding that because there was evidence of restraint beyond that inherent in the commission of the sex offense the defendant could be convicted of both the sex offense and kidnapping. The defendant was convicted of a number of several offenses, including first-degree sexual offense and second-degree kidnapping. The Court of Appeals concluded that there was insufficient evidence of restraint separate and apart from that inherent in the sex offense to support the kidnapping conviction. The Supreme Court disagreed. Here, the defendant exercised restraint over the victim during the sexual offense. However, after that offense was completed, the defendant pulled the victim off the bed, causing his head to hit the floor, and called to an accomplice who then, with the defendant, physically attacked the victim, kicking and stomping him. These additional actions increased the victim's helplessness and vulnerability beyond the initial attack that enabled the defendant to commit the sex offense. The court concluded: these actions constituted an additional restraint, which exposed the victim to greater danger than that inherent in the sex offense. For example, the victim testified

that as a result of the kicking and stomping on his knees and legs, which had not been targeted or harmed during the sex offense, he was unable to walk for 2 to 3 weeks after the attack.

Other

Scar from femur fracture in child abuse prosecution was insufficient under the facts to support "serious bodily injury"

State v. Dixon, ___ N.C. App. ___, 811 S.E.2d 705 (Feb. 20, 2018), *temp. stay granted*, __ N.C. __, 809 S.E.2d 887 (Mar. 7, 2018). In a case where the defendant was convicted of child abuse inflicting serious bodily injury under G.S. 14-318.4(a3), there was insufficient evidence that the victim experienced serious bodily injury. The victim, the defendant's daughter, experienced a femur fracture that required surgery temporarily placing rods in her leg, and resulting in permanent scarring. The court rejected the State's argument that the presence of a scar is sufficient by itself to show serious bodily injury. Here, the victim's scars resulted from surgery. By the time of trial, the scars had healed and she was engaged in unrestricted physical activities. The State's expert testified that the child should have no permanent disfiguration or any loss or impairment of function due to the scars. On these facts the scars by themselves are insufficient evidence of permanent disfigurement. The court went on to reject the State's argument that the victim suffered extreme pain and loss of use of her leg for a period of time, noting that the statute requires more. It is not enough for the victim to suffer extreme pain; the statute requires a permanent or protracted condition that causes extreme pain. Here, the victim testified that her leg stopped hurting long before trial and the evidence showed she was cleared to engage in normal activities within nine months of her surgery. No testimony or other evidence showed that the victim was ever at risk of death due to her injury. Thus, the state presented insufficient evidence of serious bodily injury. The evidence was sufficient however to support a conviction of child abuse resulting in serious physical injury. (Jeff Welty blogged about the case here).

Pleadings

Prior Convictions

Following *State v. Brice*, Court of Appeals holds G.S. 15A-928 pleading requirements are non-jurisdictional and unpreserved if no objection made at trial

State v. Simmons, ___ N.C. App. ___, 811 S.E.2d 711 (Feb. 20, 2018). On remand from the state Supreme Court for reconsideration in light of *State v. Brice*, 370 N.C. 244 (2017) (habitual misdemeanor larceny indictment was not defective; a violation of G.S. 15A-928 is not jurisdictional and cannot be raised on appeal where the defendant raised no objection or otherwise sought relief on the issue in the trial court), the court held that because the defendant failed to raise the non-jurisdictional issue below, the defendant waived his right to appeal the issue of the whether the aggravated felony death by vehicle indictment violated G.S. 15A-928.

Property Offenses

Indictment for obtaining property by false pretenses alleging that defendant obtained unspecified "credit" from victim-bank was fatally defective

State v. Everrette, ___ N.C. App. ___, 807 S.E.2d 168 (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:
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> 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.

NC Supreme Court reverses COA on sufficiency of larceny indictment identifying Belk store as "an entity capable of ownership"; no requirement to identify specific corporate entity

State v. Brawley, ___ N.C. ___, 811 S.E.2d 144(April 6, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 159 (2017), the court per curiam reversed for the reasons stated in the dissenting opinion below (here), thus holding that a larceny from a merchant indictment was not fatally defective. A majority of the panel of the Court of Appeals held that 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 of appeals 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[.]"

The court of appeals 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 of Appeals found that precedent "compel[led]" it to conclude that the charging language was insufficient. The Court of Appeals 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. The dissenting judge believed that the indictment adequately alleged the identity of the owner. The dissenting judge stated: "Given the complexity of corporate structures in today's society, I think an allegation that the merchant named in the indictment is a legal entity capable of owning property is sufficient to meet the requirements that an indictment apprise the defendant of the conduct which is the subject of the accusation." As noted, the Supreme Court reversed for reasons stated in the dissent. (Jeff Welty blogged about the case here.)

Reversing the Court of Appeals, state Supreme Court holds indictment for obtaining property by false pretenses identifying property as "U.S. Currency", without identifying a specific amount of money, was sufficient

State v. Mostafavi, ___ N.C. ___, 811 S.E.2d 138 (April 6, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 508 (2017), the court reversed, holding that the obtaining property by false pretenses indictment was not defective and that the evidence was sufficient to sustain the conviction on that charge. (1) The obtaining property by false pretenses indictment, that described the property obtained as "United States Currency" was not fatally defective. The indictment charged the defendant with two counts of obtaining property by false pretenses, alleging that the defendant, through false pretenses, knowingly and designedly obtained "United States Currency from Cash Now Pawn" by conveying specifically referenced personal property, which he represented as his own. The indictment described the personal property used to obtain the money as an Acer laptop, a Vizio television, a computer monitor, and jewelry. An indictment for obtaining property by false pretenses must describe the property obtained in sufficient detail to identify the transaction by which the defendant obtained money. Here, the indictment sufficiently identifies the crime charged because it describes the property obtained as "United States Currency" and names the items conveyed to obtain the money. As such, the indictment is facially valid; it gave the defendant reasonable notice of the charges against him and enabled him to prepare his defense. The transcript makes clear that the defendant was not confused at trial regarding the property conveyed.

Had the defendant needed more detail to prepare his defense, he could have requested a bill of particulars. In so holding the court rejected the defendant's argument that the indictment was fatally defective for failing to allege the amount of money obtained by conveying the items. (2) The State presented sufficient evidence of the defendant's false representation that he owned the stolen property to support his conviction for obtaining property by false pretenses. The pawnshop employee who completed the transaction verified the pawn tickets, which described the conveyed items and contained the defendant's name, address, driver's license number, and date of birth. The tickets included language explicitly stating that the defendant was "giving a security interest in the . . . described goods." On these facts, the State presented sufficient evidence of the defendant's false representation that he owned the stolen property that he conveyed.

(1) Indictment that misspelled defendant's middle name was not defective absent prejudice; (2) where indictment incorrectly identified defendant as white, and listed an incorrect birthday for the defendant, those mistakes were mere surplusage

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). (1) In this robbery case, the indictment was not fatally defective for misspelling the defendant's middle name. The indictment incorrectly alleged the defendant's middle name as "Rashawn." His actual middle name is "Rashaun." A minor misspelling of a defendant's name does not constitute a fatal defect absent some showing of prejudice. (2) Neither an error in the indictment with respect to the defendant's race nor one with respect to his date of birth rendered the indictment fatally defective. The indictment listed the defendant's race as white despite the fact that he is black. Additionally, his date of birth was alleged to be 31 August 1991 when, in fact, his birth date is 2 October 1991. There is no requirement that an indictment include the defendant's date of birth or race. Thus, these inaccuracies can be deemed surplusage.

Drug Offenses

Where manufacturing marijuana indictment alleged all four possible bases of a manufacturing offense (preparation, propagation, processing, and producing) and failed to allege intent to distribute (as required for a preparation-based manufacturing prosecution), indictment was fatally flawed

State v. Lofton, ___ N.C. App. ___ (May 1, 2018), *temp. stay granted*, ___ N.C. ___, 813 S.E.2d 252 (May 21, 2018). An indictment charging the defendant with manufacturing a controlled substance was fatally defective. The indictment alleged that the defendant "unlawfully, willfully and feloniously did manufacture a controlled substance . . . by producing, preparing, propagating and processing [marijuana]." Under controlling law, manufacturing a controlled substance does not require an intent to distribute unless the relevant activity is preparing or compounding. Because the manufacturing indictment included preparing as a basis, it failed to allege a required element – intent to distribute. Here, the jury was instructed on all four bases alleged in the indictment, including preparing. As such, the jury was allowed to convict the defendant on a theory of manufacturing that was not supported by a valid indictment. The court reached this issue even though it was not raised by the defendant on appeal.

Other Pleading Issues

Littering indictment was fatally flawed where it failed to allege all elements

State v. Rankin, ___ N.C. App. ___, 809 S.E.2d 358 (Jan. 2, 2018), *temp. stay granted*, __ N.C. __, 808 S.E.2d 757 (Jan. 22, 2018). Over a dissent the court held that where an indictment for felony littering of hazardous waste failed to plead an essential element of the crime it was fatally defective. The indictment failed to allege that the defendant had not discarded litter on property "designated by the State or political subdivision thereof for the disposal of garbage and refuse[ ] and . . . [was] authorized to use the property for this purpose" as set out in G.S. 14-399(a)(1). The issue on appeal was whether subsection (a)(1) is an essential element of the crime or alternatively an exception that need not be alleged. Holding that subsection (a)(1) is an element, the court reasoned: "The offense of littering under N.C. Gen. Stat. § 14-399(a) is not a "complete and definite" crime absent consideration of subsections (a)(1) and (a)(2)." It explained:

> Under § 14-399(a), the crime of littering is premised upon a defendant's act of disposing of or discarding trash in any place other than a waste receptacle (as provided for in subsection (a)(2)) or on property designated by the city or state for the disposal of garbage and refuse (as provided for in subsection (a)(1)). The text of the statutory language in § 14-399(a) prior to the word "except" does not state a crime when that language is read in isolation. Rather, subsections (a)(1) and (a)(2) are inseparably intertwined with the language preceding them.

The court further noted that it had previously held that subsection (a)(2) is an essential element of the crime and that "[b]ecause subsections (a)(1) and (a)(2) serve identical purposes in this statute, it would be illogical to suggest that one is an essential element but the other is not."

Evidence

Experts

No reliability foundation required for admission of HGN testimony

State v. Barker, ___ N.C. App. ___, 809 S.E.2d 171 (Dec. 19, 2017). The trial court did not err by admitting an officer's testimony about the results of a horizontal gaze nystagmus (HGN) test. At trial, the North Carolina Highway Patrol Trooper who responded to a call regarding a vehicle accident was tendered as an expert in HGN testing. The defendant objected to the Trooper being qualified as an expert. After a voir dire the trial court overruled the defendant's objection and the Trooper was permitted to testify. On appeal, the defendant argued that the witness failed to provide the trial court with the necessary foundation to establish the reliability of the HGN test. Citing *Godwin* and *Younts* (holding that Evidence Rule 702(a1) obviates the State's need to prove that the HGN testing method is sufficiently reliable), the court determined that such a finding "is simply unnecessary."

Reviewing for plain error only, court rejects defendant's challenges to reliability of lab analyst methods when that argument was based on facts not presented at the trial level or otherwise in the record

State v. Gray, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this drug case, the trial court did not commit plain error by admitting the expert opinion of a forensic chemist. On appeal, the defendant argued that the expert's testimony failed to demonstrate that the methods she used were reliable under the Rule 702. Specifically, he argued that the particular testing process used by the Charlotte-Mecklenburg Police Department Crime Lab to identify cocaine creates an unacceptable risk of a false positive and that this risk, standing alone, renders expert testimony based on the results of this testing process inherently unreliable under Rule 702(a). The court declined to consider this argument, concluding that it "goes beyond the record." The defendant did not object to the expert's opinion at trial. The court concluded that because the defendant failed to object at trial, the issue was unpreserved. However, because an unpreserved challenge to the performance of a trial court's gatekeeping function under Rule 702 in a criminal trial is subject to plain error review, the court reviewed the case under that standard. The court noted that its "jurisprudence wisely warns against imposing a *Daubert* ruling on a cold record" and that as a result the court limits its plain error review "of the trial court's gatekeeping function to the evidence and material included in the record on appeal and the verbatim transcript of proceedings." Here, the defendant's false positive argument "is based on documents, data, and theories that were neither presented to the trial court nor included in the record on appeal." The court determined that its plain error review of the defendant's Rule 702 argument "is limited solely to the record on appeal and the question of whether or not an adequate foundation was laid before [the] expert opinion was admitted." Here, an adequate foundation was laid. The witness, tendered as an expert in forensic chemistry, testified that she had a degree in Chemistry and over 20 years of experience in drug identification. She also testified about the type of testing conducted on the substance in question and the methods used by the Crime Lab to identify controlled substances. The witness testified that she tested the seized substance, that she used a properly functioning GCMS, and that the results from that test provided the basis for her opinion. Furthermore, her testimony indicates that she complied with Lab procedures and the methods she used were "standard practice in forensic chemistry." This testimony was sufficient to establish a foundation for admitting her expert opinion under Rule 702. The court also rejected the defendant's argument that the trial court erred "by failing to conduct any further inquiry" when the witness's testimony showed that she used scientifically unreliable methods, stating: "While in some instances a trial court's gatekeeping obligation may require the judge to question an expert witness to ensure his or her testimony is reliable, sua sponte judicial inquiry is not a prerequisite to the admission of expert opinion testimony."

No reliability foundation required to admit Drug Recognition Expert testimony under Rule 702(a1)(2)

State v. Fincher, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this DWI case the trial court did not abuse its discretion by admitting an officer's expert testimony that the defendant was under the influence of a central nervous system depressant. On appeal the defendant argued that the State failed to lay a sufficient foundation under Rule 702 to establish the reliability of the Drug Recognition Examination to determine that alprazolam was the substance that impaired the defendant's mental or physical faculties. The defendant also argued that the officer's testimony did not show that the 12-step DRE protocol was a reliable method of determining impairment. The court rejected these arguments, noting that pursuant to Rule 702(a1)(2), the

General Assembly has indicated its desire that Drug Recognition Evidence, like that given in the present case, be admitted and that this type of evidence already has been determined to be reliable and based on sufficient facts and data. Accordingly, the trial court properly admitted the testimony (Shea Denning blogged about the case here).

No error to exclude defense psychologist's expert testimony regarding fight or flight reactions

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this homicide case, the trial court did not err by excluding the expert opinion testimony of a forensic psychologist about the phenomenon of "fight or flight." Citing the North Carolina Supreme Court's *McGrady* decision the court noted that the expert did not possess any medical or scientific degrees (despite holding a PhD in psychology). This led the trial court to determine that the expert would not provide insight beyond the conclusions that the jurors could readily draw from their own ordinary experiences. The trial court acted well within its discretion in making this determination. The expert's testimony was not proffered to explain a highly technical and scientific issue in simpler terms for the jury. Rather her testimony appeared to be proffered "in order to cast a sheen of technical and scientific methodology onto a concept of which a lay person (and jury member) would probably already be aware." As such, it did not provide insight beyond the conclusions that the jurors could readily draw from their ordinary experience.

State's expert's testimony about delayed disclosure by children of sexual abuse was based on sufficient facts and data and was the product of reliable methods under Rule 702, and was thus properly admitted

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). In this child sexual assault case, the trial court did not abuse its discretion by allowing Kelli Wood, an expert in clinical social work specializing in child sexual abuse cases, to testify that it is not uncommon for children to delay disclosure of sexual abuse and to testify to possible reasons for delayed disclosures. At issue was whether the testimony satisfied Rule 702. The defendant did not dispute either Wood's qualifications or the relevance of her testimony. Rather, he asserted that her testimony did not meet two prongs of the Rule 702 *Daubert* reliability test. First, he asserted, Wood's testimony was not based on sufficient facts or data, noting that she had not conducted her own research and instead relied upon studies done by others. The court rejected this argument, finding that it directly conflicted with Rule 702, the *Daubert* line of cases and the court's precedent. Among other things, the court noted that as used in the rule, the term "data" is intended to encompass reliable opinions of other experts. Here, Wood's delayed disclosure testimony was grounded in her 200 hours of training, 11 years of forensic interviewing experience, conducting over 1200 forensic interviews (90% of which focused sex abuse allegations), and reviewing over 20 articles on delayed disclosures. Wood testified about delayed disclosures in general and did not express an opinion as to the alleged victim's credibility. As such, her testimony "was clearly" based on facts or data sufficient to satisfy the first prong of the reliability test. Second, the defendant argued that Wood's testimony was not the product of reliable principles and methods. Specifically, he asserted that the delayed disclosure research she relied upon was flawed: it assumed the participants were honest; it did not employ methods or protocols to screen out participants who made false allegations; and because there was no indication of how many participants might have lied, it was impossible to know an error rate. The defendant also argued that when Wood provided a list of possible reasons why an alleged victim might delay disclosure, she did not account for the alternative explanation that the abuse did not

occur. The court rejected this contention, pointing to specific portions of direct and cross-examination where these issues were addressed and explained. The court found that the defendant failed to demonstrate that his arguments attacking the principles and methods of Wood's testimony were pertinent in assessing its reliability. It thus held that her testimony was the product of reliable principles and methods sufficient to satisfy the second prong of the reliability analysis.

Hearsay

(1) Prior written statements of witnesses were properly admitted under recorded recollection exception to the hearsay rule; (2) video of witness interview was properly admitted as illustrative evidence and did not constitute hearsay; (3) witness testimony that the defendant told the witness that "he did it" was properly admitted as an admission of a party opponent.

State v. Brown, ___ N.C. App. ___, 811 S.E.2d 224 (Feb. 20, 2018). (1) In this murder case, the trial court did not err by admitting into evidence prior written statements made to the police by the defendant's brothers, Reginald and Antonio, pursuant to the Rule 803(5) recorded recollection exception to the hearsay rule. The statements at issue constitute hearsay. Even though Reginald and Antonio testified at trial, their written statements were not made while testifying; rather they were made to the police nearly 3 years prior to trial. Thus they were hearsay and inadmissible unless they fit within a hearsay exception. Here, and as discussed in detail in the court's opinion, the statements meet all the requirements of the Rule 803(5) recorded recollection hearsay exception. (2) The trial court did not err by admitting the defendant's brother's videotaped statement to the police as illustrative evidence. The defendant asserted that the videotaped statement constituted inadmissible hearsay. However, the trial court specifically instructed the jury that the videotape was being admitted for the limited, non-hearsay purpose of illustrating the brother's testimony. Because the videotaped statement was not admitted for substantive purposes the defendant's argument fails. (3) The trial court properly allowed into evidence the defendant's brother's testimony that "[the defendant] told [him] that he did it" and [the defendant] told [him] he was the one that did it." These statements were properly allowed as admissions of a party opponent under Rile 801(d) (Jessica Smith blogged about the case here).

Child's hearsay statements, not admissible under other hearsay exceptions, were admissible under residual hearsay exception

State v. Blankenship, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018), *temp. stay granted*, ___ N.C. ___, 812 S.E.2d 666 (May 3, 2018). In this child sexual assault case, the trial court did not err by admitting hearsay statements of the victim. At issue were several statements by the child victim. In all of them, the victim said some version of "daddy put his weiner in my coochie." First, the trial court admitted the victim's statements to the defendant's parents, Gabrielle and Keith, as a present sense impression and an excited utterance and under the residual exception to Rule 804. The court reviewed this matter for plain error. The court began by finding that the victim's statements were inadmissible as excited utterances. Although it found that the delay between the defendant's acts and the victim's statements does not bar their admission as excited utterances, it concluded that the State presented insufficient evidence to establish that the victim was under the stress of the startling event at the time she made the statements. In fact, the State presented no evidence of the victim's stress. Next, the court considered the present sense impression exception to the hearsay rule.

Present sense impressions, it explained, are statements describing or explaining an event or condition made while the declarant was perceiving the event or condition, or immediately thereafter. Here, the trial court erred by admitting the statements as present sense impressions because the record lacked evidence of exactly when the sexual misconduct occurred. However, the statements were properly admitted under the residual exception to Rule 804. There is a six-part test for admitting statements under the residual exception. Here, the trial court failed to make any conclusions regarding the second part of that test, whether the hearsay is covered by any of the exceptions listed in Rule 804(b)(1)-(4). Additionally, with respect to the third part of the test—whether the hearsay statement was trustworthy—the trial court failed to include in the record findings of fact and conclusions of law that the statements possess circumstantial guarantees of trustworthiness. Although the trial court determined that the statements possess a guarantee of trustworthiness, it found no facts to support that conclusion. This was error. However, the court went on to conclude that the record established the required guarantees of trustworthiness. Specifically: the victim had personal knowledge of the events; the victim had no motivation to fabricate the statements; the victim never recanted; and the victim was unavailable because of her lack of memory of the events. The court noted that in this case the parties had stipulated that the victim was unavailable due to lack of memory, not due to an inability to distinguish truth from fantasy. Additionally, the court concluded that the defendant suffered no prejudice from the trial court's failure to explicitly state that none of the other Rule 804 exceptions applied. Having concluded that the statements had a sufficient guarantee of trustworthiness, the court found that the trial court did not err by admitting the statements under the Rule 804 residual exception.

Second, the trial court admitted statements by the victim to Adrienne Opdike, a former victim advocate at the Children's Advocacy and Protection Center, under the residual exception of Rule 804. Referring to its analysis of the victim's statements to Gabrielle and Keith, the court concluded that the statement to Opdike has sufficient guarantees of trustworthiness and that the trial court did not abuse its discretion by admitting it under the Rule 804 residual exception.

Third, the trial court admitted statements by the victim to a relative, Bobbi, as a present sense impression and under the Rule 804 residual exception. The court reviewed this issue for plain error. Relying on its analysis with respect to the victim's statements to Gabrielle and Keith, the court held that the trial court erred by admitting the statement to Bobbi as a present sense impression. However, the trial court did not err, or abuse its discretion, in admitting the statement under the Rule 804 residual exception. The trial court adequately performed the six-part analysis that applies to the residual exception and the statement has sufficient guarantees of trustworthiness.

Fourth, the trial court admitted statements by the victim to Amy Walker Mahaffey, a registered nurse in the emergency room, under the medical diagnosis and treatment exception. Although it found the issue a close one, the court determined that it need not decide whether the trial court erred by admitting the statement under this exception because even if error occurred, the defendant failed to show prejudice. Specifically, the trial court properly admitted substantially identical statements made by the victim to others.

Authentication

Notice of trespassing ban properly authenticated by store employee that was familiar with company's policy and practice in issuing such notices, despite not having prepared the one at issue in the case

State v. Allen, ___ N.C. App. ___, 812 S.E.2d 192 (Mar. 6, 2018). In this felony breaking or entering and felony larceny case, a store Notice of Prohibited Entry was properly authenticated. After detaining the defendant for larceny, a Belk loss prevention associate entered the defendant's name in a store database. The associate found an entry for the defendant at Belk Store #329, along with a photograph that resembled the defendant and an address and date of birth that matched those listed on his driver's license. The database indicated that, as of 14 November 2015, the defendant had been banned from Belk stores for a period of 50 years pursuant to a Notice of Prohibited Entry following an encounter at store #329. The Notice included the defendant's signature. The defendant was charged with felony breaking or entering and felony larceny. At trial the trial court admitted the Notice as a business record. On appeal, the defendant argued that the Notice was not properly authenticated. The court disagreed, concluding that business records need not be authenticated by the person who made them. Here, the State presented evidence that the Notice was completed and maintained by Belk in the regular course of business. The loss prevention associate testified that she was familiar with the store's procedures for issuing Notices and with the computer system that maintains this information. She also established her familiarity with the Notice and that such forms were executed in the regular course of business. The court found it of "no legal moment" that the loss prevention officer did not herself make or execute the Notice in question, given her familiarity with the system under which it was made.

Rape Shield/Rule 412

NC Supreme Court reverses Court of Appeals to find evidence that the victim had communicable sexually transmitted diseases that the defendant did not was admissible in sexual assault prosecution under Rule 412

State v. Jacobs, ___ N.C. ___, 811 S.E.2d 579 (April 6, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 798 S.E.2d 532 (2017), the court reversed, holding that at the trial court erred by excluding defense evidence of the victim's history of STDs. The case involved allegations that the defendant had sexual relations with the victim over a period of several years. Evidence showed that the victim had contracted Trichomonas vaginalis and the Herpes simplex virus, Type II, but that testing of the defendant showed no evidence of those STDs. At trial the defense proffered as an expert witness a doctor who was a certified specialist in infectious diseases who opined, in part, that given this, it was unlikely that the victim and the defendant had engaged in unprotected sexual activity over a long period of time. The trial court determined that the defendant could not introduce any STD evidence unless the State open the door. The defendant was convicted and appealed. The Court of Appeals rejected the defendant's argument that the trial court erred by excluding this evidence. The Supreme Court reversed and ordered a new trial. The Rule 412(b)(2) exception allows for admission of "evidence of specific instances of sexual behavior offered for the purpose of showing that the act or acts charged were not committed by the defendant." The court concluded:

> The proposed expert's conclusions regarding the presence of STDs in the victim and the absence of those same STDs in defendant affirmatively permit an inference that defendant did not commit the charged crime. Furthermore, such evidence diminishes the likelihood of a three-year period of sexual relations between defendant and [the victim]. Therefore, the trial court erred in excluding this evidence pursuant to Rule 412 and there is "a reasonable possibility that, had the error not been committed, a different result would have been reached at trial." (Phil Dixon blogged about the case here.)

Relevance and Prejudice

Lay testimony of defendant's medical diagnoses was properly excluded as irrelevant

State v. Solomon, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this second-degree murder vehicle accident and felony speeding to elude case, the trial court did not err by excluding, under Rule 401, the defendant's testimony regarding his medical diagnoses. At trial, the defendant attempted to testify to his cognitive impairments and behavioral problems. The State objected, arguing that the defendant had failed to provide notice of an insanity or diminished capacity defense, and failed to provide an expert witness or medical documentation for any of the conditions. On voir dire, the defendant testified that he suffered from several mental disorders including Attention Deficit Disorder, Attention Deficit Hyperactivity Disorder, Pediatric Bipolar Disorder, and Oppositional Defiant Disorder. Defense counsel stated the testimony was not offered as a defense but rather so that "the jury would be aware of [the defendant's] condition and state of mind." The trial court determined that lay testimony from the defendant regarding his various mental disorders was not relevant under Rule 401. The court found no error, reasoning:

> Defendant attempted to offer specific medical diagnoses through his own testimony to lessen his culpability or explain his conduct without any accompanying documentation, foundation, or expert testimony. Defendant's testimony regarding the relationship between his medical diagnoses and his criminal conduct was not relevant without additional foundation or support. Such evidence would have required a tendered expert witness to put forth testimony that complies with the rules of evidence. Without a proper foundation from an expert witness and accompanying medical documentation, Defendant's testimony would not make a fact of consequence more or less probable from its admittance.

The court went on to hold that even if error occurred, it was not prejudicial.

No plain error to admit rap lyrics written by the defendant describing similar crimes

State v. Santillian, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this case involving a gang-related home invasion and murder, the trial court did not commit plain error by admitting rap lyrics found in a notebook in the defendant's room. The lyrics, which were written before the killing, described someone "kick[ing] in the door" and "spraying" bullets with an AK47 in a manner that resembled how the victims were killed. The court concluded that the defendant failed to show that, absent the alleged error, the jury probably would have returned a different verdict.

Character Evidence

Reversing the Court of Appeals, Supreme Court holds evidence of prior instance of defendant possessing a weapon near a vehicle properly admitted under Rule 404(b)

State v. Williams, ___ N.C. ___, 809 S.E.2d 581 (March 2, 2018). In this possession of a firearm by a felon case, the court reversed in part the decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 169 (2017) (here), for the reasons stated in the dissent. A divided panel of the court of appeals had held that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The court of appeals held that the trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. It reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case." The court of appeals found that the relevance of this evidence was based on an improper character inference. It further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant's opportunity to commit the crime charged. The court of appeals noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court of appeals went on to hold that the trial court's error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that because the defendant did not properly preserve his objection, the issue should be reviewed under the plain error standard, and that no plain error occurred, the position ultimately adopted by the NC Supreme Court (Jeff Welty blogged about the Court of Appeals decision here).

No plain error to admit testimony about an unrelated incident between law enforcement and the defendant where it was offered to establish the officer's familiarity with the defendant

State v. Weldon, ___ N.C. App. ___, 811 S.E.2d 683 (Feb. 20, 2018). In this possession of a firearm by a felon case, the trial court did not err when it allowed an officer to testify that during an unrelated incident, the officer saw the defendant exiting a house that the officer was surveilling and to testify that the defendant had a reputation for causing problems in the area. This testimony was offered for a proper purpose: to establish the officer's familiarity with the defendant's appearance so that he could identify him as the person depicted in surveillance footage. Additionally, the trial court did not abuse its discretion in finding that the probative value of this testimony outweighed its prejudicial impact under the Rule 403 balancing test. However, the court went on to hold that the officer's testimony that the surveillance operation in question was in response to "a drug complaint" did not add to the reliability of the officer's ability to identify the defendant. But because no objection was made to this testimony at trial plain error review applied, and any error that occurred with respect to this testimony did not meet that high threshold (Jessica Smith blogged about a related issue in the case here).

Criminal Procedure

Right to Counsel

Defendant that forfeited right to counsel by obstructive conduct in first trial is entitled to a fresh start in new trial

State v. Boderick, ___ N.C. App. ___, 812 S.E.2d 889 (Mar. 20, 2018). The trial court's determination that the defendant had forfeited his right to counsel does not "carry over" to the new trial, ordered by the court for unrelated reasons. In the 3½ years leading up to trial the defendant, among other things, fired or threatened to fire three separate lawyers, called them liars, accused them of ethical violations, reported one to the Bar, cursed at one in open court, and refused to meet with his lawyers. After the defendant refused to cooperate with and attempted to fire his third attorney, the trial court found that the defendant had forfeited his right to court-appointed counsel and appointed standby counsel. On the first day of trial, the defendant informed the trial court that he finally understood the seriousness of the situation and asked the trial court to appoint standby counsel as his lawyer. Standby counsel said that he would not be ready to go forward with trial that day if appointed. The trial court denied the motion for counsel based on the prior forfeiture orders, and the trial court declined to reconsider this matter when it arose later. The defendant represented himself at his bench trial, with counsel on standby, and was convicted. After finding that the trial court erred by proceeding with a bench trial, the court considered the defendant's forfeiture claims. Specifically, the defendant argued on appeal that his conduct did not warrant forfeiture and that the trial court's forfeiture order should have been reconsidered in light of the defendant's changed conduct. In light of the court's determination that a new trial was warranted on unrelated grounds, it declined to address these issues. However, it concluded that a break in the period of forfeiture occurs when counsel is appointed to represent the defendant on appeal following an initial conviction. Here, because the defendant accepted appointment of counsel on appeal following his trial and allowed appointed counsel to represent him through the appellate process, "the trial court's prior forfeiture determinations will not carry over to defendant's new trial." The court concluded: "Thus, defendant's forfeiture ended with his first trial. If, going forward, defendant follows the same pattern of egregious behavior toward his new counsel, the trial court should conduct a fresh inquiry in order to determine whether that conduct supports a finding of forfeiture."

Discovery and Related Issues

No abuse of discretion to allow State's undisclosed rebuttal expert to testify where defense provided final expert report on day of trial, expert witness was not the primary expert, the court limited her testimony and the defense had time to prepare for her examination

State v. Jackson, ___ N.C. App. ___, 810 S.E.2d 397 (Feb. 20, 2018). In this first-degree murder case, the trial court did not abuse its discretion by allowing the State to elicit testimony from a supplemental rebuttal expert, Dr. Wolfe, first disclosed by the State during trial. The defendant asserted a violation of G.S. 15A-903(a)(2)'s pretrial expert witness disclosure requirements. The State did not disclose Wolfe, her opinion or expert report before trial. The State offered Wolfe in response to its receipt, right before jury selection, of a primary defense expert's final report, which differed from the expert's previously supplied report. Wolfe was a supplemental rebuttal witness, not the State's sole rebuttal witness, nor a primary expert introducing new

evidence. The defendant was able to fully examine Wolfe and the basis for her opinion during a voir dire held eight days before her trial testimony. The trial court set parameters limiting Wolfe's testimony, and the defendant received the required discovery eight days before she testified. No court was held on four of these days, providing the defense an opportunity to prepare for her testimony. Although the defense moved to continue its expert's voir dire examination based on the timing of the State's discovery disclosures (Wolfe initially was offered as a rebuttal witness on the Daubert voir dire of the defendant's expert; when the trial court found that the defendant's expert satisfied Rule 702, Wolfe was offered as a rebuttal expert at trial), it never moved for a trial continuance or requested more time to prepare for Wolfe's rebuttal. Thus, the defendant failed to show that the trial court abused its discretion in allowing Wolfe's limited rebuttal testimony.

Ex parte orders obtained by the State compelling personnel and educational records of uncharged suspect were void due to lack of jurisdiction

State v. Santifort, ___ N.C. App. ___, 809 S.E.2d 213 (Dec. 19, 2017). The trial court's ex parte orders compelling the production of the defendant's personnel files and educational records were void ab initio. While employed as a police officer the defendant was involved in a vehicle pursuit that resulted in the death of the pursued driver. Prior to charging the defendant with a crime, the State obtained two separate ex parte orders compelling the production of the defendant's personnel records from four North Carolina police departments where he had been employed as well as his educational records related to a community college BLET class. After the defendant was indicted for involuntary manslaughter, he unsuccessfully moved to set aside the ex parte orders. On appeal, the court concluded that the orders were void ab initio. Citing *In re Superior Court Order*, 315 N.C. 378 (1986), and *In re Brooks*, 143 N.C. App. 601 (2001), both dealing with ex parte orders for records, the court concluded:

> The State did not present affidavits or other comparable evidence in support of their motions for the release of [the defendant's] personnel files and educational records sufficiently demonstrating their need for the documents being sought. Nor was a special proceeding, a civil action, or a criminal action ever initiated in connection with the ex parte motions and orders. For these reasons, the State never took the steps necessary to invoke the superior court's jurisdiction.

Miranda Issues

Where defendant failed to remember events at interrogation but provided detailed description of events at trial, prosecutor's questions of the defendant regarding this inconsistency were proper and not an impermissible statement on the defendant's post-arrest silence

State v. Wyrick, ___ N.C. App. ___, 809 S.E.2d 608 (Jan. 16, 2018). In this sexual assault case, the court rejected the defendant's argument that the State's impeachment of the defendant with his post-Miranda silence violated the defendant's constitutional rights. After the defendant was arrested and read his Miranda rights, he signed a waiver of his rights and gave a statement indicating that he did not recall the details of the night in question. He was later connected to the crimes and brought to trial. At trial the defendant testified to specific details of the incident. He recounted driving an unknown man home from a nightclub to an

apartment complex, meeting two young women in the complex's parking lot, and having a consensual sexual encounter with the women. The defendant testified that the women offered him "white liquor," marijuana, and invited him to their apartment. However, the defendant had failed to mention these details when questioned by law enforcement after his arrest, stating instead that he did not remember the details of the night. On cross-examination, the prosecutor asked the defendant why he had not disclosed this detailed account to law enforcement during that interview. The defendant stated that he was unable to recall the account because he was medicated due to a recent series of operations, and that the medication affected his memory during the interview. The court determined that the prosecutor's cross-examination "was directly related to the subject matter and details raised in Defendant's own direct testimony, including the nature of the sexual encounter itself, the police interrogation, and his prior convictions." "Further," the court explained, "the inquiry by the prosecutor was not in an effort to proffer substantive evidence to the jury, but rather to impeach Defendant with his inconsistent statements." It concluded:

> Defendant failed to mention his story of a consensual sexual encounter to the detective which he later recalled with a high level of particularity during direct examination. Such a "memorable" encounter would have been natural for Defendant to recall at the time [the officer] was conducting his investigation; thus, his prior statement was an "indirect inconsistency." Further, the prosecutor did not exploit Defendant's right to remain silent, but instead merely inquired as to why he did not remain consistent between testifying on direct examination and in his interview with the detective two years prior (Jeff Welty blogged about a separate issue in the case here).

(1) Where order denying suppression of defendant's statement failed to address interaction between officer and defendant after defendant invoked Miranda, remand for additional findings on that encounter (2) Court rejects argument that waiver of counsel was involuntary under the circumstances; trial court's order as to that point was supported by the evidence

State v. Santillan, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). (1) In this case involving a gang-related home invasion and murder, the court remanded to the trial court on the issue of whether the defendant's waiver of his right to counsel was voluntary. Officers interrogated the 15-year-old defendant four times over an eight hour period. Although he initially denied being involved in either a shooting or a killing, he later admitted to being present for the shooting. He denied involvement in the killing, but gave a detailed description of the murders and provided a sketch of the home based on information he claimed to have received from another person. All four interviews were videotaped. At trial, the State sought to admit the videotaped interrogation and the defendant's sketch of the home into evidence. The defendant moved to suppress on grounds that the evidence was obtained in violation of his Sixth Amendment rights. The trial court denied the motion and the defendant was convicted. He appealed arguing that the trial court's suppression order lacks key findings concerning law enforcement's communications with him after he invoked his right to counsel. The video recording of the interrogation shows that the defendant initially waived his right to counsel and spoke to officers. But, after lengthy questioning, he re-invoked his right to counsel and the officers ceased their interrogation and left the room. During that initial questioning, law enforcement told the defendant that they were arresting him on drug charges. The officers also told the defendant they suspected he was involved in the killings, but they did not tell him they were charging him

with those crimes, apparently leaving him under the impression that he was charged only with drug possession. Before being re-advised of his rights and signing a second waiver form, the defendant engaged in an exchange with the police chief, who was standing outside of the interrogation room. During the exchange, the defendant asked about being able to make a phone call; the police chief responded that would occur later because he was being arrested and needed to be booked for the shooting. The defendant insisted that he had nothing to do with that and had told the police everything he knew. The chief responded: "Son, you f***** up." Later, when officers re-entered the interrogation room, the defendant told them that he wanted to waive his right to counsel and make a statement. The trial court's order however did not address the exchange with the chief. Because of this, the court concluded that it could not examine the relevant legal factors applicable to this exchange, such as the intent of the police; whether the practice is designed to elicit an incriminating response from the accused; and any knowledge the police may have had concerning the unusual susceptibility of a defendant to a particular form of persuasion. The court thus remanded for the trial court to address this issue. (2) The court went on however to reject the defendant's argument that separate and apart from the chief's communication with him, his waiver of his right to counsel was involuntary given his age, the officers' interrogation tactics, and his lack of sleep, food, and medication. The court concluded that the trial court's order addressed these factors and, based on facts supported by competent evidence in the record, concluded that the defendant's actions and statements showed awareness and cognitive reasoning during the entire interview and that he was not coerced into making any statements, but rather made his statements voluntarily. Because the trial court's fact findings on these issues are supported by competent evidence, and those findings in turn support the court's conclusions, the court rejected this voluntariness challenge.

Jury Selection

(1) No prejudice where defendant prohibited from questioning potential jurors on a former racially charged incident between law enforcement and citizens in the jurisdiction; (2) Defendant need not exhaust peremptory challenges to preserve challenge to denial of ability to question jurors on a relevant topic

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In a case involving a shoot-out with police, the defendant was not prejudiced by the trial court's limitation on his questioning of potential jurors. The trial court did not allow the defendant to inquire into the opinions of potential jurors regarding an unrelated, high-profile case involving a shooting by a police officer that resulted in a man's death and police shootings of black men in general. The trial court disallowed these questions as stakeout questions. On appeal the defendant argued that this was a proper subject of inquiry. The court began by rejecting the State's contention that it need not consider the issue at all because the defendant failed to exhaust his preemptory challenges, therefore forestalling his ability to demonstrate prejudice, stating:

> [T]he requirement that a defendant exhaust his peremptory challenges is a meaningless exercise where, as here, a defendant has been precluded from inquiring into jurors' potential biases on a relevant subject, leaving the defendant to assume or guess about those biases without being permitted to probe deeper; this requirement elevates form over function in that the exhaustion of peremptory challenges in a case like this does nothing to ameliorate defendant's dissatisfaction with the venire. As a result, any

> peremptory challenge made by a defendant (or any party) is an empty gesture once a trial court has ruled that an entire line of (relevant) questioning will be categorically prohibited.

The court then turned to the defendant's challenge to the trial court's ruling prohibiting any inquiry into the opinions of potential jurors regarding the unrelated, high-profile case and regarding police officer shootings of black men in general. Based "[o]n the specific facts of the instant case," the court concluded that the trial court's rulings were not prejudicial to the defendant. Specifically, the court noted that in this case, the defendant did not realize until after the fact that he had been shooting at police officers. The court was careful to note that in some other case involving a black male defendant and a shooting with police officers, the line of questioning at issue could very well be proper, and even necessary. Again, however, on the precise facts of this case, the court found no prejudicial error. (John Rubin blogged about a separate issue in the case here.)

Jury Instructions

(1) Error, though not prejudicial, to instruct jury on flight where instruction unsupported by evidence; (2) plain error occurred where jury instructions on obtaining property by false pretenses did not specify the false representation at issue; (3) plain error also occurred in insurance fraud instructions where they failed to identify the fraudulent representation at issue

State v. Locklear, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). (1) In this burning case, the trial court erred by instructing the jury on flight. Here, the evidence raises no more than suspicion and conjecture that the defendant fled the scene. Moreover, there is no evidence that the defendant took steps to avoid apprehension. The error however was not prejudicial. (2) The trial court committed plain error with respect to its jury instructions on obtaining property by false pretenses; the instructions allowed the jury to convict the defendant of a theory not alleged in the indictment. The indictment alleged that the false pretense at issue was the filing a fire loss claim under the defendant's homeowner insurance policy, when in fact the defendant had intentionally burned her own residence. In its instructions to the jury, the trial court did not specify the false pretense at issue. Although the State's evidence supported the allegation in the indictment, it also supported other misrepresentations made by the defendant in connection with her insurance claim. The court concluded: "Where there is evidence of various misrepresentations which the jury could have considered in reaching a verdict for obtaining property by false pretenses, we hold the trial court erred by not mentioning the misrepresentation specified in the indictment in the jury instructions." (3) The trial court committed plain error with respect to its jury instructions for insurance fraud. The indictment for insurance fraud alleged that the defendant falsely denied setting fire to her residence. The trial court's instructions to the jury did not specify the falsity at issue. Following the same analysis applied with respect to the false pretenses charge, the court held that because the trial court's instructions allowed the jury to convict the defendant of insurance fraud on a theory not alleged in the indictment, the instructions constituted plain error.

Corpus Delecti

Where the defendant admitted driving and there was sufficient corroborating evidence that defendant was the driver of wrecked vehicle, corpus delecti was satisfied

State v. Hines, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this case, involving habitual impaired driving, driving while license revoked, and reckless driving, the corpus delicti rule was satisfied. The defendant argued that no independent evidence corroborated his admission to a trooper that he was the driver of the vehicle. The court disagreed, noting, in part, that the wrecked vehicle was found nose down in a ditch; one shoe was found in the driver's side of the vehicle, and the defendant was wearing the matching shoe; no one else was in the area at the time of the accident other than the defendant, who appeared to be appreciably impaired; the defendant had an injury consistent with having been in a wreck; and the wreck of the vehicle could not otherwise be explained. Also the State's toxicology expert testified that the defendant's blood sample had a blood ethanol concentration of 0.33.

Where the defendant's confession was uncorroborated and otherwise unsupported by independent evidence, motion to dismiss should have been granted

State v. Blankenship, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018), *temp. stay granted*, ___ N.C. ___, 812 S.E.2d 666 (May 3, 2018). In this child sexual assault case, the trial court erred by denying the defendant's motion to dismiss charges of statutory sexual offense and indecent liberties with a child where the State failed to satisfy the corpus delecti rule. Here, the only substantive evidence was the defendant's confession. Thus, the dispositive question is whether the confession was supported by substantial independent evidence tending to establish its trustworthiness, including facts tending to show that the defendant had the opportunity to commit the crime. In this case, the defendant had ample opportunity to commit the crimes; as the victim's father, he often spent time alone with the victim at their home. Thus, the defendant's opportunity corroborates the essential facts embedded in the confession. However, the confession did not corroborate any details related to the crimes likely to be known by the perpetrator. In out-of-court statements, the victim told others "Daddy put weiner in coochie." However, the defendant denied that allegation throughout his confession. He confessed to other inappropriate sexual acts but did not confess to this specific activity. Also, the defendant's confession did not fit within a pattern of sexual misconduct. Additionally, the confession was not corroborated by the victim's extrajudicial statements. Although the defendant confessed to touching the victim inappropriately and watching pornography with her, he did not confess to raping her. Thus, the State failed to prove strong corroboration of essential facts and circumstances. The court noted that although the defendant spoke of watching pornography with the victim, investigators did not find pornography on his computer. The court thus determined that the State failed to satisfy the corpus delecti rule. It went on to reject the State's argument that even without the defendant's confession, there was sufficient evidence that the defendant was the perpetrator of the crimes.

Defenses

Court of Appeals rejects casual connection for felony disqualification of self-defense

State v. Crump, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). No prejudicial error occurred with respect to the trial court's self-defense instructions. With respect to an assault with a deadly weapon with intent to kill charge, the defendant raised the statutory justifications of protection of his motor vehicle and self-defense. The trial court found that the defendant's evidence did not show that his belief that entry into his motor vehicle was imminent and gave the pattern jury instruction N.C.P.I.-Crim. 308.45 ("All assaults involving deadly force") and not N.C.P.I.-Crim. 308.80 ("defense of motor vehicle"), as requested by defendant. The trial court instructed the jury pursuant to N.C.P.I.-Crim. 308.45, incorporating statutory language indicating that self-defense is not available to one who was attempting to commit, was committing, was escaping from the commission of a felony. The State requested that the trial court also define for the jury the felonies that would disqualify the defendant's claim of self-defense. The trial court agreed and instructed the jury, using the language of G.S. 14-51.4(1), that self-defense was not available to one who engaged in specified felonious conduct. On appeal, the defendant first argued that G.S. 14-51.4(1) requires both a temporal and causal nexus between the disqualifying felony and the circumstances which gave rise to the perceived need to use defensive force. The court agreed that the statute contains a temporal requirement but disagreed that it contains a causal nexus requirement. Second, the defendant argued that the inclusion of assault with a deadly weapon with intent to kill as a qualifying felony was circular and therefore erroneous. The court agreed, but found the error was not prejudicial (John Rubin blogged about the case here).

No error to instruct the jury on aggressor doctrine where some evidence supported the defendant being the initial aggressor

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). Where there was evidence that the defendant was the aggressor, the trial court did not err by instructing the jury on the aggressor doctrine as it relates to self-defense. The court noted that based on the defendant's own testimony regarding the incident, it was possible for the jury to infer that the defendant was the initial aggressor. Additionally, the victim was shot twice in the back, indicating either that the defendant continued to be the aggressor or shot the victim in the back during what he contended was self-defense. As a result, the trial court properly allowed the jury to determine whether or not the defendant was the aggressor.

In prosecution for involuntary manslaughter based on involvement in an unlawful affray, error for trial court not to instruct on defense of others when supported by the evidence

State v. Gomola, ___ N.C. App. ___, 810 S.E.2d 797 (Feb. 6, 2018). In a case where the defendant was found guilty of involuntary manslaughter on the theory that he committed an unlawful act which proximately caused the victim's death, the trial court committed reversible error by refusing to give a jury instruction on defense of others as an affirmative defense to the unlawful act at issue. The defendant was involved in an altercation at a waterfront bar that resulted in the death of the victim. The defendant's version of the events was that the victim fell into the water and drowned after physical contact by the defendant; the defendant claimed to be defending his friend Jimmy, who had been shoved by the victim. The unlawful act at issue was

the offense of affray. On appeal the defendant argued that the trial court committed reversible error by refusing to instruct the jury on defense of others as an affirmative defense to the crime of affray. The defendant asserted that his only act—a single shove—was legally justified because he was defending his friend and thus was not unlawful. The court agreed. It noted that the state Supreme Court has previously sanctioned the use of self-defense by a defendant as an appropriate defense when the defendant is accused of unlawfully participating in affray. Where, as here, the State prosecuted the defendant for involuntary manslaughter based on the theory that the defendant committed an unlawful act (as opposed to the theory that the defendant committed a culpably negligent act) "the defendant is entitled to all instructions supported by the evidence which relate to the unlawful act, including any recognized affirmative defenses to the unlawful act." Here, the evidence supports the defendant's argument that the instruction on defense of others was warranted. Among other things, there was evidence that Jimmy felt threatened when shoved by the victim; that the defendant immediately advanced towards the victim in response to his contact with Jimmy; that the victim punched and kicked the defendant; and that the defendant only struck the victim once. The defendant was thus entitled to a defense of others instruction to affray. The court was careful to note that it took no position as to whether the defendant did in fact act unlawfully. It held only that the defendant was entitled to the instruction. The court also noted that the issue in this case is not whether self-defense is a defense to involuntary manslaughter; the issue in this case is whether self-defense is an affirmative defense to affray, the unlawful act used as the basis for the involuntary manslaughter charge.

Where defendant did not specifically intend to shoot perceived attacker, the defendant was not entitled to have the jury instructed on self-defense

State v. Cook, ___ N.C. ___, 809 S.E.2d 566 (Mar. 2, 2018). The court per curiam affirmed a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 575 (2017) (here). In this assault on a law enforcement officer case, the court of appeals 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 his presence at a bedroom door and stated 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 of appeals 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, the court of appeals stated, even if there is, in fact, other evidence from which a jury could have determined that the defendant did intend to kill the attacker.

Where substantial evidence supported a defense of necessity (and duress), error for trial court to refuse to so instruct the jury

State v. Miller, ___ N.C. App. ___, 812 S.E.2d 692 (Mar. 6, 2018). In this DWI case, the trial court erred by refusing to instruct the jury on the defense of necessity. The defendant was arrested for DWI while driving a golf cart. The evidence showed that the defendant and his wife used the golf cart on paths connecting their home to a local bar, that he drove the golf cart to the bar on those paths on the evening in question, and that he planned to return the same way. However, when a fight broke out at the bar, the defendant and his wife fled on the golf cart, driving on the roadway. The defendant was convicted and he appealed. The court began its analysis by noting that the affirmative defense of necessity is available to DWI defendants and involves these elements: reasonable action, taken to protect life, limb, or health of a person, and no other acceptable choices available. The trial court erred by applying an additional element, requiring that the defendant's action was motivated by fear. The court went on to determine that an objective standard of reasonableness applies to necessity, as compared to duress which appears to involve a subjective standard. The evidence was sufficient to satisfy the first two elements of the defense: reasonable action taken to protect life, limb, or the health of a person. Here, the bar attracted a rough clientele, including "the biker crowd." It was not unusual for fights to break out there, but the bar had no obvious security. On the night in question, the bar atmosphere became "intense" and "mean" such that the two decided to leave. The defendant then argued with several men in the parking lot, which escalated to shouting and cursing. The main person with whom the defendant was arguing was described as the "baddest motherfucker in the bar." The defendant punched the man, knocking him to the ground. The man was angry and drew a handgun, threatening the defendant. Neither the defendant nor his wife were armed. The scene turned "chaotic," with a woman telling the defendant's wife that the man was "crazy" and that they needed to "get out of [t]here." The defendant's wife was concerned that the man might shoot the defendant, her or someone else. When the defendant saw the gun, he screamed at his wife to leave. The defendant's wife said she had no doubt that if they had not fled in the golf cart they would have been hurt or killed by the man with the gun. On these facts the court held:

> [S]ubstantial evidence was presented that could have supported a jury determination that a man drawing a previously concealed handgun, immediately after having been knocked to the ground by Defendant, presented an immediate threat of death or serious bodily injury to Defendant, [his wife], or a bystander, and that attempting to escape from that danger by driving the golf cart for a brief period on the highway was a reasonable action taken to protect life, limb, or health.

The court also found that there was sufficient evidence as to the third element of the defense: no other acceptable choices available. With respect to whether the perceived danger had abated by the time the defendant encountered the officer, the court noted that the defendant had pulled off the highway approximately 2/10 of a mile from the bar and the defendant's wife said that she saw the officer within minutes of the altercation. The court concluded: "On the facts of this case, including . . . that there was a man with a firearm who had threatened to shoot Defendant, and who would likely have access to a vehicle, we hold two-tenths of a mile was not, as a matter of law, an unreasonable distance to drive before pulling off the highway." The court further clarified that the defenses of necessity and duress are separate and distinct. It

held that the evidence also supported a jury instruction on duress (Shea Denning blogged about the case here).

(1) Where trial court agreed to give pattern instruction on self-defense but modified it without notice, the error was preserved even without objection; (2) omission of "stand your ground" provisions from pattern self-defense instruction was misleading and required a new trial

State v. Lee, ___ N.C. ___, 811 S.E.2d 563 (April 6, 2018). On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 789 S.E.2d 679 (2016), the court reversed because of errors in the jury instructions on self-defense. At trial, the parties agreed to the delivery of N.C.P.I.–Crim. 206.10, the pattern instruction on first-degree murder and self-defense. That instruction provides, in relevant part: "Furthermore, the defendant has no duty to retreat in a place where the defendant has a lawful right to be." Additionally, N.C.P.I.–Crim. 308.10, which is incorporated by reference in footnote 7 of N.C.P.I.–Crim. 206.10 and entitled "Self-Defense, Retreat," states that "[i]f the defendant was not the aggressor and the defendant was . . . [at a place the defendant had a lawful right to be], the defendant could stand the defendant's ground and repel force with force." Although the trial court agreed to instruct the jury on self-defense according to N.C.P.I.–Crim. 206.10, it ultimately omitted the "no duty to retreat" language of N.C.P.I.–Crim. 206.10 from its actual instructions without prior notice to the parties and did not give any part of the "stand-your-ground" instruction. Defense counsel did not object to the instruction as given. The jury convicted defendant of second-degree murder and the defendant appealed. The Court of Appeals affirmed the conviction, reasoning that the law limits a defendant's right to stand his ground to any place he or she has the lawful right to be, which did not include the public street where the incident occurred. The Supreme Court allowed defendant's petition for discretionary review and reversed. (1) The court held that when a trial court agrees to give a requested pattern instruction, an erroneous deviation from that instruction is preserved for appellate review without further request or objection. Here, because the trial court agreed to instruct the jury in accordance with N.C.P.I.–Crim. 206.10, its omission of the required stand-your-ground provision substantively deviated from the agreed-upon pattern jury instruction, thus preserving this issue for appellate review. (2) By omitting the relevant stand-your-ground provision, the trial court's jury instructions were an inaccurate and misleading statement of the law. The court concluded, in part, that "[c]ontrary to the opinion below, the phrase "any place he or she has the lawful right to be" is not limited to one's home, motor vehicle, or workplace, but includes any place the citizenry has a general right to be under the circumstances." Here, the defendant offered ample evidence that he acted in self-defense while standing in a public street, where he had a right to be when he shot the victim. Because the defendant showed a reasonable possibility that, had the trial court given the required stand-your-ground instruction, a different result would have been reached at trial, the court reversed the Court of Appeals, finding that the defendant was entitled to a new trial.

Speedy Trial

Failure by trial court to weigh and consider *Barker v. Wingo* factors required remand for full hearing and findings on motion to dismiss

State v. Wilkerson, ___ N.C. App. ___, 810 S.E.2d 389 (Feb. 6, 2018). On an appeal from the denial of a motion to dismiss for violation of speedy trial rights in a case involving a trial delay of 3 years and 9 months, the court held that because the trial court failed to adequately weigh and apply the *Barker v. Wingo* factors

and to fully consider the prima facie evidence of prosecutorial neglect, the trial court's order must be vacated and the case remanded "for a full evidentiary hearing and to make proper findings and analysis of the relevant factors." After reviewing the facts of the case vis-a-vis the *Barker* factors, the court noted:

> [W]ith the limited record before us, Defendant tends to show his Sixth Amendment right to a speedy trial may have been violated. The length of the delay and the lack of appropriate reason for the delay tends to weigh in his favor. Defendant's evidence regarding the prejudice he suffered in his pretrial incarceration and the prejudice to his ability to defend against his charges, if true, would tend to weigh in his favor, but requires a more nuanced consideration.

Pleas

Misstatement by trial court of maximum possible penalty was not prejudicial error where there was no demonstrable impact on the actual sentence

State v. Bullock, ___ N.C. App. ___, 811 S.E.2d 713 (Feb. 20, 2018). With one judge concurring in the result only, the court held that the trial court did not commit prejudicial error when, in connection with a plea, it misinformed the defendant of the maximum sentence. Pursuant to an agreement, the defendant pleaded guilty to trafficking in heroin and possession of a controlled substance with intent to sell. The trial court correctly informed the defendant of the maximum punishment for the trafficking charge but erroneously informed the defendant that the possession with intent charge carried a maximum punishment of 24 months (the correct maximum was 39 months). The trial court also told the defendant that he faced a total potential maximum punishment of 582 months, when the correct total was 597 months. Both errors were repeated on the transcript of plea form. The trial court accepted the defendant's plea, consolidated the convictions and sentenced the defendant to 225 to 279 months. The defendant argued that the trial court violated G.S. 15A-1022(a)(6), providing that a trial court may not accept a guilty plea without informing the defendant of the maximum possible sentence for the charge. The court noted that decisions have rejected a ritualistic or strict approach to the statutory requirement and have required prejudice before a plea will be set aside. Here, the defendant cannot show prejudice. The court noted that the defendant faced no additional time of imprisonment because of the error; put another way, the trial court's error did not affect the maximum punishment that the defendant received as a result of the plea. Furthermore, the defendant failed to argue how the result would have been different had he been correctly informed of the maximum punishment. The court stated: "It would be a miscarriage of justice for us to accept that Defendant would have backed out of his agreement if Defendant knew that the total potential maximum punishment was 15 months longer on a charge that was being consolidated into his trafficking conviction." [Author's Note: The defendant does not appear to have made the constitutional argument that the plea was not knowing, voluntary and intelligent; constitutional errors are presumed to be prejudicial unless the State proves them to be harmless beyond a reasonable doubt.

Ineffective Assistance of Counsel

Failure to argue on appeal plain error from improperly disjunctive jury instructions constituted ineffective assistance of appellate counsel; motion for appropriate relief properly granted

State v. Collington, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018), *temp. stay granted*, ___ N.C. ___, 812 S.E.2d 372 (Apr. 27, 2018) . The trial court properly granted the defendant's Motion for Appropriate Relief (MAR) alleging ineffective assistance of appellate counsel. The defendant was found guilty of felon in possession of a firearm. The trial court's jury instructions allowed for a guilty verdict if the defendant committed the crime by himself or acting in concert with his brother, also a felon. The verdict sheet did not indicate on which theory the jury convicted. The defendant appealed his conviction challenging the jury instruction. On direct appeal, the court held that even assuming the trial court erred in its jury instructions, the defendant did not establish plain error. That decision noted that the defendant had not presented any arguments under *State v. Pakulski*, 319 N.C. 562 (1987), which held that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, where one of the theories is improper, and it cannot be discerned from the record the theory upon which the jury relied. The defendant then filed a MAR asserting ineffective assistance of appellate counsel. He asserted that appellate counsel rendered ineffective assistance by failing to argue the *Pakulski* issue on appeal. The trial court concluded that the defendant received ineffective assistance of appellate counsel and granted the defendant's MAR, vacated the conviction and ordered a new trial. The State sought review. The court affirmed. It began by reviewing the relevant rules with respect to plain error and disjunctive jury instructions. It then concluded that appellate counsel's performance was deficient. It stated: "Appellate counsel's lack of professional diligence in uncovering the readily-available—and outcome determinative—legal principles enunciated in the *Pakulski* line of cases was so unreasonable as to constitute ineffective assistance of counsel." The court went on to conclude that the prejudice prong of the ineffective assistance analysis also was satisfied.

Miscellaneous Procedural Issues

No due process violation where State presented testimony of accomplice and threatened that witness with obstruction of justice charges

State v. Stroud, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this robbery case, the defendant's due process rights were not violated. The defendant asserted that a due process violation occurred when an accomplice was compelled to appear at trial as a witness for the State. Specifically, the defendant asserted that the prosecutor improperly coerced the accomplice into testifying by threatening to charge her with obstruction of justice if she refused to testify and by telling the accomplice that she would make inquiries about the accomplice possibly having visitation with her son if she testified for the State. Because the issue was not raised at trial, it was waived. However even if it was properly presented, it would fail. The court noted that the defendant did not argue that he intended to call the accomplice as a defense witness but was prevented from doing so by the State. Furthermore, the circumstances surrounding the accomplice's agreement to testify did not result in the accomplice testifying more favorably for the State than she otherwise would have. To the contrary, the record makes clear that her testimony was largely unhelpful to the State.

(1) Trial court's denial of motion to dismiss for insufficiency of the evidence in the presence of the jury was not an impermissible expression of opinion; (2) No abuse of discretion where court failed to declare a mistrial sua sponte.

State v. Shore, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). The trial court did not impermissibly express an opinion on the evidence in violation of G.S. 15A-1222 by denying the defendant's motion to dismiss in the presence of the jury. At the close of the State's evidence and outside the presence of the jury, the defendant made a motion to dismiss the charges, which the trial court denied. Following the presentation of the defendant's evidence, the defendant renewed his motion to dismiss, in the jury's presence. The trial court denied the motion. The defendant did not seek to have the ruling made outside of the presence of the jury, did not object, and did not move for a mistrial on these grounds. The court found *State v. Welch*, 65 N.C. App. 390 (1983), controlling and rejected the defendant's argument. "Generally, ordinary rulings by the court in the course of a trial do not amount to an impermissible expression of opinion." (2) The court did not err in failing to declare a mistrial *sua sponte*. The victim's father allegedly made derogatory comments towards the defendant and his attorney outside of the courtroom on several settings, and was admonished several times by the court during his testimony for evasive answers and editorial comments. The trial court responded to each incident and the defendant did not move for a mistrial, object to the manner in which the court dealt with the issues, and did not request any additional action from the court. "In light of the immediate and reasonable steps taken by the trial court to address H.M.'s father's behavior, we find that the trial court did not abuse its discretion when it did not *sua sponte* declare a mistrial."

Waiver of jury trial for defendant arraigned prior to effective date of constitutional amendment authorizing bench trials was structural error and required automatic reversal

State v. Boderick, ___ N.C. App. ___, 812 S.E.2d 889 (Mar. 20, 2018). Because the constitutional amendment permitting waiver of a jury trial only applies to defendants arraigned on or after 1 December 2014, a bench trial was improperly allowed in this case where the defendant was arraigned in February 2014. The session law authorizing the ballot measure regarding waiver of a jury trial provided that if the constitutional amendment is approved by the voters it becomes effective 1 December 2014 and applies to criminal cases arraigned in Superior Court on or after that date. After the ballot measure was approved, the constitutional amendment was codified at G.S. 15A-1201(b). That statute was subsequently amended to provide procedures for a defendant's waiver of the right to a jury trial, by a statute that became effective on 1 October 2015. The court rejected the State's argument that because of the subsequent statutory amendment, the constitutional amendment allowing for waiver of a jury trial applies to any defendant seeking to waive his right to a jury trial after 1 October 2015. The amendment to the statute does not change the effective date of the constitutional amendment itself. The court concluded: "Accordingly, a trial court may consent to a criminal defendant's waiver of his right to a jury trial only if the defendant was arraigned on or after 1 December 2014." The parties may not stipulate around this requirement. Here, because the defendant was arraigned in February 2014, he could not waive his right to a trial by jury. The court found that automatic reversal was required.

Sentencing

Insufficient findings on juvenile LWOP sentence required resentencing

State v. Santillan, ___ N.C. App. ___, ___ S.E.2d ___ (May 1, 2018). In this case involving a defendant who was 15 years old at the time of his crimes, and as conceded by the State, the trial court failed to make sufficient findings to support two sentences of life without parole. On appeal the defendant argued that although the trial court listed each of the statutory mitigating factors under G.S. 15A-1340.19B(c), it failed to expressly state the evidence supporting or opposing those mitigating factors as required by relevant case law. The State conceded that this was error and the court remanded.

Restitution worksheet, without evidence in support, was insufficient to support award of restitution

State v. Thomas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). In this homicide case there was insufficient evidence to support restitution in the amount of $3,360.00 in funeral expenses to the victim's family. No documentary or testimonial evidence supported the amount of restitution ordered. The record contains only the restitution worksheet, which is insufficient to support the restitution order.

No abuse of discretion to deny extraordinary mitigation

State v. Leonard, ___ N.C. App. ___, 811 S.E.2d 658 (Feb. 20, 2018). In this voluntary manslaughter case, the trial court did not abuse its discretion by failing to find extraordinary mitigation. Although the court found numerous mitigating factors, it found no extraordinary mitigation in the defendant's case; the trial court sentenced the defendant to the lowest possible sentence in the mitigated range. The court rejected the defendant's argument that the trial court misunderstood the applicable law, finding that the transcript of the sentencing hearing reveals that the trial court understood the extraordinary mitigation statute and exercised proper discretion.

Error to sentence defendant for larceny, assault, and common law robbery arising from the same event, despite the trial court consolidating all of the offenses into one judgment

State v. Cromartie, ___ N.C. App. ___, 810 S.E.2d 766 (Feb. 6, 2018). Because misdemeanor larceny and simple assault are lesser included offenses of common law robbery, the trial court erred by sentencing the defendant for all three offenses. The court rejected the State's argument that the defendant was not prejudiced by this error because all three convictions were consolidated for judgment and the defendant received the lowest possible sentence in the mitigated range. The court noted that the State's argument ignores the collateral consequences of the judgment. The court thus arrested judgment on the convictions for misdemeanor larceny and simple assault.

Miscellaneous

Probation Violations and Revocations

Divided court of appeals finds insufficient evidence of willful absconding where probation visited home once, was informed by an unidentified person that the defendant no longer resided there, and made no additional attempts to contact the defendant over a seven day period

State v. Krider, ___ N.C. App. ___, 810 S.E.2d 828 (Feb. 20, 2018), *temp. stay granted*, __ N.C. __, 809 S.E.2d 888 (Mar. 8, 2018). Over a dissent, the court held that because the State presented insufficient evidence to support a finding of willful absconding, the trial court lacked jurisdiction to revoke the defendant's probation after the term of probation ended. When the defendant's probation officer visited his reported address, an unidentified woman advised the officer that the defendant did not live there. The State presented no evidence regarding the identity of this person or her relationship to the defendant. The officer never attempted to contact the defendant again. However, when the defendant contacted the officer following his absconding arrest, the officer met the defendant at the residence in question. This evidence is insufficient to establish absconding. The trial court's decision was not only an abuse of discretion but also was an error that deprived the court of jurisdiction to revoke the defendant's probation after his probationary term expired. (Jamie Markham blogged about this case here.)

Where no written violation report or notice of hearing was provided to defendant, trial court lacked jurisdiction to revoke probation, despite defendant's refusal to submit to probation

State v. McCaster, ___ N.C. App. ___, 811 S.E.2d 211 (Feb. 6, 2018). The trial court lacked jurisdiction to conduct a probation revocation hearing because the defendant was not provided with adequate notice, including a written statement of the violations alleged. The trial court revoked the defendant's probation after the defendant made multiple repeated objections to probation. The court rejected the State's argument that the defendant waived her right to statutory notice by voluntarily appearing before the court and participating in the revocation hearing. Because the defendant was not provided with prior statutory notice of the alleged violations, the trial court lacked jurisdiction to revoke probation. The court went on to note that the trial court is not without recourse to compel a recalcitrant defendant in these circumstances. The violation report could have been filed and an arrest warrant could have been issued to provide the defendant with proper notice. Alternatively, the trial court could have found the defendant in contempt of court. And, regardless of the defendant's statements and protests, the trial court could have simply ordered the defendant to be accompanied by a law enforcement or probation officer to register and implement probation supervision (Phil Dixon blogged about the case here).

Probation improperly extended for defendant to complete substance abuse treatment program; substance abuse treatment is not "medical or psychiatric treatment" by statute, and the trial court therefore lacked authority to extend defendant's probation; revocation vacated

State v. Peed,___ N.C. App. ___, 810 S.E.2d 777 (Feb. 6, 2018). The trial court did not have jurisdiction to revoke the defendant's probation. Four days before his 30 months of probation was to expire, the trial court entered an order extending the defendant's probation for 12 months with the defendant's consent. The purpose of the extension was to allow the defendant time "to complete Substance Abuse Treatment." During

the 12-month extension the defendant violated probation and after a hearing the trial court revoked probation. The defendant appealed. The court began by rejecting the State's argument that the defendant's appeal was moot because he had already served the entire sentence assigned for the revocation. Turning to the merits, the court held that the trial court lacked jurisdiction to revoke the defendant's probation because his probationary period was unlawfully extended. In order to extend an individual's probationary period, the trial court must have statutory authority to do so. No statute authorizes a trial court to extend the defendant's probation to allow him time to complete a substance abuse program. The court rejected the State's argument that because the statutes allow an extension of probation for completion of medical or psychiatric treatment ordered as a condition of probation, the trial court's extension was proper. It reasoned, in part, that the General Assembly did not intend for a probation condition to complete "substance-abuse treatment" to be synonymous with, or a subset of, a probation condition to complete "medical or psychiatric treatment."

Satellite-Based Monitoring

(1) General objection to SBM order was sufficient in context to preserve *Grady* challenge; (2) Error to impose SBM without *Grady* hearing, and (3) because SBM here was ordered before *State v. Greene*, State may pursue SBM on remand

State v. Bursell, ___ N.C. App. ___, ___ S.E. 2d ___ (Mar. 20, 2018). (1) Over a dissent, the court rejected the State's argument that because the defendant failed to raise a Fourth Amendment *Grady* objection when challenging imposition of SBM at sentencing, he waived his right to appellate review of the issue. Considering the objections made below, the court concluded that "although defendant did not clearly and directly reference the Fourth Amendment when objecting to the State's application for SBM, nor specifically argue that imposing SBM without a proper Grady determination would violate his constitutional rights, it is readily apparent from the context that his objection was based upon the insufficiency of the State's evidence to support an order imposing SBM, which directly implicates defendant's rights under *Grady* to a Fourth Amendment reasonableness determination before the imposition of SBM." Even if the defendant's objection was inadequate to preserve the constitutional challenge for appellate review, the court stated that in its discretion it would invoke Rule 2 in order to review the issue on its merits. (2) On an appeal from an order requiring the defendant to role in lifetime SBM, the court held--as conceded by the State--that the trial court erred by imposing lifetime SBM without conducting the required *Grady* hearing to determine whether monitoring would amount to a reasonable search under the Fourth Amendment. (3) The court vacated the SBM order without prejudice to the State's ability to file a subsequent SBM application since the matter was decided prior to the Court's opinion in *State v. Greene*, ___ N.C. App. ___ (Oct. 3, 2017) (holding where the State failed to meet its burden at a SBM hearing, the matter should be dismissed without remand).

Appellate Issues

(1) Court holds *Anders* review available for denial of post-conviction DNA testing; (2) Defendant's inconsistent arguments at the trial court and on appeal regarding the value of testing rendered the appeal frivolous

State v. Velasquez-Cardenas, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). (1) The court held that it had both jurisdiction and authority to decide whether *Anders*-type review should be prohibited, allowed, or required in appeals from G.S. 15A-270.1. Exercising this discretionary authority, the court held that *Anders* procedures apply to appeals pursuant to G.S. 15A–270.1. However, it was careful to limit its holding "to the issue before us – appeal pursuant to N.C.G.S. § 15A–270.1." (2) Conducting an *Anders* review in this appeal from the trial court's denial of the defendant's motion to locate and preserve evidence and for post-conviction DNA testing pursuant to G.S. 15A-268 and 269, the court found the appeal wholly frivolous. In this homicide case, the defendant argued that he did not act with premeditation and deliberation in killing the victim and did not come to her apartment with intent to commit a felony therein. The court found that these averments bear no relation to the integrity of the DNA evidence presented at trial or to the potential value of additional testing. The court also found that the defendant's argument was "wholly at odds" with the theory presented in his motion to the trial court, that is, that the testing would prove he was not the perpetrator.

(1) Defendant's consent to mistrial and failure to raise the issue of double jeopardy at trial level during second trial waived appellate review of the issue; (2) Defense counsel was not ineffective for failing to object to mistrial at the first trial

State v. Mathis, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). (1) In this felony assault case, the defendant failed preserved for appeal the argument that double jeopardy precluded his second trial. During the defendant's first trial, the trial court expressed concern about moving forward with the trial. A juror would become unavailable because of his wife's upcoming heart procedure and the trial court expressed "no confidence" and "absolutely no faith" in the alternate juror, indicating the belief that the alternate "has not been able to hear much of what has transpired." The trial court asked the parties if they wished to be heard on the matter. Defense counsel indicated that he supported the mistrial. The trial court then declared a mistrial based on manifest necessity and neither party objected. The defendant was convicted at a second trial. On direct appeal from that conviction the defendant asserted that he was subjected to double jeopardy because the trial court erred by declaring a mistrial in the absence of manifest necessity. The court concluded that the defendant failed to preserve this issue by consenting to the mistrial and by failing to raise the double jeopardy issue at his second trial. (2) Considering the merits of the defendant's ineffective assistance of counsel claim on direct appeal from his conviction of felony assault, the court held that the defendant did not receive ineffective assistance of counsel when trial counsel consented to a mistrial at the first trial. Analyzing the claim under the *Strickland* attorney error standard, the court held that the defendant failed to show prejudice because the trial court did not abuse its discretion in declaring a mistrial due to manifest necessity. Thus, counsel's failure to object "was not of any consequence."

(1) Where defendant failed to raise double jeopardy at the trial level, the issue was waived on appeal; (2) where lifetime satellite-based monitoring order was unsupported by findings and in contravention of the statute, review of the SBM order was preserved, despite a lack of objection from the defendant

State v. Harding, ___ N.C. App. ___, 813 S.E.2d 254 (Mar. 6, 2018), *temp. stay allowed*, ___ N.C. ___, 811 S.E.2d 601 (Apr. 11, 2018). (1) In this kidnapping and sexual assault case, the court held that by failing to object and raise a constitutional double jeopardy argument in the trial court, it was waived on appeal. The defendant tried to assert on appeal that the trial court violated double jeopardy by sentencing him for both kidnapping and sexual offense. The court declined to invoke Rule 2 of the Rules of Appellate Procedure to address the merits of the defendant's unpreserved constitutional argument. (2) Although the defendant failed to raise the issue at sentencing, his argument that the trial court's findings were insufficient to support its lifetime registration and SBM orders was preserved for appellate review. The findings of the trial court indicated that defendant did not meet the criteria for SBM, but nonetheless ordered the defendant to enroll in the program. This issue in question implicated a statutory mandate and was thus preserved for review.

(1) Where defendant failed to challenge aiding and abetting offense in motion to dismiss for insufficiency, issue was waived on appeal; (2) similarly where one element of obtaining property by false pretenses was challenged in motion to dismiss for insufficiency but not others, review of the unchallenged elements on appeal was waived

State v. Golder, ___ N.C. App. ___, 809 S.E.2d 502 (Feb. 6, 2018). (1) Because the defendant did not challenge, at the trial level, the sufficiency of the evidence with respect to aiding and abetting, he waived appellate review of that issue. The defendant made several specific arguments when moving to dismiss the relevant charges for insufficient evidence, but did not challenge the State's aiding and abetting theory. (2) Because the defendant did not assert, at the trial level, the specific assertion made on appeal with respect to the sufficiency of the evidence as to a conviction for obtaining property by false pretenses, the issue was waived on appeal. At trial, the defendant challenged only the amount of property obtained. On appeal, he asserted that the evidence was insufficient because the State failed to establish that he obtained any item of value.

Collateral Issues

(1) Error for trial court to recuse the entire district attorney's office *sua sponte* and without notice; (2) the filing of a civil suit by one defendant against the district attorney's office does not create a per se actual conflict of interest

State v. Smith, ___ N.C. App. ___, ___ S.E.2d ___ (April 3, 2018). (1) The court vacated the trial court's order recusing the District Attorney and all staff of that office from further prosecuting the defendant and five unnamed co-defendants. In 2013, the defendant was indicted for electronic sweepstakes offenses. Those charges resulted in a mistrial. In 2015, the defendant was indicted on multiple charges involving video gaming machines, gambling, and electronic sweepstakes. The State moved to revoke the defendant's initial bond of $68,750 and set a new secured bond of $500,000. The defendant filed a response to this motion, along with a motion to dismiss all charges for prosecutorial vindictiveness. On the same day, businesses affiliated with the defendant filed a civil complaint against the District Attorney and others. Although a hearing on the State's

motion to increase the bond was set, it was continued by agreement of the parties. Before that hearing occurred, the trial court, *sua sponte* and without a hearing, entered an order removing the District Attorney and his entire staff from serving as prosecutors in the pending criminal cases. The State sought review. The court noted that under *State v. Cama*cho, 329 N.C. 589 (1991), a prosecutor may not be disqualified unless the trial court determines that an actual conflict of interest exists. Such a conflict arises when a District Attorney or a member of staff has previously represented the defendant on the charges to be prosecuted and, as a result of that attorney-client relationship, the prosecution has obtained confidential information which may be used to the defendant's detriment at trial. If such a conflict exists, the disqualification order ordinarily should be directed only to individual prosecutors who have been exposed to such information. This holding recognizes the constitutional nature of the office of the District Attorney. The court found the recusal order at issue deficient in several respects. First, *Camacho* "plainly directs" that a prosecutor may be disqualified only when the trial court finds a conflict of interest because of prior representation of the defendant. Here the trial court made no finding that such a conflict existed, nor was there evidence that would support such a finding. Rather, the trial court based its recusal order on the fact that the civil action created a conflict of interest. (2) The court went on to hold that even assuming some other type of conflict could support a recusal order, the unilateral filing of a civil suit by a criminal defendant cannot, on its own, suffice. It continued: "A conflict of interest sufficient to disqualify a prosecutor cannot arise merely from the unilateral actions of a criminal defendant." And it added that the trial court's order included no findings as to how the civil suit created a conflict of interest. Moreover, the court continued, *Camacho* directs that any order tending to infringe on the constitutional powers and duties of the District Attorney must be narrowly drawn. Here, the trial court's order disqualifies the District Attorney and the entire office, and applies not only to the defendant but also to five other unnamed co-defendants. The court concluded: "Because the trial court's order lacks the proper findings sufficient to support the disqualification of the prosecutor or any of his staff, and because the trial court's order is not narrowly tailored to address any possible conflict of interests, we hold that the trial court exceeded its lawful authority in ordering the recusal of the District Attorney . . . and his entire staff." (Shea Denning blogged about the case here.)

Due process requires notice of reasons for denial of a gun permit and a meaningful opportunity to be heard

Debruhl v. Mecklenburg County Sheriff's Office, ___ N.C. App. ___, ___ S.E.2d ___ (April 17, 2018). The due process clause of the 14th Amendment requires that an applicant be afforded an opportunity for an evidentiary hearing to contest the denial of his application for renewal of a Concealed Handgun Permit pursuant to G.S. 14-415.12(a)(3). Daniel DeBruhl, who had maintained a Concealed Handgun Permit for 10 years, submitted an application for the renewal of his permit to the county Sheriff's Office. The Sheriff's Office issued a perfunctory denial of the application, without notice of the nature of or basis for the denial or any opportunity for DeBruhl to be heard. DeBruhl appealed the Sheriff's decision to the District Court, arguing that there was no way for him to know what facts to challenge on appeal because no detail was provided in the denial. The District Court denied the appeal, finding in part that the permit was denied because DeBruhl sought or received mental health and/or substance abuse treatment and that he suffers from a mental health disorder that affects his ability to safely handle a firearm. Without affording DeBruhl an opportunity to be heard, District Court affirmed the Sheriff's decision. DeBruhl appealed. The Court of Appeals began by finding that the defendant had a protected property interest in the renewal of his

Concealed Handgun Permit upon expiration of his prior permit. The court went on to find that he was deprived of his right to procedural due process by the manner in which the renewal application was denied. Here, although DeBruhl had an opportunity for review, he did not have an opportunity to be heard. The court determined that "appellate review without an opportunity to be heard does not satisfy the demands of due process" and that the procedures employed here were "wholly inadequate." It held:

> Where a local sheriff determines that an application for renewal of a Concealed Handgun Permit ought to be denied on the grounds that the applicant "suffer[s] from a . . . mental infirmity that prevents the safe handling of a handgun[,]" that applicant must be afforded an opportunity to dispute the allegations underlying the denial before it becomes final. The opportunity to appeal the denial to the district court as set forth in N.C. Gen. Stat. § 14-415.15(c) is procedurally sufficient only to the extent that it provides an opportunity for the applicant to be heard at that stage. At a minimum, an applicant denied the renewal of a permit pursuant to the provisions of this subsection must be provided notice of the precise grounds for the sheriff's denial, together with the information alleged in support thereof. This process must be followed by an opportunity to contest the matter in a hearing in district court.