Shea Denning, 919.843.5120, denning@sog.unc.edu
Phil Dixon, 919.966.4248, dixon@sog.unc.edu

2018 Winter Webinar: Criminal Case and Legislative Update

December 7, 2018

Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decisions decided between June 22, 2018 and November 20, 2018. The summaries of state and U.S. Supreme Court criminal cases were prepared primarily by Jessica Smith. Summaries of Fourth Circuit cases were prepared by Phil Dixon. To view all of the summaries, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

Table of Contents

Search and Seizure

Investigative Stops

Officer's mistake of fact regarding basis for traffic stop was not objectively reasonable where officer stopped a validly registered vehicle for expired registration; stop was not otherwise supported by reasonable suspicion

State v. Baskins, ___ N.C. App. ___, 818 S.E.2d 381 (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 586 (Aug. 27, 2018). In a case in which the court determined that the defendant received ineffective assistance of appellate counsel, it considered whether the officers' mistake of fact regarding a basis for a traffic stop was reasonable and concluded that it was not. Having found that appellate counsel's performance was deficient, the court moved on to the prejudice prong of the ineffective assistance of counsel claim. The analysis required it to evaluate how it would have ruled on direct appeal with respect to the defendant's claim that the officers' mistake of fact regarding his vehicle registration invalidated the traffic stop. Here, the officers argued that the stop was justified because the vehicle had an expired registration. Although the vehicle's registration was in fact valid at the time, the trial court had found that the officers' mistake was reasonable and did not invalidate the stop. The DMV record indicated that the registration was valid and the officers stopped the vehicle "for a registration violation despite having intentionally neglected to read the very sentence in which the relevant expiration date appeared." Under the circumstances, the court found that there is a reasonable probability that it would have determined that the facts do not constitute the sort of objectively reasonable mistake of fact tolerable under the Fourth Amendment.

The appellate court also evaluated how it would have ruled on direct appeal with respect to the defendant's claim that there was no reasonable suspicion for the stop. Here, the conclusion that the officers had reasonable suspicion to stop the vehicle was based solely on the following facts: officers saw the defendant and a woman exit a China Bus carrying small bags at the "same bus stop that a lot of heroin is being transported from New York to the Greensboro area" and while waiting for his ride at an adjacent gas station, the defendant briefly looked towards an officer's unmarked vehicle and "shooed" that vehicle away, at which point the defendant's ride pulled into the parking lot. These facts do not support a finding of reasonable suspicion, particularly where the defendant was entirely unknown to the officers.

Where reasonable suspicion developed during normal incidents of the traffic stop, the stop was not unlawfully extended under Rodriguez

State v. McNeil, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). In this DWI case, an officer did not unduly prolong a traffic stop. While on patrol, officers ran a vehicle's tag and learned that the registered owner was a male with a suspended license. An officer stopped the vehicle based on the suspicion that it was being driven without a valid license. The officer who approached the vehicle immediately saw that the defendant, a female, was in the driver's seat and that a female passenger was next to her. Although the officer determined that the owner was not driving the vehicle, the defendant ended up charged with DWI. On appeal, the defendant argued that while the officers may have had reasonable suspicion to

stop the vehicle, the stop became unlawful when they verified that the male owner was not driving the vehicle. The court disagreed, stating:

> Defendant's argument is based upon a basic erroneous assumption: that a police officer can discern the gender of a driver from a distance based simply upon outward appearance. Not all men wear stereotypical "male" hairstyles nor do they all wear "male" clothing. The driver's license includes a physical description of the driver, including "sex." Until [the] Officer . . . had seen Defendant's driver's license, he had not confirmed that the person driving the car was female and not its owner. While he was waiting for her to find her license, he noticed her difficulty with her wallet, the odor of alcohol, and her slurred speech.

Additionally, the time needed to complete a stop includes the time for ordinary inquiries incident to the stop, including checking the driver's license, determining whether there are outstanding warrants against the driver, and inspecting the vehicle's registration and proof of insurance. The officer's mission upon stopping the vehicle included talking with the defendant to inform her of the basis for the stop, asking for her driver's license, and checking that the vehicle's registration and insurance had not expired. While the officer was pursuing these tasks, the defendant avoided rolling her window all the way down and repeatedly fumbled through cards trying to find her license. Additionally because she was mumbling and had a slight slur in her speech, the officer leaned towards the window where he smelled an odor of alcohol. This evidence gave him reasonable suspicion to believe that the defendant was intoxicated. Because he developed this reasonable suspicion while completing the original mission of the stop, no fourth amendment violation occurred.

Reversing Court of Appeals, N.C. Supreme Court holds stop supported by reasonable suspicion where circumstances objectively indicated a crime occurring, despite officer's subjective belief

State v. Nicholson, ___ N.C. ___, 813 S.E.2d 840 (June 8, 2018). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 348 (2017), the court reversed, holding that an officer's decision to briefly detain the defendant for questioning was supported by reasonable suspicion of criminal activity. While on patrol at 4 AM, Lieutenant Marotz noticed a car parked in a turn lane of the street, with its headlights on but no turn signal blinking. Marotz saw two men inside the vehicle, one in the driver's seat and the other—later identified as the defendant—in the seat directly behind the driver. The windows were down despite rain and low temperatures. As Marotz pulled alongside of the vehicle, he saw the defendant pull down a hood or toboggan style mask with holes in the eyes, but then push the item back up when he saw the officer. Martoz asked the two whether everything was okay and they responded that it was. The driver said that the man in the back was his brother and they had been arguing. The driver said the argument was over and everything was okay. Sensing that something was not right, the officer again asked if they were okay, and they nodded that they were. Then the driver moved his hand near his neck, "scratching or doing something with his hand," but Marotz was not sure how to interpret the gesture. Still feeling that something was amiss, Marotz drove to a nearby gas station to observe the situation. After the car remained immobile in the turn lane for another half minute, Marotz got out of his vehicle and started on foot towards the car. The defendant stepped out of the vehicle and the driver began to edge the car forward. Marotz asked the driver what he was doing and the driver said he was late and had to get to work. The officer again asked whether everything was okay and the men said that everything was fine. However, although the driver responded "yes" to the officer's question, he shook his head "no." This prompted the officer to further

question the defendant. The driver insisted he just had to get to work and the officer told him to go. After the driver left, the defendant asked the officer if he could walk to a nearby store. The officer responded, "[H]ang tight for me just a second . . . you don't have any weapons on you do you?" The defendant said he had a knife but a frisk by a backup officer did not reveal a weapon. After additional questioning the officers' learned the defendant's identity and told him he was free to go. Later that day the driver reported to the police that the defendant was not his brother and had been robbing him when Marotz pulled up. The defendant held a knife to the driver's throat and demanded money. Officers later found a steak knife in the back seat of the vehicle. The defendant was charged with armed robbery and he moved to suppress the evidence obtained as a result of his seizure by Marotz. The parties agreed that the defendant was seized when Marotz told him to "hang tight." The court found that the circumstances established a reasonable, articulable suspicion that criminal activity was afoot. Although the facts might not establish reasonable suspicion when viewed in isolation, when considered in their totality they could lead a reasonable officer to suspect that he had just happened upon a robbery in progress. The court also found that the Court of Appeals placed undue weight on Marotz's subjective interpretation of the facts (the officer's testimony suggested that he did not believe he had reasonable suspicion of criminal activity), rather than focusing on how an objective, reasonable officer would have viewed them. The court noted that an action is reasonable under the fourth amendment regardless of the officer's state of mind, if the circumstances viewed objectively justify the action.

Strong odor of alcohol, admission to drinking, and handing officer debit card instead of license created reasonable suspicion to investigate impaired driving; motion to suppress properly denied

State v. Cole, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). In this DWI case, the trial court properly denied the defendant's motion to suppress evidence discovered after a roadside breath test. Specifically, the defendant asserted that the results of roadside sobriety tests and intoxilyzer test should be suppressed as fruit of the poisonous tree of an illegal search and seizure caused by an unlawfully compelled roadside breath test. The court disagreed. An officer observed the defendant exit a bar after midnight and swerve several times within his driving lane; after the initial traffic stop—the legality of which the defendant did not challenge—the officer smelled a strong odor of alcohol, the defendant presented his debit card when asked for his driver's license, and the defendant initially denied but later admitted drinking alcohol. These facts were sufficient to establish reasonable suspicion to justify prolonging the initial stop to investigate the defendant's potential impairment, including administering the roadside sobriety tests which both produced positive results. These findings, in conjunction with findings regarding the defendant's performance on those tests supported a conclusion that the officer had probable cause to arrest the defendant for DWI, justifying the later intoxilyzer test. Therefore, the trial court properly refused to suppress the results of the roadside sobriety tests and the intoxilyzer test.

Searches

The government conducts a search under the Fourth Amendment when it accesses historical cell phone records that provide a comprehensive chronicle of the user's past movements

Carpenter v. United States, 585 U.S. ___, 138 S. Ct. 2206 (June 22, 2018). Police officers arrested four men suspected of robbing Radio Shack and TMobile stores in Detroit. One of the men confessed to a series of robberies in Michigan and Ohio, identified 15 accomplices, and gave law enforcement some of their cell phone numbers. Based on this information, prosecutors applied for court orders under the

Stored Communications Act (SCA) to obtain cell phone records for defendant Timothy Carpenter. The SCA permits the Government to compel the disclosure of certain telecommunications records when it "offers specific and articulable facts showing that there are reasonable grounds to believe" that the records sought "are relevant and material to an ongoing criminal investigation." Federal Magistrate Judges issued two orders directing Carpenter's wireless carriers—MetroPCS and Sprint—to disclose "cell/site sector [information] for [Carpenter's] telephone[ ] at call origination and at call termination for incoming and outgoing calls" during the four-month period when the string of robberies occurred. The first order sought 152 days of cell-site records from MetroPCS, which produced records spanning 127 days. The second order requested seven days of CSLI from Sprint, which produced two days of records covering the period when Carpenter's phone was "roaming" in northeastern Ohio. Altogether the Government obtained 12,898 location points cataloging Carpenter's movements—an average of 101 data points per day.

Carpenter was charged with six counts of robbery and six counts of carrying a firearm during a federal crime of violence. He moved to suppress the cell-site data provided by the wireless carriers, arguing that the Government's seizure of the records violated the Fourth Amendment because they had been obtained without a warrant supported by probable cause. The District Court denied the motion. At trial FBI agent Christopher Hess offered expert testimony about the cell-site data. Hess explained that each time a cell phone taps into the wireless network, the carrier logs a time-stamped record of the cell site and particular sector that were used. With this information, Hess produced maps that placed Carpenter's phone near four of the charged robberies. Carpenter was convicted on all but one count. After an unsuccessful appeal to the Sixth Circuit, the Supreme Court agreed to take the case.

The Court began by noting that for many years Fourth Amendment search doctrine was "tied to common-law trespass" and focused on whether the Government "obtains information by physically intruding on a constitutionally protected area." But, in *Katz v. United States*, 389 U. S. 347 (1967), the Court established that "the Fourth Amendment protects people, not places," and expanded its conception of the Amendment to certain expectations of privacy as well. It explained: "When an individual seeks to preserve something as private, and his expectation of privacy is one that society is prepared to recognize as reasonable, we have held that official intrusion into that private sphere generally qualifies as a search and requires a warrant supported by probable cause."

The Court noted that the digital data at issue in this case does not fit neatly under existing precedents. Instead, requests for cell-site records lie at the intersection of two lines of cases. The first set of cases addresses a person's expectation of privacy in his physical location and movements, including *United States v. Knotts*, 460 U. S. 276 (1983) (monitoring a beeper signal in a container in an automobile on public highways did not violate the Fourth Amendment), *United States v. Jones,* 565 U.S. 400 (2012) (the government's installation of a GPS tracking device on a vehicle and its use of that device to monitor the vehicle's movements on public streets constitutes a search within the meaning of the Fourth Amendment). In the second set of cases, including *Smith v. Maryland*, 442 U.S. 735 (1979), and *United States v. Miller,* 425 U.S. 435 (1976), the Court applied the "third-party doctrine" and has drawn a line between what a person keeps to himself and what he shares with others, holding that "a person has no legitimate expectation of privacy in information he voluntarily turns over to third parties." Against this review, the Court presented the issue as follows:

> The question we confront today is how to apply the Fourth Amendment to a new phenomenon: the ability to chronicle a person's past movements through the record of his cell phone signals. Such tracking partakes of many of the qualities of the GPS

> monitoring we considered in *Jones*. Much like GPS tracking of a vehicle, cell phone location information is detailed, encyclopedic, and effortlessly compiled.
>
> At the same time, the fact that the individual continuously reveals his location to his wireless carrier implicates the third-party principle of *Smith* and *Miller*. But while the third-party doctrine applies to telephone numbers and bank records, it is not clear whether its logic extends to the qualitatively different category of cell-site records. After all, when *Smith* was decided in 1979, few could have imagined a society in which a phone goes wherever its owner goes, conveying to the wireless carrier not just dialed digits, but a detailed and comprehensive record of the person's movements

It held:

> We decline to extend *Smith* and *Miller* to cover these novel circumstances. Given the unique nature of cell phone location records, the fact that the information is held by a third party does not by itself overcome the user's claim to Fourth Amendment protection. Whether the Government employs its own surveillance technology as in *Jones* or leverages the technology of a wireless carrier, we hold that an individual maintains a legitimate expectation of privacy in the record of his physical movements as captured through CSLI. The location information obtained from Carpenter's wireless carriers was the product of a search.

The Court characterized its decision as "a narrow one," noting:

> We do not express a view on matters not before us: real-time CSLI or "tower dumps" (a download of information on all the devices that connected to a particular cell site during a particular interval). We do not disturb the application of *Smith* and *Miller* or call into question conventional surveillance techniques and tools, such as security cameras. Nor do we address other business records that might incidentally reveal location information. Further, our opinion does not consider other collection techniques involving foreign affairs or national security.

Having found that the acquisition of Carpenter's CSLI was a search, the Court went on to conclude that the Government must generally obtain a warrant supported by probable cause before acquiring such records. It noted that the showing required in the SCA "falls well short of the probable cause required for a warrant." Thus, an order issued under the SCA "is not a permissible mechanism for accessing historical cell-site records. Before compelling a wireless carrier to turn over a subscriber's CSLI, the Government's obligation is a familiar one—get a warrant." The Court continued, noting that while the Government will generally need a warrant to access CSLI, case-specific exceptions such as exigent circumstances may support a warrantless search of an individual's cellsite records. Jeff Welty blogged about the case here and here.

Officers serving probation violation warrant properly seized shotgun in plain view; contraband nature of gun was immediately apparent in light of defendant's status as a probationer

State v. Smith, ___ N.C. ___, 818 S.E.2d 100 (Sept. 21, 2018). In a per curiam opinion in this felon in possession of a firearm case, the court reversed the Court of Appeals for reasons stated in the dissenting opinion below, thus holding that the shotgun was in plain view and properly seized. In the opinion below, ___ N.C. App. ___, 804 S.E.2d 235 (2017) (here), the Court of Appeals held that the trial court

erred by denying the defendant's motion to suppress. Three officers entered the defendant's apartment to execute arrest warrants issued for misdemeanors. While two officers made the in-home arrest, the third conducted a protective sweep of the defendant's apartment, leading to the discovery and seizure of the stolen shotgun. The shotgun was leaning against the wall in the entry of the defendant's bedroom. The bedroom door was open and the shotgun was visible, in plain view, from the hallway. The officer walked past the shotgun when checking the defendant's bedroom to confirm that no other occupants were present. After completing the sweep, the officer secured the shotgun "to have it in . . . control and also check to see if it was stolen." The officer located the serial number on the shotgun and called it into the police department, which reported that the gun was stolen. The officer then seized the weapon. The defendant moved to suppress the shotgun, arguing that the officer lacked authority to conduct a protective sweep and that the seizure could not be justified under the plain view doctrine. The trial court denied the defendant's motion to suppress.

The Court of Appeals held, over a dissent, that the plain view doctrine could not justify seizure of the shotgun. The defendant argued that the seizure could not be justified under the plain view doctrine because the incriminating nature of the shotgun was not immediately apparent. He also argued that the officer conducted an unlawful search, without probable cause, by manipulating the shotgun to reveal its serial number. The court concluded that observing the shotgun in plain view did not provide the officer with authority to seize the weapon permanently where the State's evidence failed to establish that, based on the objective facts known to him at the time, the officer had probable cause to believe that the weapon was contraband or evidence of a crime. The officers were executing arrest warrants for misdemeanor offenses and were not aware that the defendant was a convicted felon. Before the seizure, the officer asked the other officers in the apartment if the defendant was a convicted felon, which they could not confirm. The court went on to find that the incriminating character of the shotgun became apparent only upon some further action by the officers, here, exposing its serial number and calling that number into the police department. Such action constitutes a search, separate and apart from the lawful objective of the entry. The search cannot be justified under the plain view doctrine because the shotgun's incriminating nature was not immediately apparent. There was no evidence to indicate that the officer had probable cause to believe that the shotgun was stolen. It was only after the unlawful search that he had reason to believe it was evidence of a crime. The dissenting judge concluded that regardless of whether the officer knew that defendant was a felon or knew that the shotgun was stolen, it was immediately apparent that the shotgun was contraband. One of the regular conditions of the defendant's probation was that he possess no firearms. Thus, the dissenting judge concluded, under the regular terms and conditions of probation, the shotgun was contraband. The dissenting judge continued: "Given that the officers were serving a warrant for a probation violation, it was immediately apparent that the shotgun was contraband."

Trial court erred by finding that a vehicle was within the curtilage of the defendant's residence, but it properly found that officers had probable cause to search the vehicle.

State v. Degraphenreed, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018). Officers conducted a drug investigation of the defendant, including surveillance of his residence. During the investigation, a confidential police informant arranged and engaged in a controlled purchase of heroin from the defendant's residence. A couple of months later the same confidential informant conducted another controlled purchase of heroin at the defendant's residence. Officers saw the confidential informant purchase the drugs from the defendant at the trunk of a black 1985 Mercury Grand Marquis parked on the other side of the road from the defendant's residence. Officers saw the vehicle regularly parked in this location during their investigation. As a result of the investigation, Officer Kimel got a search

warrant for the defendant's residence; the warrant did not mention the Grand Marquis. When the officers arrived to execute the search warrant, Kimel saw the vehicle parked across the street. The back and sides of the residence were surrounded by a 7- or 8-foot-high chain link fence; a short wooden fence was in the front of the residence. Kimel asked another officer have his K-9 sniff the vehicle. The dog gave a positive alert for drugs. Kimel obtained the keys to the vehicle from the defendant's pocket and searched the car. In the trunk, officers found the defendant's wallet, guns, ammunition, a digital scale, and drugs. After the defendant unsuccessfully moved to suppress evidence obtained from the search of the vehicle, the defendant pled guilty to multiple drug charges, reserving the right to appeal the denial of his suppression motion. On appeal the defendant argued that the officers searched the vehicle without either a search warrant or probable cause.

The court began by holding that the trial court erred by concluding that the vehicle was within the curtilage of the residence while parked on the side of a public street opposite the home and outside the home's fenced-in area. The State had conceded this issue at oral argument.

The court went on to find, however, that the officers had probable cause to search the vehicle based on: the controlled purchases by the informant, during which times the Grand Marquis was always present; the officers' observation of a drug transaction taking place at the trunk of the Grand Marquis; the Grand Marquis being parked on a public street near the defendant's residence during the officers' investigation; the defendant's possession of the keys to the Grand Marquis; and the K-9's positive alert outside of the vehicle for the potential presence of narcotics. It concluded: "Based upon the automobile being located on a public road exception to the Fourth Amendment warrant requirement, probable cause justified the officers in conducting the warrantless search of the Grand Marquis."

The court declined to consider the defendant's argument, raised for the first time on appeal, that the reliability of the K-9 was not sufficiently established under *Florida v. Harris*, 568 U.S. 237 (2013), noting that a party may not assert on appeal a theory that was not raised at the trial court. It further noted that the K-9 sniff was not a search and the dog's positive alert provided support for the trial court's determination that officers had probable cause to conduct a warrantless search of the vehicle. The court did, however, note that officers arguably had probable cause to search the vehicle even without the sniff and alert.

Trial court properly denied the defendant's motion to suppress heroin discovered following a search of the defendant during a traffic stop

State v. Bartlett, ___ N.C. App. ___, 818 S.E.2d 710 (Aug. 7, 2018). The trial court properly denied the defendant's motion to suppress heroin discovered following a search of the defendant during a traffic stop. A tactical narcotics officer noticed a Lincoln sedan weaving in and out of heavy traffic at high speeds, nearly causing multiple collisions. The vehicle pulled into a Sonic Drive-In parking lot next to an unoccupied Honda. The defendant, a passenger in the Lincoln, exited the vehicle, approached the Honda, and placed his hand inside the passenger window of that vehicle. The driver of the Honda appeared and spoke with the defendant briefly. The defendant then returned to the Lincoln and the vehicle drove away. No one in the Lincoln had ordered any food. Based on his experience, the officer concluded that the defendant had participated in a drug transaction. Other officers then saw the Lincoln go to a gas station. A second officer radioed that the vehicle continued to be driven in a careless and reckless manner, at approximately 15 miles per hour over the speed limit. After the vehicle left the gas station, the first officer stopped it for reckless driving and speeding. Four other officers participated in the stop; all five officers were in uniform. The first officer approached the passenger side of the vehicle, while two others approached the driver's side. The officer approaching the passenger side saw the

defendant reach toward the floorboard. Because he did not know whether the defendant had a weapon or was trying to conceal contraband, the officer asked the defendant to show his hands. The defendant raised his hands, which were daubed in a light pink substance that the defendant stated was fabric softener. The officer ordered the defendant out of the vehicle and asked whether he was attempting to conceal something. The defendant denied doing so. The officer testified that when he asked for the defendant's consent to search his person the defendant gave consent saying, "go ahead." The defendant testified that he never consented to a search. When the officer proceeded to pat down the defendant he noticed a larger than normal bulge near the groin area that was not consistent with "male parts." The officer then detained the defendant in handcuffs, believing that he had contraband on his person. The officer asked the defendant if he had anything inside of his underwear and the defendant said that he did. The officer asked the defendant if he would retrieve the item and the defendant said he would. The officer removed the handcuffs, the defendant reached into his pants and produced a plastic bag containing heroin. He was then placed under arrest.

The court first found that the defendant consented to the search, rejecting the defendant's argument that his consent was not voluntary given the coercive environment fostered by the police. The defendant argued that his race is highly relevant to the determination of whether he voluntarily consented to the search because people of color will view a "request" to search by the police as an inherently coercive command, and he cited various studies in support of this claim. The court agreed that the defendant's race may be a relevant factor in considering whether consent was voluntary. However, aside from the studies presented by the defendant, the record is devoid of any indication that the defendant's consent in this case was involuntary. To the contrary, the circumstances show that the defendant's consent was freely and intelligently made. Although multiple officers were present, only the first officer interacted with the defendant. When the officer approached the vehicle he asked the defendant whether he had anything illegal and the defendant said that he did not. The officer then asked if he could search the defendant's person, to which the defendant responded "go ahead." No other conversation occurred. There is no evidence that the defendant was unaware of his ability to refuse the request or that he feared retribution had he done so. There is no indication that the officer made threats, used harsh language, or raised his voice. There is no evidence of any physical contact with the defendant. Additionally, the officers' firearms remain holstered throughout the encounter.

The court next rejected the defendant's argument that the scope of his consent to search his person did not include a frisk of his private parts, and lacking probable cause or exigent circumstances to justify such a search, the pat down of his groin area was unconstitutional. The court concluded that because the defendant's consent encompassed the sort of limited frisk that was performed, neither probable cause nor exigency was required to justify the search. The pat down of the defendant's groin area was within the bounds of what a reasonable person would have expected the search to include. The officer limited his pat down to the outer layer of the defendant's clothing. He did not reach into the defendant's pants to search his undergarments or directly touch his groin area. Nothing about the search involved the exposure of the defendant's privates to the officer or to the public. And there is no evidence that the groin pat down was conducted in an unreasonably offensive manner. Thus, the court concluded that a reasonable person in the defendant's position would have understood his consent to include the sort of limited outer pat down that was performed here.

Finally, the court rejected the defendant's argument that the officers continued detention of him after searching his groin area was not justified by the plain feel doctrine. During the pat down the officer felt a bulge that he determined was not consistent with male body parts and was obviously contraband. When coupled with the totality of the circumstances already observed by the officer, this discovery

amounted to reasonable suspicion justifying further detention of the defendant to question him about the contents of his clothing. Jeff Welty blogged about the case here.

Search of vehicle incident to arrest was justified by open container and driving without a license

State v. Jackson, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). In this case involving drug charges and a charge of driving without an operator's license, the court declined to address the defendant's argument that the officer lacked reasonable suspicion to prolong the traffic stop and search the defendant, finding that the search was justified as a search incident to arrest for two offenses for which the officer had probable cause to arrest. An officer was on the lookout for a gold Kia sedan in connection with an earlier incident at the Green Valley Inn. As the officer was monitoring an intersection, he saw a Kia sedan drive through a red light. The officer conducted a traffic stop. The officer approached the vehicle and immediately saw an open beer container in the center console. The officer asked the defendant for his license and registration. The defendant said he did not have a license but handed over a Pennsylvania ID card, with a shaky hand. After noticing the defendant's red, glassy eyes and detecting an odor of alcohol from the vehicle, the officer asked the defendant to exit the car so that he could search it and have the defendant perform sobriety tests. Before searching the vehicle the officer frisked the defendant. As the officer returned to his police car to check the defendant's license for outstanding warrants, the defendant spontaneously handed the officer his car keys. Because it was cold, the officer allowed the defendant to sit in the back of the patrol car as he ran the license and warrant checks. The officer determined that the defendant's license was expired, the vehicle was not registered to the defendant, and the defendant had no outstanding warrants. While sitting in the officer's vehicle, the defendant voluntarily made a variety of spontaneous statements and asked the officer if he could give drive him back to the Green Valley Inn after the traffic stop completed. After doing the license and warrants check, the officer conducted standardized field sobriety tests, which were performed to his satisfaction. He then asked for and got consent to search the defendant, finding powder and crack cocaine in the defendant's pockets.
On appeal, the defendant argued that the officer lacked reasonable suspicion to extend the stop after determining that the defendant was not intoxicated. The court however concluded that the officer did not need reasonable suspicion to extend the stop; the court reasoned that because the officer had probable cause to justify arrest, the search was justified as a search incident to arrest. Specifically, the officer's discovery of the open container and that the defendant was driving without an operator's license gave the officer probable cause to arrest. An officer may conduct a warrantless search incident to a lawful arrest; a search is incident to an arrest even if conducted prior to the formal arrest.

For similar reasons, the court rejected the defendant's argument that his consent to search was invalid because it was given while the stop was unduly prolonged. The court reasoned that because probable cause existed for the arrest and the search was justified as a search incident to an arrest, the defendant's consent was unnecessary. The court went on to hold that even if the search was unlawful, discovery of the contraband on the defendant's person was inevitable. Here, the officer testified that he would not have allowed the defendant to drive away from the traffic stop because he was not licensed to operate a motor vehicle. The officer testified that he would have searched the defendant before giving him a ride or transporting him to jail because of his practice of searching everyone transported in his patrol car. Also, the defendant repeatedly asked the officer if he would give him a ride back to the Green Valley Inn. Thus, the State established that the cocaine would have been inevitably discovered because the officer would have searched the defendant for weapons or contraband before transporting him to another location or jail.

Search Warrants

(1) Warrant to search the defendant's person and vehicle in drug trafficking case was supported by probable cause; (2) Officers did not unreasonably seize the defendant in connection with execution of the search warrant; (3) Officers' entry into home by breaking open the door without first knocking and announcing their presence did not violate statutory knock and announce requirement.

State v. Winchester, ___ N.C. App. ___, 818 S.E.2d 306 (July 17, 2018). (1) After a three-month investigation prompted by a confidential informant's tip that the defendant was dealing heroin, Detective Cole obtained a warrant to search the defendant's residence for evidence of drug dealing. The warrant also authorized the search of a specified Range Rover and of the defendant. On appeal the defendant argued that the searches of his person and vehicle were not supported by probable cause. He conceded that there was probable cause to search the house. The court rejected the defendant's argument noting that a confidential informant known to law enforcement stated that the defendant was using the Range Rover to transport heroin and other drugs to and from the residence and was selling drugs from the vehicle. The ensuing investigation included authorized GPS tracking of the Range Rover and visual surveillance of the defendant and the vehicle. It revealed that the defendant appeared to reside at the residence and that he frequented locations known for drug sales. Additionally at one point the defendant was stopped in the vehicle which displayed a fictitious or altered tag and when the defendant's driving privileges had been suspended or revoked. Officers performed "trash pulls" at the residence which found paraphernalia that tested positive for heroin and cocaine, as well as bills and other papers indicating that the defendant lived there. The most recent trash pull occurred within one week of the search. These facts support the trial court's conclusion that there was probable cause to issue the warrant to search the defendant and the Range Rover. The confidential informant's statements were corroborated by a month's-long investigation, the drug evidence recovered from the multiple trash pulls was not stale, and the allegations sufficiently linked the defendant and the Range Rover to the residence and the known drug evidence.

(2) The defendant asserted that his seizure was unreasonable because it occurred two miles away from the residence in question. The court noted in part that the warrant authorized a search of both the premises and the defendant.

(3) The defendant argued that because the officers deliberately waited until he vacated the premises before breaking open the door without knocking and announcing their presence, they violated the statutory knock and announce requirement. Here, before executing the warrant a detective loudly announced three times that officers would be entering the residence to execute the search warrant. After waiting a reasonable time and hearing no response, officers made a forced entry into the residence. These facts establish that no statutory violation occurred.

Criminal Offenses

Assaults

A defendant may not be convicted of assault with a deadly weapon under G.S. 14-32 and assault on a child under G.S. 14-33 based on the same incident.

State v. Perry, ___ N.C. App. ___, 818 S.E.2d 699 (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 395 (Aug. 22, 2018). G.S. 14-33 states that a defendant shall be guilty of assault on a child unless

another statue provides harsher punishment for the same conduct. Here, because the defendant was convicted and sentenced for assault with a deadly weapon for his assault on the same victim and since this conviction carries a harsher punishment than assault on a child, the conviction and sentence for assault on a child must be vacated.

Conspiracy

NC Supreme Court adopts majority opinion that evidence supported separate conspiracies to commit robbery, despite closeness in time of offenses

State v. Stimpson, ___ N.C. ___, 818 S.E.2d 101 (Sept. 21, 2018) (per curiam). In a per curiam opinion, the court affirmed the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 807 S.E.2d 603 (2017) (here). The defendant was charged with five indictments alleging five separate offenses of conspiracy to commit robbery arising from five separate incidents. The Court of Appeals held, over a dissent, that the trial court did not err by denying the defendant's motion to dismiss four of the charges. On appeal, the defendant argued that there was only one agreement and thus only one conspiracy charge was proper. The majority disagreed, concluding, in part, that the random nature and happenstance of the robberies did not indicate a one-time, pre-planned conspiracy. It noted that the victims and crimes committed arose at random and by pure opportunity.

Criminal Contempt

(1) Trial court did not consider inadmissible hearsay in finding defendant in criminal contempt as the evidence was admitted for corroboration and not for the truth of the matter asserted; (2) Findings of fact supported the trial court's conclusion that the defendant willfully interrupted proceedings

State v. Baker, ___ N.C. App. ___, 817 S.E.2d 907 (July 3, 2018). At the show cause hearing the trial court found that the defendant was seen by a testifying State's witness to have made a hand gesture indicating a gun to his head and shaking his head. This interaction interrupted the State's direct examination of the witness. At the hearing, the State introduced two transcripts into evidence. The first was a one-page excerpt of the witness's trial testimony. The second reflected an additional interview with the witness taken after the witness's trial testimony was completed. Over the defendant's hearsay objection, the trial court admitted the transcripts. The State further called three witnesses to testify to the events in question, one of whom was the ADA who testified that he saw the defendant make the gesture. The trial court found the defendant to be in willful contempt of court and entered a civil judgment for attorney's fees and costs. The defendant gave oral notice of appeal. He later filed a petition for a writ of certiorari seeking a belated appeal of the civil judgment. On appeal the defendant argued that he was found in criminal contempt based on inadmissible hearsay. The court rejected this argument, noting that the first transcript was used to illustrate the context in which the incident arose and to corroborate other testimony that the witness seemed agitated and distracted on the stand. The second transcript was used to corroborate the ADA's testimony. The court concluded: "Because [the transcripts] were used to corroborate the testimony of the State's witnesses, and were not offered into evidence to prove that Defendant was speaking and making a gun gesture, the trial court did not err when admitting them into evidence." (2) The trial court's findings of fact support its conclusion that the defendant's conduct was willful. The trial court found, in part, that the defendant's willful behavior committed during court was intended to interrupt the proceedings and resulted in the witness ceasing testimony and challenging the defendant's action on the stand in front of the jury. The court held that

this finding of fact supported the trial court's conclusion that the defendant willfully interrupted the proceedings.

Crime Against Nature

Sufficient evidence established that the defendant unlawfully engaged in sexual acts in a public place to support conviction for crime against nature

State v. Gentle, ___ N.C. App. ___, 817 S.E.2d 833 (July 3, 2018). The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss a crime against nature charge. The defendant asserted that the State failed to offer substantial evidence that the offense was committed in a public place. The court noted that although *Lawrence v. Texas* limited the circumstances in which a defendant can be prosecuted for crime against nature, the State may prosecute conduct in which a minor is involved, involving nonconsensual or coercive sexual acts, occurring in a public place, or involving prostitution or solicitation. Here, the trial court instructed the jury on the public place theory. The defendant argued that the State failed to prove that the offense occurred in a public place because it occurred well outside of public view in a dark and wooded area. There is no requirement that the prohibited conduct occur in public view. Also, the victim's description of the dark, wooded area does not foreclose its status as a public place. She consistently testified that the offense occurred at the bottom of the stairs in a parking lot and other evidence supported that testimony. Thus there was sufficient evidence that the defendant unlawfully engaged in sexual acts in a public place.

Disorderly Conduct & Resisting and Officer

Evidence was insufficient to establish that juvenile who threw chair in cafeteria committed disorderly conduct or that he resisted an officer by yelling "no" and cursing as an officer grabbed him from behind

In re T.T.E., ___ N.C. App. ___, 818 S.E.2d 324 (July 17, 2018), *temp. stay allowed*, ___ N.C. ___, 816 S.E.2d 515 (Aug. 2, 2018). There was insufficient evidence to support an adjudication of delinquency for disorderly conduct and resisting a public officer. A school resource officer testified that he saw the juvenile throw a chair in the cafeteria. No one was hit with the chair, and no one was nearby who could have been hit by it. After throwing the chair, the juvenile ran out of the cafeteria. The officer followed and without calling out to the juvenile, grabbed him from behind. The juvenile initially yelled "no" and cursed when the officer caught him and then told the officer that he was playing with his brother. (1) Over a dissent, the court held that the evidence was insufficient to adjudicate the juvenile delinquent based on disorderly conduct under G.S. 14-288.4(a)(1). Under G.S. 14-288.4(a)(1), disorderly conduct is a public disturbance intentionally caused by any person who "[e]ngages in fighting or other violent conduct or in conduct creating the threat of imminent fighting or other violence." A public disturbance is "[a]ny annoying, disturbing, or alarming act or condition exceeding the bounds of social toleration normal for the time and place" that occurs in a public place or "occurs in, affects persons in, or is likely to affect persons in a place to which the public or a substantial group has access." G.S. 14-288.1(a). Regardless of whether T.T.E.'s conduct created a public disturbance, the court of appeals determined that there was no evidence that he engaged in fighting, violent conduct or conduct creating an imminent risk of fighting or other violence. No one was near the chair. The chair did not hit a table or another chair. No one was hurt or threatened. T.T.E. did not yell, throw anything else, or raise his fists. Nothing

he did, the court said, indicated escalating violent behavior. Thus, the court concluded, T.T.E.'s acts did not amount to disorderly conduct under G.S. 14-288.4(a)(1). Accordingly, the court vacated the adjudication and disposition for disorderly conduct.

(2) There was insufficient evidence of resisting an officer. To prove a violation of G.S. 14-223, the State must establish, among other elements, that the defendant (or juvenile alleged to be delinquent) knew or had reasonable grounds to believe that the victim was a public officer. The State failed to prove that element in T.T.E.'s case. The school resource officer snuck up behind T.T.E. and, without asking him to stop, grabbed him by the shirt. T.T.E. did not know or have reasonable grounds to know that the person who grabbed him was a public officer until after he was stopped. Moreover, the court found no evidence that T.T.E. resisted, delayed or obstructed the resource officer after the officer grabbed him. Yelling "no" and cursing when the officer grabbed him did not suffice. Shea Denning blogged about the case here.

Drug Offenses

On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 796 S.E.2d 91 (2017), the state supreme court reversed, holding that the evidence was sufficient to support a conviction of maintaining a vehicle for the purpose of keeping controlled substances in violation of G.S. 90-108(a)(7)

State v. Rogers, ___ N.C. ___, 817 S.E.2d 150 (Aug. 17, 2018). The issues before the court were whether the defendant kept or maintained the vehicle and, if so, whether there was substantial evidence that the vehicle was used for the keeping of controlled substances. Considering the first question, the court found that the word "keep" with respect to "keeping or maintaining" "refers to possessing something for at least a short period of time—or intending to retain possession of something in the future—for a certain use." Here, officers conducted surveillance for about an hour and a half before searching the vehicle and the defendant's hotel room. During that surveillance, they saw the defendant arrive at the hotel in the vehicle, stay in his room for a period of time, and then leave the vehicle. The defendant was the only person seen using the car. Additionally, a service receipt bearing the defendant's name was found inside the vehicle and was dated about 2½ months before the defendant's arrest. From these facts a reasonable jury could conclude that the defendant had possessed the car for at least 2½ months. This was sufficient evidence that the defendant kept the vehicle.

The court then turned to the second issue: whether there was sufficient evidence that the defendant used the vehicle for the keeping of illegal drugs. The court determined that in this context the word keeps refers to storing objects in the vehicle. The court found that here, there was substantial evidence that the defendant was using the vehicle to store crack cocaine, not merely to transport it, noting, among other things, the fact that the drugs were found in a hidden compartment and evidence suggesting that the defendant was involved in selling drugs. The court emphasized however that the statute does not create a separate crime simply because controlled substances are temporarily in a vehicle. It clarified:

> In other words, merely possessing or transporting drugs inside a car—because, for instance, they are in an occupant's pocket or they are being taken from one place to another—is not enough to justify a conviction under the "keeping" element of subsection 90-108(a)(7). Rather, courts must determine whether the defendant was

> using a car for the *keeping* of drugs—which, again, means the *storing* of drugs—and courts must focus their inquiry "on the use, not the contents, of the vehicle.""

The court went on to disavow its statement in *State v. Mitchell*, 336 N.C. 22 (1994), that keeping of drugs means "not just possession, but possession that occurs over a duration of time." The court concluded that the statute does not require that the drugs be kept for a duration of time. Rather, "the linchpin of the inquiry into whether a defendant was using a vehicle, building, or other place 'for the keeping . . . of' drugs is whether the defendant was using that vehicle, building, or other place for the storing of drugs." The court continued:

> So, for instance, when the evidence indicates that a defendant has possessed a car for at least a short period of time, but that he had just begun storing drugs inside his car at the time of his arrest, that defendant has still violated subsection 90-108(a)(7)—even if, arguably, he has not stored the drugs for any appreciable "duration of time." The critical question is *whether* a defendant's car is used to store drugs, not *how long* the defendant's car has been used to store drugs for. As a result, we reject any notion that subsection 90-108(a)(7) requires that a car kept or maintained by a defendant be used to store drugs for a certain minimum period of time—or that evidence of drugs must be found in the vehicle, building, or other place on more than one occasion—for a defendant to have violated subsection 90-108(a)(7). But again, merely having drugs in a car (or other place) is not enough to justify a conviction under subsection 90-108(a)(7). The evidence and all reasonable inferences drawn from the evidence must indicate, based "on the totality of the circumstances," that the drugs are also being stored there. To the extent that *Mitchell*'s "duration of time" requirement conflicts with the text of subsection 90-108(a)(7), therefore, this aspect of *Mitchell* is disavowed. (citation omitted).

Jessica Smith blogged about the case here.

Defendant's admission that she "used" heroin was insufficient to establish the substance as heroin absent a chemical analysis

State v. Osborne, ___ N.C. App. ___, ___ S.E.2d ___ (October 2, 2018), *temp. stay allowed*, ___ N.C. ___, 819 S.E.2d 99 (Oct. 22, 2018). The evidence is insufficient to sustain the defendant's conviction for possession of heroin because the controlled substance at issue was not sufficiently identified as heroin. Officers found the defendant unconscious in a hotel room. After being revived, the defendant admitted to using heroin. Officers searched the hotel room and found syringes, spoons with burn marks and residue, and a rock-like substance. The State did not have the substance tested using a scientifically valid chemical analysis. Rather, at trial the State relied on the defendant's statement to officers that she used heroin, as well as officers' descriptions of the rock-like substance and the results of field tests on the substance, including one performed in open court. On appeal the State conceded, or at least did not dispute, that the field tests are not scientifically valid chemical analysis sufficient to support a conviction. Instead, the State relied on *State v. Ortiz-Zape*, 367 N.C. 1 (2013), and related cases. In *Ortiz-Zape*, the court held that an officer's testimony concerning the defendant's out-of-court identification as the substance as cocaine, combined with the officers own testimony that the substance appeared to be cocaine, was sufficient to survive a motion to dismiss. Here however the defendant did not identify the seized substance as heroin. Rather, after being revived she told officers that she had ingested heroin. Although the State's evidence strongly suggests that the substance was heroin, it is not sufficient to establish that fact. The court concluded that a holding otherwise "likely would eliminate the need for

scientifically valid chemical analysis in many—perhaps most—drug cases" and undermine the Supreme Court's decision in *State v. Ward*, 364 N.C. 133 (2010). Phil Dixon blogged about the case here.

Fraud

Convictions for attempted obtaining property by false pretenses and the completed offense violated the 'single taking' rule where defendant's only misrepresentation was a single affidavit

State v. Buchanan, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). The trial court committed plain error with respect to its obtaining property by false pretenses instructions. The case was before the court on certification from the state Supreme Court for consideration of whether the trial court committed plain error by failing to instruct the jury that it could not convict the defendant of obtaining property by false pretenses and attempting to obtain property by false pretense because such a verdict would violate the "single taking rule." The defendant was indicted for two counts of false pretenses for signing a bank check fraud/forgery affidavit disputing three checks from his account totaling $900. In fact, the defendant pre-signed the checks, gave them to the mother of his daughter, and authorized her to use them for their child's care. Based on the defendant's representation in the affidavit, the bank gave him a temporary credit for one of the three checks (in the amount of $600) but denied him credit for the two other checks. The defendant was convicted of obtaining property by false pretenses for the $600 provisional credit and of attempting to obtain property by false pretenses for the two other checks. Because the defendant did not object to the instructions at trial, plain error applied. Here, plain error occurred. The defendant submitted one affidavit disputing three checks. The submission of the affidavit is the one act, or one false representation, for which the defendant was charged. Therefore there was only a single act or taking under the "single taking rule," which prevents the defendant from being charged or convicted multiple times for a single continuous actor transaction.

Because the State presented no evidence that the defendant made fraudulent representations in support of an insurance claim to The Hartford Insurance Company as alleged by the indictment, the trial court erred by denying the defendant's motion to dismiss this charge

State v. Ferrer, ___ N.C. App. ___, 818 S.E.2d 697 (Aug. 7, 2018). The evidence at trial showed only that the defendant made a statement in connection with a separate insurance claim to Nationwide Insurance. No statement from the defendant to Hartford was in evidence.

(1) Evidence was sufficient to convict the defendant of unlawfully accessing a government computer in violation of G.S. 14-454.1; (2) Evidence was insufficient to support conviction of obtaining property by false pretenses as the defendant did not obtain his bail bondsman's license as a result of the false representations; (3) Defendant failed to make a prima facie case of selective prosecution.

State v. Mathis, ___ N.C. App. ___, 819 S.E.2d 627 (Sept. 4, 2018). The charges in this case stemmed from the defendant-bail bondsman's submission of false monthly reports to the state Department of Insurance that omitted some of the outstanding bonds he had issued. The defendant was convicted of unlawfully accessing a government computer, falsification of monthly bail bond report information, and obtaining property by false pretenses.

(1) As to the charge that he unlawfully accessed a government computer, Mathis argued that the State failed to prove he acted willfully because he was required by law to complete and submit monthly bond reports and his inadvertent failure to accurately report his transactions could not be considered intentional. The court rejected Mathis's contention, concluding that Mathis was authorized to access DOI's reporting system and that he exceeded that authorization by purposely inputting fraudulent information. Mathis also argued that the State failed to prove that he directly or indirectly accessed or caused to be accessed a government computer. The State offered evidence that some of the false monthly reports were submitted through the State's on-line reporting system (SBS) using Mathis's user name and password and that others were submitted from Mathis's email account. Mathis argued that transmitting information through SBS or email did not constitute accessing a government computer as DOI personnel and not Mathis personally.

(2) As to the conviction of obtaining property by false pretenses, Mathis argued that because he was licensed as a bail bondsman in 1998, a decade before any of the fraudulent reports were submitted, he did not *obtain* licensure as a result of the alleged false pretenses. The State contended that the fraudulent reports enabled Mathis to retain his license, which, it argued, was the same as obtaining the license through a false pretense. The court of appeals rejected the State's argument, reasoning that obtaining is the process of procuring something, while retaining is keeping something already acquired. Retain is not, therefore, included within the definition of obtain under G.S. 14-100. While submitting the fraudulent reports enabled Mathis to retain his license, it did not enable him to obtain it, and the trial court erred by denying the defendant's motion to dismiss.

(3) Finally, the court held that the defendant did not make out a prima facie case for selective prosecution. To demonstrate selective prosecution, a defendant must first make a prima facie showing that he has been singled out for prosecution while others similarly situated and committing the same acts have not; and second, after doing so, he must demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent his exercise of constitutional rights. Here, the court rejected the defendant's argument that certain testimony at trial established "the total lack of prosecutions of bail bondsmen . . . for intentionally filing false reports." Shea Denning blogged about the case here.

Impaired Driving

Under G.S. 20-139.1(b5), no re-advisement of implied consent rights was required for a subsequent breath test; the statute only requires re-advisement when the defendant is requested to submit to additional chemical analyses of blood or other bodily fluid in lieu of the breath test

State v. Cole, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). In this DWI case, the trial court did not err by denying the defendant's motion to suppress intoxilyzer results. The defendant argued that the trial court improperly concluded that the officer was not required, under G.S. 20-139.1(b5), to re-advise him of his implied consent rights before administering a breath test on a second machine. The defendant did not dispute that the officer advised him of his implied consent rights before he agreed to submit to a chemical analysis of his breath; rather, he argued that because the test administered on the first intoxilyzer machine failed to produce a valid result, it was a "nullity," and thus the officer's subsequent request that the defendant provide another sample for testing on a different intoxilyzer machine constituted a request for a "subsequent chemical analysis" under G.S. 20-139.1(b5). Therefore, the defendant argued, the officer violated the defendant's right under that statute to be re-advised of

implied consent rights before administering the test on the second machine. The court disagreed, finding that G.S. 20-139.1(b5) requires a re-advisement of rights only when an officer requests that a person submit to a chemical analysis of blood or other bodily fluid or substance in addition to or in lieu of a chemical analysis of breath. Here, the officer's request that the defendant provide another sample for the same chemical analysis of breath on a second intoxilyzer machine did not trigger the re-advisement requirement of G.S. 20-139.1(b5).

Larceny

(1) Trial court erred by entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction; (2) There was no fatal variance between the indictment for misdemeanor larceny and the evidence at trial

State v. Forte, ___ N.C. App. ___, 817 S.E.2d 764 (July 3, 2018), *temp. stay allowed*, ___ N.C. ___, 815 S.E.2d 382 (July 18, 2018). (1) The State conceded and the Court of Appeals held that the trial court erred by entering judgment for eight counts of felony larceny where all of the property was stolen in a single transaction. The court thus vacated seven of the convictions. (2) The defendant argued that there was a fatal variance between the allegation that he stole a checkbook from Glenn Cox and the evidence at trial, which showed that the checkbook belonged to Cox Auto Salvage. The court noted that a larceny indictment must allege a person who has a property interest in the stolen item, and that the State must prove that person has ownership, meaning title to the property or some special property interest. As to the case at hand, it concluded:

> While there is no evidence tending to show Glenn Cox was the actual owner of Cox Auto Salvage, there is ample evidence indicating Cox had a special property interest in the checkbook. Cox testified the checkbook was his, had his name written on it, and contained stubs of checks he had written. Cox always kept a company checkbook, and he realized the checkbook was missing when he needed to pay a customer. We conclude this evidence establishes Cox was in exclusive possession and control of the checkbook, and that he viewed it as being his checkbook. Therefore, Cox had a special property interest in the checkbook.

Sexual Assaults

Trial court properly denied the defendant's motion to dismiss charge of felony indecent exposure, but erred in denying defendant's request for a jury instruction that required that the child have been able to see the exposure had the child looked

State v. Hoyle, ___ N.C. App. ___, 818 S.E.2d 149 (July 17, 2018), *temp. stay allowed*, ___ N.C. ___, 816 S.E.2d 516 (Aug. 3, 2018). The trial court properly denied the defendant's motion to dismiss a charge of felony indecent exposure. This offense requires, in part, that the exposure occur in the presence of a person less than 16 years old. The defendant asserted that there was insufficient evidence of this element. The facts show that the defendant exposed himself while sitting in his vehicle. The child's mother had approached the window while the child was playing in a nearby tree. The court concluded that in order for an exposure to be "in the presence of" a child the child must be present during the exposure and have been able to see the exposure had the child looked. Here, the evidence was sufficient to withstand the motion to dismiss and allow the jury to decide whether the exposure was in the presence of the child.

Over a dissent the court held that the trial court committed prejudicial error with respect to its jury instructions on felony indecent exposure. This offense involves indecent exposure in the presence of a child. The defendant requested that the trial court add to the pattern instruction that "[t]he person need not actually see what is being exposed . . . *but that the person could have seen had they looked*." The trial court declined to instruct the jury on the italicized language. That language however is a correct statement of law. Thus, it was error for the trial court not to give the instruction. Given the facts of this case, it is likely that without the additional instruction defining presence, the jury considered only the child's proximity to the alleged exposure in determining whether it was in the presence of the child. Absent the requested instruction, there was no reason for the jury to consider whether the child could have seen the alleged exposure had he looked. Thus, the defendant was prejudiced by the omission of the requested instruction. Jeff Welty blogged about the case here.

Trial court did not err by denying the defendant's motion to dismiss a charge of first-degree rape

State v. White, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). Because the victim could not remember the incident, she was unable to testify that she had been raped or that the defendant was the perpetrator. The evidence showed that while out with friends one night, the victim met the defendant. Later that evening, two strangers, John and Jean, responded to a woman screaming for help. They found a man straddling the victim. After throwing the man off, John saw him pull up his pants over an erection. The man ran, chased by John and another person. Jean stayed with the victim, who was on the ground with her pants and underwear pulled to her ankles. An officer saw the chase and detained the defendant, whose pants were undone. John and Jean participated in a show up identification of the defendant shortly thereafter; both identified the defendant as the perpetrator. The victim was taken to the emergency room where a nurse found debris and a small black hair consistent with a pubic hair inside the victim's vagina. The nurse testified in part that debris cannot enter the vaginal unless something had opened the vagina; thus the debris could not have entered merely because she was on the ground. The defendant unsuccessfully moved to dismiss, was convicted and appealed. On appeal the defendant argued that the State failed to produce sufficient evidence that penetration occurred and that he was the perpetrator. The court disagreed, succinctly concluding that a reasonable juror could have inferred that the victim was vaginally penetrated against her will and that the defendant was the perpetrator.

Evidence was sufficient to sustain the defendant's convictions for sex offense by a substitute parent

State v. Wilson, ___ N.C. App. ___, 818 S.E.2d 160 (Aug. 7, 2018). The case involved allegations of digital penetration. On appeal the defendant argued that the evidence was insufficient to establish that he penetrated the victim's genitals. The only evidence offered by the State that could establish penetration came from an officer who testified to the defendant's confession that he put his hands "in [the victim's] genital area", causing her to become sexually aroused. The officer recounted that the defendant talked about the victim being "wet." The court concluded that a rational juror, hearing this description of the defendant being "in" the victim's genital area and feeling that she was "wet" and sexually stimulated could reasonably infer that he at least penetrated her labia. Although the evidence does not conclusively establish penetration, a juror could reasonably infer that it occurred.

Where victim testified to assaults having occurred once a week for over a year (but could not state a specific number of instances), jury could reasonably infer the number of counts and court did not err in denying motion to dismiss

State v. Hill, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). The trial court did not err by denying the defendant's motion to dismiss 33 counts of statutory rape, two counts of statutory sex offense, and 17 counts of indecent liberties as to victim F.H. At trial, the victim testified to sexual contact during her relationship with the defendant; she stated that she and the defendant had vaginal intercourse at least once a week beginning the day they met, and that she performed oral sex before, during, and after each occurrence of sexual intercourse. Two additional witnesses testified to observing the defendant and the victim have sexual intercourse during this time, one of whom also testified to observing oral sex. The defendant asserted that because the State failed to provide a specific number of times that the two had sexual intercourse and oral sex and how many times the defendant touched the victim in an immoral way, the total number of counts is not supported and his motion to dismiss should have been granted. The court disagreed, concluding that although the victim did not explicitly state the specific number of times that the two had sexual relations, a reasonable jury could find the evidence sufficient to support an inference for the number of counts at issue. Specifically, the victim testified that she and the defendant had sexual intercourse at least once a week for span of seventy-one weeks.

Pleadings

Presentments

Where a grand jury presentment was obtained, the superior court had subject matter jurisdiction over the defendant's charge of misdemeanor stalking

State v. Hobson, ___ N.C. App. __, 819 S.E.2d 397 (Aug. 21, 2018). The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction over a misdemeanor stalking charge. Although the defendant argued that there was no evidence in the record of a presentment, the amended record shows that a presentment was issued by the grand jury and filed with the superior court. Jeff Welty blogged about the case here.

Superior court properly acquired jurisdiction over DWI where presentment issued, despite State's failure to dismiss related citation in district court

State v. Cole, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). In this DWI case, the superior court properly denied the defendant's motion to dismiss the indictment for lack of jurisdiction. The defendant asserted that because the State failed to dismiss the citation charging the offense in district court, that charge remained valid and pending in district court, depriving the superior court of jurisdiction. The court concluded that because the charge in superior court was initiated by presentment, that court acquired jurisdiction over the offense when the indictment was issued. The court rejected the defendant's argument that because the State never dismissed the citation in district court, that charge remained pending and active requiring the superior court to dismiss the indictment. Although the State never filed a formal dismissal of the citation in district court, it abandoned that prosecution in favor of the superior court prosecution, "which effectively served as the functional equivalent of a dismissal of the district court charge, rendering it no longer valid and pending." The court further rejected the defendant's argument that the two courts had concurrent jurisdiction and that as the first court exercising jurisdiction, the district court had jurisdiction to the exclusion of the superior court. The court found no evidence of the district court's exercise jurisdiction over the offense after the existence of concurrent jurisdiction with the superior court.

Indictments

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 166 (2017), the court reversed, holding that a habitual felon indictment was not fatally defective.

State v. Langley, ___ N.C. ___, 817 S.E.2d 191 (Aug. 17, 2018). The statute requires that a habitual felon indictment set forth "the date that prior felony offenses were committed;" "the name of the state or other sovereign against whom said felony offenses were committed;" "the dates that pleas of guilty were entered to or convictions returned in said felony offenses;" and "the identity of the court wherein said pleas or convictions took place." Here, the indictment alleged that the three prior felony offenses were committed on 11 September 2006, 8 October 2009, and 24 August 2011; that the offenses that led to defendant's felony convictions were committed against the State of North Carolina; that defendant was convicted of committing these offenses, the identity of which was specified in the body of the habitual felon indictment, on 15 February 2007, 21 September 2010, and 5 May 2014; and that each of these convictions occurred in the Superior Court, Pitt County. As a result, the habitual felon indictment contains all of the information required by G.S. 14-7.3 and provides defendant with adequate notice of the bases for the State's contention that defendant had attained habitual felon status. The court noted that the indictment alleged that the defendant had committed the offenses of armed robbery and had been convicted of the lesser included offenses of common-law robbery. Because an indictment for an offense includes all lesser offenses, when the defendant allegedly committed the offense of armed robbery 8 October 2009 and 24 August 2011, he also committed the lesser included offense of common law robbery. Thus, the Court of Appeals was incorrect to state that "[i]t would be an impermissible inference to read into the indictment that common law robbery took place on 8 October 2009 or 24 August 2011 because that is not what the grand jury found when it returned its bill of indictment."

(1) Embezzlement indictment was not fatally flawed where it failed to allege fraudulent intent; (2) allegation that defendant "embezzled" money without describing more specific acts was sufficient to put the defendant on notice of the charges and did not affect her ability to defend the case

State v. Booker, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018)
(1) An embezzlement indictment was not fatally defective. The indictment alleged that the defendant: unlawfully, willfully and feloniously did embezzle three thousand nine hundred fifty seven dollars and eighty one cents ($3,957.81) in good and lawful United States currency belonging to AMPZ, LLC d/b/a Interstate All Battery Center. At the time the defendant was over 16 years of age and was the employee of AMPZ, LLC d/b/a Interstate All Battery Center and in that capacity had been entrusted to receive the property described above and in that capacity the defendant did receive and take into her care and possession that property. The defendant argued that the indictment failed to allege that she acted with fraudulent intent. The court determined that "the concept of fraudulent intent is already contained within the ordinary meaning of the term 'embezzle,'" as used in the indictment. The court noted that the defendant did not argue that she was prejudiced in her ability to prepare a defense because of this issue. It further noted that to convict the defendant of embezzlement, the State must prove that she fraudulently *or* knowingly and willfully misapplied or converted the property. Here, the indictment can fairly be read to allege that the defendant "knowingly and willfully" embezzled from her employer.

(2) The court also rejected the argument that the indictment was defective for failing to specify the acts constituting embezzlement. The indictment alleges that the defendant embezzled a specific sum of money entrusted to her in a fiduciary capacity as an employee of the company. The court "fail[ed] to see

how these allegations would not adequately apprise Defendant as to the charges facing her or prejudiced her ability to prepare a defense." Jonathan Holbrook blogged about this case in part here.

(1) Reading all of the counts of the indictment together, indictment for resisting public officer was sufficient to identify the officer and his public office; (2) Allegation that the officer tried to remove defendant from the property was sufficient to state the officer's official duty at the time; (3) DMV inspector had authority to enforce criminal laws at the DMV office

State v. Nickens, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). (1) The indictment properly charged resisting a public officer. On appeal the defendant argued that the indictment was invalid because it failed to sufficiently allege the officer's public office. The indictment alleged that the defendant "did resist, delay and obstruct Agent B.L. Wall, a public officer holding the office of North Carolina State Law Enforcement Agent, by refusing commands to leave the premises, assaulting the officer, refusing verbal commands during the course of arrest for trespassing and assault, and continuing to resist arrest." Count I of the indictment which charged the separate offense of assault on a government officer, identified the officer as "Agent B.L. Wall, a state law enforcement officer employed by the North Carolina Division of Motor Vehicles." Both counts, taken together, provided the defendant was sufficient information to identify the office in question. (2) The court also rejected the defendant's argument that the indictment was defective because it failed to fully and clearly articulate a duty that the officer was discharging. After noting the language in Count II, the court noted that Count III, alleging trespass, asserted that the defendant remained on the premises of the specified DMV office "after having been notified not to remain there by a person in charge of the premises." The court held that "the charges" specifically state the duties the officer was attempting to discharge, namely: commanding the defendant to leave the premises and arresting or attempting to rest her when she failed to comply.
(3) The court went on to hold that the officer was acting within the scope of his duties at the time. It court noted that G.S. 20-49.1(a) "contains an expansive grant of power," vesting DMV inspectors with the same powers vested in law enforcement officers by statute or common law. Thus, the officer was acting under the authority given to him under the statute at the time and was acting within the scope of his duties. The court concluded: "Even though the indictment could have been be more specific, we decline to require that it be hyper-technical." Jonathan Holbrook blogged about this case in part here.

Citations

N.C. Supreme Court holds citation sufficient to confer jurisdiction despite failure to allege multiple elements of the crime; pleading standards are relaxed for citations

State v. Jones, ___ N.C. ___, 819 S.E.2d 340 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 701 (2017), the court affirmed, holding that the citation charging the offense in question was legally sufficient to properly invoke the trial court's subject matter jurisdiction. The defendant was cited for speeding and charged with operating a motor vehicle when having an open container of alcohol while alcohol remained in his system. With respect to the open container charge, the citation stated that the defendant "did unlawfully and willfully WITH AN OPEN CONTAINER OF ALCOHOLIC BEVERAGE AFTER DRINKING (G.S. 20-138.7(A))[.]" The defendant moved to dismiss the open container charge on grounds that the citation was fatally defective. The District Court denied the motion and found the defendant guilty of both offenses. The defendant appealed to Superior Court and a jury found him guilty of the open container offense. Before the Court

of Appeals, the defendant argued that the trial court lacked jurisdiction to try him for the open container offense because the citation failed to allege all of the essential elements of the crime. The Court of Appeals found no error and the Supreme Court affirmed. Relying in part on the Official Commentary to the statutes, the Supreme Court held that a citation need only identify the crime at issue; it need not provide a more exhaustive statement of the crime as is required for other criminal pleadings. If the defendant had concerns about the level of detail contained in the citation, G.S. 15A-922(c) expressly allowed him to move that the offense be charged in a new pleading. The court further determined that because the defendant did not move in District Court to have the State charge him in a new pleading while the matter was pending in the court of original jurisdiction, the defendant was precluded from challenging the citation in another tribunal on those grounds. The court concluded: "A citation that identifies the charged offense in compliance with N.C.G.S. § 15A-302(c) sufficiently satisfies the legal requirements applicable to the contents of this category of criminal pleadings and establishes the exercise of the trial court's jurisdiction. Under the facts and circumstances of the present case, the citation at issue included sufficient criminal pleading contents in order to properly charge defendant with the misdemeanor offense for which he was found guilty, and the trial court had subject-matter jurisdiction to enter judgment in this criminal proceeding." Jeff Welty blogged about the Court of Appeals decision in the case here, and Shea Denning blogged about the N.C. Supreme Court decision here.

Evidence

Best Evidence Rule

Trial court did not err when it allowed an ACIS printout to be admitted as proof of a prior conviction to establish the defendant's habitual felon status

State v. Waycaster, ___ N.C. App. ___, 818 S.E.2d 189 (Aug. 7, 2018). The court held, over a dissent, that the trial court did not err when it allowed an ACIS printout to be admitted as proof of a prior conviction to establish the defendant's habitual felon status. On appeal the defendant argued that admission of the printout violated the best evidence rule. The court held that printouts from the ACIS database are admissible to prove a prior felony under G.S. 14-7.4 and are not barred by the best evidence rule. Shea Denning blogged about the case here.

Brady Material

Brady and Napue claims relating to undisclosed immigration impeachment information rejected as not material

U.S. v. Chavez, 894 F.3d 593, 2018 WL 3215914 (4th Cir. July 2, 2018). This multi-defendant case from the eastern district of Virginia involved charges of murder in aid of racketeering or conspiracy to commit murder in aid of racketeering for each of the defendants, among other offenses. The prosecution was aimed at disrupting the MS-13 organization. Six defendants pled guilty prior to trial and five agreed to cooperate, while the remaining six defendants proceeded to trial. All six were convicted of all charges at a joint trial and appealed, alleging constitutional discovery violations.

The *Brady* and *Napue* claims focused on the one of the cooperating co-defendants, "Junior." Under *Brady*, the prosecution's suppression of evidence favorable to the defendant and material to guilt or

sentencing constitutes a due process violation. *Napue* rights are closely related and prohibit the government from knowingly using or allowing false evidence at trial as a matter of due process. Junior received assistance with his immigration status from the FBI as a part of his efforts to cooperate with the investigation, including a letter in support of his green card application, which was ultimately granted. This potential source of impeachment was explored by both sides at trial. At one point during his testimony, Junior indicated that the immigration judge never received the FBI letter in support of his green card application, but later acknowledged on cross that he showed the immigration judge the letter in person at hearing. The defense moved unsuccessfully to subpoena his immigration file. In a later, related proceeding against a different defendant, Junior's immigration file was produced, showing that he had misrepresented his criminal record and gang ties on certain immigration forms. The district court here then ordered the information produced, and the defendants moved for a new trial based on the undisclosed information. The trial judge denied that motion, finding that the government "did not know or have reason to know of the impeachment potential of the immigration documents and that the new disclosures were immaterial in any event."

Materiality under *Brady* requires that the undisclosed evidence "could reasonably be taken to put the whole case in such a different light as to undermine confidence in the verdict." *Id*. at 8. If a *Brady* claim clearly fails to meet the standard of "material" evidence, the reviewing court may begin its analysis with that element. Here, most of Junior's cooperation was in the investigative stage, infiltrating the gang and finding tangible evidence. The government produced several eyewitnesses to each murder beyond Junior's testimony, as well as "hours" of phone call recordings where the defendants admitted the offenses and forensic evidence linking them to the crimes. The immigration benefits were discussed and explored at trial, and the witness corrected his own testimony on cross-examination regarding whether or not the immigration judge received the FBI letter. This, the court held, simply failed to meet the *Brady* standard for material evidence. "Whatever impeachment value Junior's immigration file may have held, it certainly did not rise to that level." *Id*. at 8. Further impeachment of Junior on these points did nothing to undercut the "overwhelming and significantly corroborated body of evidence."

The *Napue* claim failed for similar reasons: to the extent the witness gave false testimony regarding the immigration help he received from the FBI, he corrected it during cross. "It is unclear what more the government could or should have done to correct the false testimony once Junior corrected himself on the stand." *Id*. at 10. Moreover, a *Napue* violation requires that the prosecution *knowingly* used false evidence. Here, there was no evidence that the government knew about the FBI letter being personally presented to the immigration judge or the contents of the immigration file until the witness mentioned it on cross. Even assuming that there was false testimony by Junior of which the government was aware at the time, it too was not material: "Whether the FBI's letter was successfully delivered to the immigration judge or not could not plausibly throw the jury verdict into question, particularly when the truth of the matter was disclosed to the jury during the trial."

Character Evidence

Victim's character is not an essential element of self-defense and the trial court properly excluded specific instances of violence by the victim under Rule 405

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the Supreme Court reversed, holding that the trial court properly excluded specific instances of the victim's violent conduct for the purpose of

proving that he was the first aggressor. The charges arose from the defendant's shooting of the victim. The defendant asserted self-defense. In his case in chief, the defendant sought to introduce testimony describing specific instances of violent conduct by the victim, specifically testimony from three witnesses about times when they had experienced or witnessed the victim's violent behavior. The trial court excluded this evidence but allowed each witness to testify to his or her opinion of the victim's character for violence and the victim's reputation in the community. Construing the relevant evidence rules, the Supreme Court determined that character is not an essential element of self-defense. Therefore, with regard to a claim of self-defense, the victim's character may not be proved by evidence of specific acts. Here, the excluded evidence consisted of specific incidents of violence committed by the victim. Because Rule 405 limits the use of specific instances of past conduct to cases in which character is an essential element of the charge, claim, or defense, the trial court properly excluded testimony regarding these specific prior acts of violence by the victim.

Trial court did not commit plain error by introducing 404(b) evidence from the defendant's ex-girlfriend that the defendant had assaulted her and that she was afraid of him

State v. Hobson, ___ N.C. App. __, 819 S.E.2d 397 (Aug. 21, 2018). Where the defendant was convicted of stalking victim Lorrie, with whom the defendant had a dating relationship, the trial court did not commit plain error by introducing 404(b) evidence from Holly, the defendant's ex-girlfriend. The defendant argued that the trial court erred in failing to exclude Holly's testimony that the defendant had assaulted her in the past, that she was afraid of the defendant, and that the defendant told Holly "he would never be arrested again" and "he would not be taken alive." The court disagreed, finding that Holly's testimony established that Lorrie was in reasonable fear of the defendant. Holly testified to texting Lorrie about the assault and warning Lorrie to be careful, and that Holly herself was afraid of the defendant. This testimony demonstrates both that Lorrie had a legitimate basis for her fear of the defendant and that her fear was reasonable as required by the stalking statute. Similarly, the court noted, the defendant's statements to Holly -- that "he would never be arrested again" and "he would not be taken alive" -- were made in reference to the assault and further illustrate a course of conduct that would cause a reasonable person to fear for her safety.

Closing Argument

Court admonishes prosecutor for improperly commenting on defendant's exercise of right to trial, but finds error harmless in light of overwhelming evidence of guilt

State v. Degraffenried, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). In this drug trafficking case, the court rejected the defendant's argument that the trial court erred by failing to intervene ex mero motu during the State's closing argument. During those arguments, the prosecutor, without objection, made references to the defendant's right to a jury trial and noted that the defendant had exercised that right despite "[a]ll of the evidence" being against him. The defendant has a constitutional right to plead not guilty and be tried by a jury. Reference by the State to a defendant's failure to plead guilty violates the defendant's constitutional right to a jury trial. Here, the prosecutor's comments were improper. The court stated: "Counsel is admonished for minimalizing and referring to Defendant's exercise of his right to a trial by jury in a condescending manner." However, because the evidence of guilt was overwhelming the defendant failed to show that the comments were so prejudicial as to render the trial fundamentally unfair.

(1) Prosecutor's use of 'fool' in reference to the defendant was not improper in context; (2) prosecutor's expression of personal belief in credibility of witnesses was improper, but not so grossly improper as to warrant a new trial; (3) prosecutor's expression of personal belief in the guilt of the defendant was likewise 'obviously improper' but not so grossly improper that the court should have intervened

State v. Wardrett, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018). (1) In this felon in possession of a firearm case, the court held that although some of the prosecutor's statements were improper, they were not so improper as to deprive the defendant of a fundamentally fair trial. The court first determined that, in context, the prosecutor's use of the term "fool" was not improper. The prosecutor's remarks related to a gunfight and did not single out the defendant as a fool, but compared him to other fools who behave recklessly with firearms. Additionally there were no repeated ad hominem attacks on the defendant. (2) Although the prosecutor's expressions of personal belief were improper, they were not so grossly improper as to warrant reversal. Specifically, "[t]he prosecutor went too far when he asserted that the witnesses were "telling the truth." These statements improperly vouched for the truthfulness of the witnesses. (3) Although the prosecutor's statements as to the defendant's guilt were improper, they did not deprive the defendant of a fair trial. The prosecutor proclaimed that the defendant was "absolutely guilty" and that there was "just no question about it." The court concluded with this note:

> While we reject Defendant's arguments, we do not condone remarks by prosecutors that exceed statutory and ethical limitations. Derogatory comments, epithets, stating personal beliefs, or remarks regarding a witness's truthfulness reflect poorly on the propriety of prosecutors and on the criminal justice system as a whole. Prosecutors are given a wide berth of discretion to perform an important role for the State, and it is unfortunate that universal compliance with "seemingly simple requirements" are hindered by "some attorneys intentionally 'push[ing] the envelope' with their jury arguments." Jones, 355 N.C. at 127, 558 S.E.2d at 104. But, because Defendant has failed to overcome the high burden to prove that these missteps violated his due process rights, he is not entitled to relief.

Confrontation Clause

Trial court did not violate the defendant's Confrontation Clause rights by allowing him to stipulate to the admission of forensic laboratory reports

State v. Perez, ___ N.C. App. ___, 817 S.E.2d 612 (July 3, 2018). In this drug case, the court rejected the defendant's argument that the trial court violated his Confrontation Clause rights when it permitted him to stipulate to the admission of forensic laboratory reports without first addressing him personally and ensuring that he understood the stipulation would waive those rights. At trial the prosecutor informed the trial court that the defendant intended to stipulate to the admission of forensic laboratory reports confirming that the substance seized was cocaine. Both defense counsel and the defendant signed the stipulations and the trial court admitted the stipulated evidence. On appeal, the defendant argued that the trial court erred by permitting him to stipulate to the admission of the reports without engaging in a colloquy to ensure he understood the consequences of that decision. The court rejected this argument. It began by acknowledging that the stipulation acted as a waiver of the defendant's Confrontation

Clause rights. The court held however that "the waiver of Confrontation Clause rights does not require the sort of extensive colloquy needed to waive the right to counsel or enter a guilty plea."

The court rejected the defendant's argument that *State v. English*, 171 N.C. App. 277 (2005), requires such a colloquy. Here, both the defendant and counsel signed the stipulations, and there may have been strategic reasons to do so. The court found it notable that the defendant did not argue that his lawyer failed to discuss those strategic issues with him, or that defense counsel failed to explain that stipulating to admission of the lab reports would waive his Confrontation Clause rights. Instead, he argued that the trial court should have discussed these issues with him in open court. The court declined the defendant's request to impose on trial courts an obligation to personally address a defendant whose attorney seeks to waive any of his constitutional rights via stipulation with the State. If the defendant did not understand the implications of stipulating, his recourse is to pursue an MAR asserting ineffective assistance of counsel. Phil Dixon blogged about the case here.

Victim's statements were made to assist in apprehending armed suspects and were properly considered non-testimonial

State v. Guy, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). In this case involving armed robbery and other charges, the victim's statements to a responding officer were nontestimonial. When officer Rigsby arrived at the victim's home to investigate the robbery call, the victim was shaken up, fumbling over his words, and speaking so fast that it sounded like he was speaking another language. Once the victim calmed down he told the officer that a group of black men robbed him, that one of them put a snubnosed revolver to the back of his head, one wore a clown mask, the suspects fled in a silver car, and one of the robbers was wearing red clothing. Shortly thereafter, another officer informed Rigsby that she had found a vehicle and suspects matching the description provided by 911 communications. Rigsby immediately left the victim to assist that officer. Although the suspects had fled the victim's home, an ongoing emergency posing danger to the public existed. The victim's statements to Rigsby were nontestimonial because they were provided to assist police in meeting an ongoing emergency and to aid in the apprehension of armed, fleeing suspects.

Cross-Examination

Trial court erred by preventing the defendant from cross-examining the State's witnesses concerning the defendant's admission and his attempt to help investigators rescue the victim during his post-arrest interrogation, but the error was harmless

State v. Edwards, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). In this case involving convictions for attempted first-degree murder, statutory sex offense with a child by an adult, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and taking indecent liberties with a child, although the trial court erred by preventing the defendant from cross-examining the State's witnesses concerning the defendant's admission and attempt to help investigators rescue the victim during his post-arrest interrogation, the error was harmless. The case involved the defendant's abduction of a six-year-old girl and related conduct including binding the child to a tree with a chain around her neck. The defendant asserted that the trial court's limitation on cross-examination violated his constitutional rights to due process, a fair trial and right to silence. The State elicited testimony from law enforcement officers about the defendant's pre-arrest statements. It did not however elicit any testimony regarding the post-arrest interrogation of him, and sought to prevent the defendant from introducing any evidence from the State's witnesses regarding the post-arrest interrogation during cross-examination.

According to the State, the pre-arrest interview of the defendant was separate from the post-arrest interrogation that occurred the next day. The trial court agreed with the State and prevented the defendant from questioning the State's witnesses, including Detective Sorg, regarding the defendant's post-arrest interrogation. After the State rested, the issue of the defense presenting evidence regarding the post-arrest interrogation arose again, specifically with respect to calling Sorg as a defense witness. According to the State, the testimony would include self-serving statements by the defendant from a completely different interview that constituted hearsay. The State asserted that if the defense wanted to present evidence about what the defendant said during those interviews, he had to take the stand. The trial court agreed and ruled that the defense could not question Sorg on anything related to the post-arrest interrogation. The defendant took the stand and testified about that interrogation.

The court rejected the defendant's argument that the cross-examination should have been allowed under Rule 106, to prevent the jury from being misled or deceived by the evidence presented regarding the pre-arrest interview. The purpose of Rule 106's completeness rule is to ensure that misleading impressions created by taking matters out of context are corrected. Here, there was no nexus between the interview and the post-arrest interrogation that would require evidence of the post-arrest interrogation to explain or add context to the earlier interview. Thus the trial court did not err by concluding that the two events were discrete. Moreover, Rule 106 is limited to writings and recorded statements. Here, the defense did not seek to introduce any such materials; rather, the defense simply wanted to question the State's witnesses about that interrogation during cross-examination.

Considering Rule 611, which addresses the proper scope of cross-examination, the court found that the trial court abused its discretion by disallowing the evidence. Rule 611 provides that a witness may be cross-examined on any relevant matter, and here the evidence that the defendant sought to elicit from the State's witnesses was relevant. However, the court went on to conclude that the trial court's error was harmless given the overwhelming evidence of guilt.

In this murder, armed robbery, and possession of a firearm by a felon case, the court held, over a dissent, that the trial court committed reversible constitutional error in restricting the defendant's cross-examination of the State's principal witness

State v. Bowman, ___ N.C. App. ___, 818 S.E.2d 718 (Aug. 7, 2018), *review allowed*, ___ N.C. ___, 819 S.E.2d 374 (Oct. 24, 2018). The defendant, Lakenda Malachi, and the victim were associates in a drug business. The charges in question arose out of an incident in which the defendant arrived at Malachi's house and confronted the victim about money allegedly owed to him. The victim ended up dead. The case was tried in Forsyth County. On appeal, the defendant argued that the trial court erred by limiting the scope of his cross-examination of Malachi, preventing him from adequately questioning her regarding pending drug charges in Guilford County for which she could receive a favorable plea offer contingent on her testimony against the defendant. The court agreed. Here, trial counsel argued that an email exchange between prosecutors established a possible reduction of drug trafficking charges against Malachi in Guilford County in exchange for her testimony against the defendant in Forsyth County. After a voir dire, the trial court ruled that it would allow defense counsel limited cross-examination of Malachi regarding her pending charges. However, before the jury, the trial court sustained the State's objection to defense counsel's cross-examination of Malachi, precluding defense counsel from establishing a possible bias in Malachi's testimony. Because the defendant presented evidence of communication between the districts, the trial court's limitation of Malachi's cross-examination was error. The court went on to conclude that the State cannot prove that the error was harmless beyond a reasonable doubt, noting in part that Malachi was the state's principal eyewitness. There were no other witnesses

to the shooting and the other evidence provided by the State was tenuous. The court ordered a new trial. The dissenting judge concluded that any error was harmless beyond a reasonable doubt.

Defendant's Silence

(1) The trial court did not err by allowing the prosecutor to cross-examine defendant Perry regarding his post-arrest, pre-Miranda silence; (2) Although it was error to admit evidence of the defendant's post-Miranda warnings silence about an alibi, the error did not constitute plain error for either defendant

State v. Perry, ___ N.C. App. ___, 818 S.E.2d 699 (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 395 (Aug. 22, 2018). (1) Defendants Perry and Powell appealed from judgments entered upon jury verdicts finding them guilty of offenses in connection with a shooting. The defendants were tried together. At trial Perry testified regarding his alibi defense. On appeal the defendants argued that the trial court committed reversible error by allowing the prosecutor to cross-examine Perry regarding his silence to the police after his arrest regarding his alibi. Although a defendant's post-arrest, post-Miranda warning silence may not be used by the State for any purpose, a defendant's post-arrest, pre-Miranda silence may be used by the State to impeach a defendant by suggesting that the defendant's prior silence is inconsistent with his present statements at trial. Our Supreme Court has instructed that a defendant's silence about an alibi at the time of arrest can constitute an inconsistent statement, and that this silence can be used to impeach a defendant's alibi offered at trial if it would have been natural for a defendant to mention the alibi at the time of his encounter with the police. Applying these rules to the case at hand, the court concluded:

> [T]here was evidence which showed as follows: The offenses were perpetrated no more than 72 hours before Defendant Perry was arrested and informed of the charges against him. Defendant Perry knew the victims named in the warrant: he knew one of the victims because she was his ex-girlfriend, and he knew the other victim from hanging out in the same neighborhood. Despite Defendant Perry's familiarity with these two victims and the location where the shooting occurred, he made no statements that he had an alibi to account for his whereabouts during the commission of the crime. When the officer charged Defendant Perry with three counts of attempted murder and three counts of injury to real or personal property, Defendant Perry failed to mention his alibi when it would have been natural to deny that he would not have attempted to kill his ex-girlfriend, her current partner, and his ex-girlfriend's son.
>
> Based on this evidence, we conclude that Defendant Perry's silence is inconsistent with his later alibi testimony presented for the first time during trial. Therefore, the trial court did not err when it allowed the State to impeach Defendant Perry on cross-examination about his failure to say anything about his alibi when the warrants were read to him and before he had received Miranda warnings.

(2) Although it was error to admit evidence of Perry's post-Miranda warnings silence about an alibi, the error did not constitute plain error for either defendant. Because the defendant failed to object to the testimony at trial, the plain error standard applied. Here no plain error occurred because there was ample evidence establishing the defendants' guilt.

No plain error to admit evidence of defendant's post-arrest silence where defendant opened the door

State v. Booker, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). In this embezzlement case, the trial court did not commit plain error by allowing a detective to testify regarding the defendant's post-arrest silence. The defendant opened the door to the testimony by pursuing a line of inquiry on cross-examination centering around the detective's attempts to contact the defendant before and after her arrest.

Identifications

Victim's identification testimony was not the result of improperly suggestive procedures and was properly admitted

State v. Mitchell, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). The trial court properly denied the defendant's motion to suppress a victim's identification of the defendant as the perpetrator. The defendant was charged with armed robbery of a Game Stop store and threaten use of a firearm against a store employee, Cintron, during the robbery. Although Cintron failed to identify an alleged perpetrator in a photographic lineup shown to him two days after the robbery, he later identified the defendant when shown a single still-frame photograph obtained from the store's surveillance video. Cintron then identified the defendant as the perpetrator in the same photographic lineup shown to him two days after the robbery and again in four close-up, post-arrest photographs of the defendant showing his neck tattoos. The defendant unsuccessfully moved to suppress Cintron's in-court and out-of-court identifications.

On appeal the defendant argued that the State conducted an impermissibly suggestive pretrial identification procedure that created a substantial likelihood of misidentification. The court rejected that argument, finding that the trial court's challenged findings and conclusions—that the authorities substantially followed statutory and police department policies in each photo lineup and that the substance of any deviation from those policies revolved around the defendant's neck tattoos—are supported by the evidence. The defendant fit the victim's initial description of the perpetrator, which emphasized a tattoo of an Asian symbol on the left side of his neck and notable forehead creases. Based on this description, the victim had the ability to identify the defendant both in court and in photographs reflecting a close-up view of the defendant's tattoos, and he specifically testified to his ability to recognize the defendant as the perpetrator independent of any lineup or photo he had been shown. Thus, the trial court's ultimate conclusion—that the procedures did not give rise to a substantial likelihood that the defendant was mistakenly identified—is supported by the totality of the circumstances indicating that the identification was sufficiently reliable.

Lay Opinions

Where the defendant failed to object to the officer's lay opinion of property damage over $1000, the opinion (along with other evidence of damage) was sufficient to survive motion to dismiss

State v. Gorham, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). In this felony speeding to elude case, the State presented sufficient evidence that the defendant caused property damage in excess of $1000, one of the elements of the charge. At trial, an officer testified that the value of damages to a guardrail, vehicle, and house and shed exceeded $1000. Additionally, the State presented pictures and videos showing the damaged property. The court noted that because the relevant statute does not

specify how to determine the value of the property damage, value may mean either the cost to repair the property damage or the decrease in value of the damaged property as a whole, depending on the circumstances of the case. It instructed: "Where the property is completely destroyed and has no value after the damage, the value of the property damage would likely be its fair market value in its original condition, since it is a total loss." It continued, noting that in this case, it need not decide that issue because the defendant did not challenge the jury instructions, and the evidence was more than sufficient to support either interpretation of the amount of property damage. Here, the officer's testimony and the photos and video establish that besides hitting the guard rail, the defendant drove through a house and damaged a nearby shed. "The jury could use common sense and knowledge from their 'experiences of everyday life' to determine the damages from driving through a house alone would be in excess of $1000.

Trial court did not commit plain error by allowing officer to give his opinion that "the secretions a woman emitted during sexual arousal can only be detected by vaginal penetration"

State v. Wilson, ___ N.C. App. ___, 818 S.E.2d 160 (Aug. 7, 2018). In a case involving charges of sexual activity by a substitute parent, the court rejected the defendant's argument that the trial court committed plain error by allowing an officer to give his opinion that "the secretions a woman emitted during sexual arousal can only be detected by vaginal penetration" and that, based on the defendant's confession, the fact that the defendant could feel that the victim was "wet" in her genital area means penetration must have occurred. Assuming the trial court erred by not striking the testimony in question, the error did not rise to the level of plain error.

Expert Opinions

No error to exclude portions of defense expert testimony on eyewitness identification reliability

State v. Vann, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 2, 2018). The trial court did not abuse its discretion by partially sustaining the State's objection to expert testimony by a defense witness regarding the factors affecting the reliability of eyewitness identification. UNC-Charlotte Prof. Dr. Van Wallendael was qualified and accepted by the court as an expert witness in the field of memory perception and eyewitness identification. The defendant sought to have her testify concerning whether any factors were present that could have affected the witnesses' identification of the defendant as the shooter. At a voir dire, the witness identified four factors in the case which could have affected the witnesses' identifications: the time factor; the disguise factor; the stress factor; and the weapon focus effect. According to the time factor, the likelihood of an accurate identification increases the longer in time a witness has to view the perpetrator's face. Under the disguise factor, anything covering the face of the perpetrator decreases the chances of an accurate identification later by the eyewitness. The stress factor states that stress, especially from violent crimes, can significantly reduce an eyewitness's ability to remember accurately. Studies on the weapon focus factor show that people confronted with a weapon tend to concentrate their attention on the weapon itself, and not the individual holding the weapon, which decreases the likelihood of an accurate identification of the assailant or shooter later. The trial court sustained the State's objection to opinion testimony concerning the time and disguise factors, noting that they are commonsense conclusions that would be of little if any benefit to the jury. It did however allow testimony on the stress factor and the weapon focus effect. The defendant failed to show any abuse of discretion by the trial court in partially sustaining the State's objection. The trial court properly found that the time and disguise concepts were commonsense conclusions that would be of little benefit to the jury.

Relevance and Prejudice

Trial court did not abuse its discretion by admitting into evidence the victim's skeletal remains

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). In this first-degree murder case, the trial court did not abuse its discretion under Rule 403 by admitting the victim's skeletal remains, specifically her skull, ribs, and femur. The court considered each set of bones, starting with the skull. It noted that admission of a homicide victim's skull was an issue of first impression. Generally, however, evidence used to identify a victim is relevant and admissible at trial. Here, the State argued, in part, that it needed witness Curtis, who found the skull, to identify it so that other witnesses could identify other pertinent bones. Curtis positively identified the skull as the one he found in the woods, based on the front teeth. Here, the skull is relevant to the State's case, illustrated Curtis's testimony, and was properly admitted under Rule 403.

As to the rib bones, the court noted that evidence showing the nature and number of the victim's injuries is probative. Here, the State used the rib bones to illustrate the victim's injuries, which the medical examiner concluded caused death. They thus were more probative prejudicial and were properly admitted under Rule 403.

Considering the femur, the court noted that biological items used in DNA testing generally are admissible. Here, the State used the femur to establish the identity of the victim through DNA testing and it was properly admitted under Rule 403.

Trial court did not err in child sexual assault case by excluding defendant's proffered testimony regarding the rape of his other daughter by a neighbor

State v. Alonzo, ___ N.C. App. __, 819 S.E.2d 584 (Aug. 21, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (Sept. 7, 2018). In this child sexual assault case, the trial court did not err by finding that the defendant's proffered testimony was not relevant. The defendant was charged with committing sexual acts on his daughter Sandy while home from the military on compassion leave. At trial, the defendant attempted to testify that the reason for his compassionate leave was the rape of his other daughter by a neighbor. The defendant argued that his testimony constituted substantive evidence showing that he did not sexually assault the victim during his compassionate leave and would have allowed him to impeach his ex-wife, Ms. Alonzo, who testified that she witnessed the abuse. Specifically, he asserted that his testimony informing the jury of the sexual assault of his other daughter proves that he "would have been sufficiently deterred" from molesting Sandy during that same time period as "Ms. Alonzo [was] watching him like a hawk." He further asserted that the testimony would "discredit[] Ms. Alonzo's testimony" that she saw him sexually assault Sandy, making her explanation for not contacting the police after witnessing his acts "less convincing." The trial court excluded the testimony under Rules 401 and 403.

The court made swift work of the defendant's Rule 401 argument, concluding that his proposed testimony does not have a logical tendency to prove that Defendant would not have sexually molested Sandy. The court went on to conclude that even if the testimony was relevant, the trial court did not abuse its discretion in excluding it under Rule 403. The court explained: "The testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value."

The court also rejected the defendant's argument that his testimony could have been used to impeach Ms. Alonzo. Specifically, he argued that because Ms. Alonzo reported the sexual assault of their other daughter by a neighbor, she therefore would have reported any assault she witnessed him commit. Defendant further alleged that because Ms. Alonzo did not file any reports, the jury could have therefore determined there was no sexual assault. The court rejected with this argument, concluding: "Ms. Alonzo turning in a neighbor for sexual assault is entirely different, psychologically and emotionally, than turning in her husband. Without an established correlation between turning in neighbors and husbands for sexual assault, Defendant's proposed testimony does not 'have a logical tendency to prove' that Ms. Alonzo was incorrect or untruthful in her testimony." Moreover, the trial court did not abuse its discretion in excluding this testimony under Rule 403. The court explained: "As previously stated, testimony concerning the sexual assault of another child by an unrelated, third-party had the potential to confuse the jury, outweighing any probative value."

(1) Trial court did not abuse its discretion in stalking case by admitting into evidence Domestic Violence Protective Orders (DVPOs) obtained by the victim against the defendant; (2) Although the trial court erred by admitting into evidence photographs of firearms, ammunition, and surveillance equipment found throughout the defendant's home, the error was not prejudicial

State v. Hobson, ___ N.C. App. __, 819 S.E.2d 397 (Aug. 21, 2018). (1) The defendant asserted that the findings of fact in the DVPOs unfairly prejudiced him and confused the jury. The court found that the DVPOs were relevant to show the defendant's course of conduct as well as his motive to commit the current offense. It noted that after reviewing the DVPOs, the trial court redacted those portions it found to be unfairly prejudicial to defendant, and only the redacted versions were admitted into evidence and published to the jury. The court rejected the defendant's argument that the jury was highly likely to regard the findings contained in the DVPOs as true and binding simply because they had been handwritten by a district court judge, noting that the trial court redacted the DVPOs and properly instructed the jury regarding the State's burden of proof as well as the jury's duty to find the facts.

(2) Although the trial court erred by admitting into evidence approximately 28 photographs of firearms, ammunition, and surveillance equipment found throughout the defendant's home during the execution of a search warrant, the error did not amount to prejudicial error. Photographs of the defendant's firearms, ammunition, and surveillance equipment all of which the defendant legally possessed at the time the search warrant was executed were wholly irrelevant to the issue of whether the defendant committed the offense of stalking. The court thus agreed with the defendant that the probative value of the photographs was substantially outweighed by the danger of unfair prejudice, and that the trial court should have exercised its discretion to exclude this evidence. The court went on to conclude that in light of the overwhelming additional evidence presented at trial, the defendant failed to show that the admission of the photographs amounted to prejudicial error.

Rule 404(b) and Rule 803(3)

(1) Trial court did not err by admitting, in murder case, 404(b) testimony from the defendant's former girlfriend and his ex-wife about assaults that the defendant committed on them; (2) Trial court did not err by instructing the jury that it could use of evidence of the defendant's prior assaults on the victim to show identity; (3) Trial court did not err by admitting handwritten document made by victim listing things she was going to tell the defendant

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). (1) In this non-capital first-degree murder case where the defendant was convicted of murdering a former girlfriend Sellars, the trial court did not err by admitting 404(b) testimony from the defendant's former girlfriend Crisp and former wife Lewis about assaults that the defendant committed on them. The evidence was admitted to show motive, intent, modus operandi, and identity. The requirement of similarity among the prior bad acts and the crime charged was satisfied. Among other things, the trial court's findings of fact identified "location similarities between the incidents." The defendant's assaults of Crisp and Lewis occurred in isolated areas, and Sellars' remains were found on one of the roads in an isolated area where the defendant assaulted Crisp. With respect to remoteness, the defendant's assaults on Crisp occurred from 1990-1993; the assaults on Lewis occurred from 1996-1999; and Sellars' death occurred in 2012, 13 years after the last assault. Subtracting 4 years that the defendant spent in prison leaves a 9 year gap. The court concluded that assaults on multiple victims over time with relatively short gaps in between show a pattern of behavior, and that the evidence satisfied the temporal proximity requirement of the Rule 404(b) analysis. The court went on to find that the trial court did not abuse its discretion by finding that the 404 evidence satisfied Rule 403.

(2) The trial court did not err by instructing the jury that it could use of evidence of the defendant's prior assaults on the victim to show identity. Multiple witnesses testified regarding the defendant's abuse of the victim prior to her murder and the defendant's prior assaults on her arose in the context of a relationship in which the defendant used violence to control her behavior. This evidence was properly admitted to show identity.

(3) The trial did not err by admitting, under Rule 803(3), a handwritten document made by the victim that contained a list of things that the victim was going to tell the defendant and that referred to the victim having been "choked," having had her "air cut[] off," having "begged for [her] life, and having been without "heat in the middle of winter." The trial court properly determined that the document showed the victim's state of mind.

Criminal Procedure

Defenses

Affirming Court of Appeals, N.C. Supreme Court holds trial court erred in omitting stand-your-ground language from self-defense jury instructions where defendant was lawfully present outside of his apartment building

State v. Bass, ___ N.C. ___, 819 S.E.2d 322 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 802 S.E.2d 477 (2017), the court affirmed, holding that the trial court committed prejudicial error by omitting stand-your-ground language from the self-defense jury instructions. The incident in question occurred outside of the Bay Tree Apartments. The defendant gave notice of his intent to pursue self-defense and throughout the trial presented evidence tending to support this defense. At the charge conference, the defendant requested that the jury charge include language from Pattern Jury Instruction 308.45 providing, in relevant part, that the defendant has no duty to retreat in a place where the defendant has a lawful right to be and that the defendant would have a lawful right to be at his place of residence. Believing that the no duty to retreat provisions applies only to an individual located in his own home, workplace, or motor vehicle, the trial court declined to give the requested instruction. After deliberations began, the jury asked for clarification on duty to

retreat. Outside the presence of the jury, the defendant again requested that the trial court deliver a no duty to retreat instruction, this time pointing to Pattern Jury Instruction 308.10, including its language that the defendant has no duty to retreat when at a place that the defendant has a lawful right to be. The trial court again concluded that because the defendant was not in his residence, workplace, or car, the no duty to retreat instruction did not apply. The Court of Appeals held that the trial court committed reversible error in omitting the no duty to retreat language from its instruction. Reviewing the relevant statutes, the Supreme Court affirmed this holding, concluding that "wherever an individual is lawfully located—whether it is his home, motor vehicle, workplace, or any other place where he has the lawful right to be—the individual may stand his ground and defend himself from attack when he reasonably believes such force is necessary to prevent imminent death or great bodily harm to himself or another." John Rubin blogged about the Court of Appeals decision in the case here.

Trial court erred by failing to give a no duty to retreat instruction where defendant was lawfully on a public road

State v. Ayers, ___ N.C. App. ___, 819 S.E.2d 407 (Sept. 4, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 735 (Sept. 12, 2018). Although the trial court properly gave a self-defense instruction in this shooting into an occupied vehicle and injury to personal property case, it erred by failing to give a no duty to retreat instruction. Viewed in the light most favorable to the defendant, the evidence showed that the defendant was driving at night in wet conditions with a potential for ice, along a meandering two-lane highway with few street lights. The victim Parker came up behind the defendant and persistently tailgated the defendant's vehicle with bright lights, while other traffic was traveling in front of the defendant. Although Parker had an opportunity to pass the defendant, he pulled up alongside the defendant. When the defendant slowed down, Parker also slowed and "paced" him, rather than passing, and veered closer towards the defendant's vehicle. Parker moved his vehicle into the defendant's lane and was driving so close to the defendant's vehicle, that the defendant could have reached out from his driver's side window and touched Parker's tire. The passenger-side tires of the defendant's vehicle were forced off the road onto the muddy shoulder. Fearing that he would lose control of his vehicle and suffer injury, the defendant shot at Parker's tire to disable his vehicle. The trial court gave a self-defense instruction without language about duty or lack of duty to retreat. The defendant was found guilty and appealed.

The court first held that the trial court properly instructed on self-defense, even though there was no intent to kill in this case. It noted that although the state Supreme Court has held that self-defense is not available where the defendant claims that the victim's death was an accident, those cases were distinguishable and not controlling where, here, it is undisputed that the defendant intended to "strike the blow"—to shoot Parker's tire. The court explained that the defendant was not required to show that he intended to kill Parker; he only needed to show the intent to strike the blow by shooting at Parker's vehicle.

Next, the court concluded that the trial court committed prejudicial error by denying the defendant's request for an instruction on no duty to retreat. The court reasoned: "Defendant was present in a location he lawfully had a right to be: driving inside his vehicle upon a public highway. Defendant was under no legal obligation to stop, pull off the road, veer from his lane of travel, or to engage his brakes and risk endangering himself." Phil Dixon blogged about the case here.

Trial court erred in possession of a firearm by a felon case by denying the defendant's request for a jury instruction on the defense of justification

State v. Mercer, ___ N.C. App. ___, 818 S.E.2d 375 (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 209 (Aug. 21, 2018). The charges arose from an altercation during which the defendant, a convicted felon, possessed a gun. The defendant lived near the home of Dazoveen Mingo. The day before the incident in question, the defendant's cousin Wardell accused Dazoveen of stealing his phone and the two nearly fought. The following day, Wardell again accused Dazoveen of stealing his phone and a fight occurred, which was broken up by the defendant's mother. Thereafter Dazoveen and a group of family members walked to the defendant's home, where Wardell was visiting, with the intention of fighting. An altercation occurred resulting in the charges at issue. The participants and witnesses provided different versions of the event at trial. According to the defendant, he knew he was a convicted felon and was not allowed to possess a firearm, but did so when confronted with a group of people with guns. During the charge conference the defendant requested a jury instruction on justification, which the trial court denied. During deliberations the jury sent the trial court a note asking whether or not a defendant can be justified in possessing a firearm even if he is a felon. The trial court responded by rereading and recharging its instruction on reasonable doubt. The defendant was found guilty and appealed, arguing that the trial court erred by refusing his request for an instruction on justification. The court agreed. Under the test established in *United States v. Deleveaux*, 205 F.3d 1292, 1297 (11th Cir. 2000), to establish justification for this offense, a defendant must show four elements: that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; that the defendant had no reasonable legal alternative to violating the law; and that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm. Here each element of the test was satisfied. Having concluded that the defendant was entitled to a jury instruction on justification, the court went on to find that he was prejudiced by this error. Phil Dixon blogged about the case here.

Double Jeopardy

When a defendant agrees to have charges against him considered in two trials, he cannot later successfully argue that the second trial offends the Double Jeopardy Clause

Currier v. Virginia, 585 U.S. ___, 138 S. Ct. 2144 (June 22, 2018). When a defendant agrees to have charges against him considered in two trials, he cannot later successfully argue that the second trial offends the Double Jeopardy Clause. Facing trial on charges of burglary, grand larceny, and unlawful possession of a firearm by a felon, defendant Michael Currier worried that because the prosecution could introduce evidence of his prior convictions to prove the felon-in-possession charge, that evidence might prejudice the jury's consideration of the other charges. Currier and the government agreed to a severance, with the burglary and larceny charges to be tried first, followed by a second trial on the felon-in-possession charge. But after the first trial ended in an acquittal, Currier argued that the second trial would violate double jeopardy. Alternatively he asked the trial court to forbid the government from relitigating in the second trial any issue resolved in his favor at the first. So, for example, he said the trial court should exclude from the new proceeding any evidence about the burglary and larceny. The trial court rejected his arguments and allowed the second trial to proceed. The jury convicted Currier on the felon-in-possession charge. After his unsuccessful appeal in the state courts, the Supreme Court granted review.

Currier argued that *Ashe v. Swenson*, 397 U. S. 436 (1970), required a ruling in his favor. The Court rejected this argument, noting, in part, that *Ashe* forbids a second trial only if to secure a conviction the prosecution must prevail on an issue the jury necessarily resolved in the defendant's favor in the first

trial. It found *Ashe* distinguishable, noting that in the case before it, the defendant consented to the second trial. Instead, the Court found guidance in *Jeffers v. United States*, 432 U.S. 137 (1977), in which the defendant sought separate trials on each count against him to reduce the possibility of prejudice. The court granted his request. After the jury convicted the defendant in the first trial of a lesser-included offense, he argued that the prosecution could not later try him for a greater offense. The *Jeffers* Court concluded that if a single trial on multiple charges would suffice to avoid a double jeopardy complaint, "there is no violation of the Double Jeopardy Clause when [the defendant] elects to have the . . . offenses tried separately and persuades the trial court to honor his election." (citation omitted). The Court continued:

> What was true in *Jeffers*, we hold, can be no less true here. If a defendant's consent to two trials can overcome concerns lying at the historic core of the Double Jeopardy Clause, so too we think it must overcome a double jeopardy complaint under *Ashe*. Nor does anything in *Jeffers* suggest that the outcome should be different if the first trial yielded an acquittal rather than a conviction when a defendant consents to severance. While we acknowledge that *Ashe*'s protections apply only to trials following acquittals, as a general rule, the Double Jeopardy Clause "'protects against a second prosecution for the same offense after conviction'" as well as "'against a second prosecution for the same offense after acquittal.'" Because the Clause applies equally in both situations, consent to a second trial should in general have equal effect in both situations. (citation omitted)

The Court went on to explain that holding otherwise would create inconsistency not just with *Jeffers* but with other Court precedents as well. It concluded: "This Court's teachings are consistent and plain: the 'Clause, which guards against Government oppression, does not relieve a defendant from the consequences of his voluntary choice.'"

The Court continued in Part III of the Opinion, which garnered only four votes, rejecting Currier's argument that even if he voluntarily consented to holding the second trial, that consent did not extend to the relitigation of any issues the first jury resolved in his favor. This argument turned on issue preclusion principles in civil cases that Currier invited the Court to import into the criminal law through the Double Jeopardy Clause. As noted, however, this aspect of the Court's opinion did not enjoy the support of a majority of the Court. Shea Denning blogged about the case here.

Joinder and Severance

Where the transactional connection between two offenses was sufficient for joinder, trial court did not err in denying motion to sever offenses; defendant's assertion that he may have testified in one case was insufficient to establish prejudice without more

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). In this gang-related case involving two shootings and charges of first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury, attempted first-degree murder, and discharging a weapon into an occupied dwelling, the trial court did not err by denying the defendant's motion to sever. Here, the transactional connection between the offenses was sufficient for joinder. Each arose from a continuous course of violent criminal conduct related to gang rivalries. The evidence tended to show that the second shooting was in retaliation for the first. The two shootings occurred the same day; the same pistol was used in both; and witnesses testified to evidence that applied to both shootings, or testified that they were present at both crime scenes. Additionally, neither the number of offenses nor the complexity of the evidence

offered required severance. The evidence was not unduly complicated or confusing. The jury instructions clearly and carefully separated the offenses, and the verdict forms unmistakably distinguished the offenses by using the victim's names. The court rejected the defendant's argument that severance was necessary to protect his constitutional right to choose to testify with respect to some of the charges but not others. The court noted that a trial court does not abuse its discretion by refusing to sever multiple offenses against the same defendant where the defendant's only assertion of prejudice is that he might have elected to testify in one of the cases and not in the others.

No abuse of discretion to deny severance of trials of codefendants where all six were charged with being a part of a conspiracy, had similar culpability, and did not have antagonistic defenses

U.S. v. Chavez, 894 F.3d 593, 2018 WL 3215914 (4th Cir. July 2, 2018). This multi-defendant case from the eastern district of Virginia involved charges of murder in aid of racketeering or conspiracy to commit murder in aid of racketeering for each of the defendants, among other offenses. The prosecution was aimed at disrupting the MS-13 organization. Six defendants pled guilty prior to trial and five agreed to cooperate, while the remaining six defendants proceeded to trial, and all were convicted. Two defendants challenged the trial judge's decision to deny their motions to sever their individual trials from those of the co-defendants. The court noted that the decision to deny severance of co-defendants is reviewed for abuse of discretion. When defendants are indicted together for related offenses, the "preference" is for a joint trial, particularly in longer and more complex cases. This promotes more efficient use of court resources, avoids witnesses having to repeatedly return to court for repetitive testimony, and helps avoid inconsistent verdicts among codefendants, among other benefits. Only in "relatively few" instances have convictions been vacated for an abuse of discretion as to severance. Here, one appellant claimed error in the trial judge's failure to sever his trial based on the fact that evidence presented at the joint trial included violent acts in which he did not participate and was not involved. This argument was foreclosed by *U.S. v. Dinkins*, 691 F.3d 358 (4th Cir. 2012) (severance of defendants not required solely due to different defendant being charged with different murders where all were a part of the conspiracy, all were charged with a murder in furtherance thereof, and all had similar degrees of culpability). Other defendants argued that another co-defendant presented a defense antagonistic to their defenses, and the cases should have been severed on that basis. Under *Zafiro v. U.S.*, 506 U.S. 534, 538 (1993), "mutually antagonistic defenses are not prejudicial per se." Severance is required only where "there is such a stark contrast presented by the defenses that the jury is presented with the proposition that to believe the core of one defense it must disbelieve the other, or that the jury will unjustifiably infer that this conflict alone demonstrates that both are guilty." *Chavez* slip op. at 19. Here, the one codefendant's defense alleged to be antagonistic to that of the others involved a claim that he did not know about the plan to commit murder before it occurred. This was consistent with the defenses of the other codefendants, which all focused on the lack of proof as to who was present at which murder, who actually participated in the murder, and who knew about the plans to commit murder ahead of time. Thus, the court found the defense "perfectly consistent with the core of the defense[s]" presented by the other codefendants.

Jury Instructions

Although the trial court erred with respect to its jury instructions for felony child abuse by sexual act under G.S. 14-318.4(a2) the error did not rise to the level of plain error

State v. Alonzo, ___ N.C. App. __, 819 S.E.2d 584 (Aug. 21, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 733 (Sep. 7, 2018). The trial court instructed the jury in accordance with the Pattern Jury

Instruction, N.C.P.I.--Crim. 239.55B. That instruction defines a sexual act as "an immoral, improper or indecent act by [Defendant] upon [Sandy] for the purpose of arousing, gratifying sexual desire." On appeal the defendant argued that definition is not in accord with the court's precedent. The court agreed, noting that it held in *State v. Lark*, 198 N.C. App. 82 (2009), that the term "sexual act" is defined by G.S. 14-27.20(4) (formerly G.S. 14-27.1(4)) to include "cunnilingus, fellatio, analingus, or anal intercourse, but does not include vaginal intercourse. Sexual act also means the penetration, however slight, by any object into the genital or anal opening of another person's body: provided, that it shall be an affirmative defense that the penetration was for accepted medical purposes." Although a later decision by the court declined to apply that definition to the charge at issue, the court found itself bound by its earlier decision that did so. It noted:

> This . . . indicates the necessity of updating the Pattern Jury Instructions to be in accordance with our precedent. The Pattern Jury Instruction's definition of sexual act must conform with this Court's definition in Lark. (citation omitted)

The court went on to hold that the error did not rise to the level of plain error, finding that the defendant failed to demonstrate that the jury would have reached a different verdict had correct jury instructions been given, with the proper definition of the term sexual act.

Trial court committed prejudicial error in voluntary manslaughter case by denying the defendant's request for a jury instruction on defense of habitation

State v. Kuhns, ___ N.C. App. ___, 817 S.E.2d 828 (July 3, 2018). The trial court denied the defendant's requested instruction, finding no evidence that the victim was "trying to break in." According to the trial court, the defendant's evidence demonstrated that he was attempting to prevent injury to himself, not trying to prevent someone coming into his curtilage or home. The trial court's ruling was erroneous. As explained in the "Note Well" in the jury instruction, the use of force is justified when the defendant is acting to prevent a forcible entry into the defendant's home or to terminate an intruder's unlawful entry into the home, a term that includes the curtilage. Here, the victim was standing within the curtilage of the defendant's property when the defendant fired the fatal shot. The court rejected the State's argument that the defendant was not entitled to the instruction because the victim never came onto the defendant's porch and never tried to open the door to the defendant's trailer, finding that it "defies the plain language of the statute." Despite numerous requests to leave and multiple orders from law enforcement, the victim continued to return to the curtilage of the defendant's property while repeatedly threatening bodily harm. Thus, the trial court erred by denying the defendant's request for the jury instruction, and this error required reversal. John Rubin blogged about the case here.

Prejudicial error to omit no duty to retreat and stand your ground instructions

State v. Irabor, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). In a case where the defendant was found guilty of second-degree murder, assault with a deadly weapon, and discharging a firearm into an occupied dwelling, the trial court committed prejudicial error by failing to include no duty to retreat and stand your ground provisions in the jury instruction on self-defense. Viewed in the light most favorable to the defendant, the defendant was aware of the victim's violent and dangerous propensities on the night of the shooting. The defendant's testimony established, among other things, that the victim had achieved high-ranking gang membership by killing a rival gang member, that the defendant saw the victim rob others multiple times, and that he knew the victim always carried a gun. The defendant's knowledge of the victim's violent propensities, being armed, and prior acts support a finding that the defendant reasonably believed it was necessary to use deadly force to save himself from death or great

bodily harm. Prior to the shooting, the victim stood outside of the defendant's apartment with two others and waited to confront the defendant about an alleged prior incident. The defendant also testified that he borrowed a gun for protection. When the victim noticed the defendant walking towards his apartment, the victim told the defendant, "this is war, empty your pocket", continued to advance after the defendant fired two warning shots, and lunged at the defendant while reaching behind his back towards his waistband. In the light most favorable to the defendant, a jury could conclude that the defendant actually and reasonably believed that the victim was about to shoot him and it was necessary to use deadly force to protect himself. The fact that the defendant armed himself does not make the defendant the initial aggressor. Although law enforcement officers did not find a gun when they searched the victim's body, evidence presented at trial suggested that he may have been armed. Thus, a jury could infer that the defendant reasonably believed the victim was armed at the time of the altercation.

(1) Trial court did not commit plain error by instructing the jury in defendant's trial on rape and sex offense charges that it could find that the victim suffered serious personal injury in the form of mental injury even though the State presented no evidence of mental injury

State v. Gentle, ___ N.C. App. ___, 817 S.E.2d 833 (July 3, 2018). (1) In this rape and sex offense case, the court rejected the defendant's argument that the trial court committed plain error by instructing the jury that it could find that the victim suffered serious personal injury in the form of mental injury; even if error occurred, it had no probable impact on the verdict. The defendant argued that the jury instruction was improper because the State presented no evidence of mental injury. The court noted that for several decades the appellate courts had held that it was per se error for the trial court to instruct the jury on a theory that was not supported by the evidence. However, in *State v. Boyd*, 366 N.C. 548 (2013) (per curiam), the Supreme Court shifted away from the per se rule. Now, a reviewing court must determine whether such an instruction constituted reversible error, without being required to assume that the jury relied on the inappropriate theory. Under North Carolina law, evidence of bodily or mental injuries can constitute serious personal injury for the purposes of forcible rape and forcible sex offense. Here, there was substantial evidence that the defendant inflicted bodily harm on the victim, who was seven months pregnant. The victim struggled to protect her stomach while the defendant forcibly dragged her down 33 concrete stairs and into nearby woods. She sustained extensive bruises and abrasions to most of the left side of her body, including her leg, abdomen, back, side, arm, and shoulder. Although some of the wounds were superficial, others were more significant abrasions. A nurse who testified at trial compared her injuries to "road rash" that a person might suffer after falling off a motorcycle traveling at 55 mph. The victim testified that her injuries were painful and she still bore extensive scars at trial. The court concluded that even assuming arguendo that there was no evidence to support the trial court's instruction on mental injury, the defendant failed to meet his burden of showing that the alleged error had any probable impact on the jury's verdict.

Jury Management

No error to dismiss juror mid-trial for misconduct in failing to abide by the court's instructions and providing different answers in response to inquiries by the court

State v. Knight, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). The trial court did not err by dismissing an empaneled juror. During trial he State moved for the trial court to inquire into the competency of Juror 7 to render a fair and impartial verdict. The trial court conducted a hearing in which a bailiff testified that the juror asked the bailiff "if they could have prayer during the breaks in the jury

room," and said that "he felt it was inappropriate and rude for [the District Attorney] to be pointing at people in the audience while a witness was testifying." Upon questioning, the juror said that he did not remember making any statement pertaining to the case and agreed that he had not formed an opinion that would affect his ability to be a fair and impartial juror. Rather than dismiss the juror, the trial court gave curative instructions to the jury. Later that day, the State played audio from a jailhouse call between the defendant and his mother, revealing that the defendant's mother knew Juror 7. The State renewed its request to dismiss the juror. The trial court again asked the juror whether he had made the comment about the district attorney being rude. The juror admitted that he could "vaguely remember" discussing the jury's security and whether he could pray for the jury because he believed they were "in jeopardy somehow." The trial court made findings of fact indicating that the juror provided a different response to the same question during separate hearings and ignored the trial court's instructions. In these circumstances, the trial court did not abuse its discretion by dismissing the juror.

Jury Selection

Trial court did not abuse its discretion by preventing the defendant from rehabilitating a juror

State v. Enoch, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). During jury selection in this non-capital first-degree murder case, the State questioned prospective juror Terrance Copling, who said he was familiar with the defendant's family, did not know the defendant personally, and could be impartial and fair to both sides. However, when pressed by the State, Copling admitted that his connection to the defendant's father would "probably cause issues." The State moved to dismiss Copling for cause. The trial court denied the defendant's request to rehabilitate and upon questioning by the trial court Copling indicated that because of his connection to the defendant's family he could not be impartial. The trial court allowed the State's challenge for cause and excused Copling over the defendant's objection. The defendant also wanted to rehabilitate prospective juror Clapp, believing that the State's questions had confused her. The trial court rejected this request and excused Clapp for cause. The defendant was convicted and appealed. The court reasoned that in non-capital cases the trial court has discretion regarding whether to allow rehabilitation during voir dire. Here, although the trial court initially told the defendant that rehabilitation was not permissible in a non-capital case, the trial court later allowed for the possibility of rehabilitation and thus did not establish a blanket ruling against all rehabilitation. It further found that the trial court properly exercised its discretion by denying the defendant's request to rehabilitate jurors.

Court rejected defendant's *Batson* challenges in murder and robbery trial

State v. Hobbs, ___ N.C. App. ___, 817 S.E.2d 779 (July 17, 2018). In this murder and robbery case that was tried capitally but for which a sentence of life in prison was imposed, the court rejected the defendant's *Batson* challenge. As to jurors Layden and Humphrey, the defense asserted that the State had used six out of eight peremptory challenges to excuse black jurors, even though the responses from those jurors were similar to whites who were not excused. The defendant did not assert his first *Batson* challenge until after the State had exercised its eighth peremptory strike. Where a defendant has not made any previous *Batson* challenge, the trial court is not obligated to inquire into the reasons for striking those previously excused. At the time of the challenge, 11 black potential jurors were examined by the State, and the State passed five, one of whom was later dismissed by the trial court for cause. The defendant used two of five peremptory challenges to strike black jurors. At the time of the first challenge, the jury consisted of two white males, two black males, and two white females. If the defendant had not used its two strikes, the composition of the jury at the time of the first challenge

would have been four black jurors (3 males and one female) and four white jurors. Continuing with its consideration of the other relevant factors, the court noted that the defendant is black, the murder victim was white, at least one of the robbery victims was black, and certain key witnesses were black. Additionally, the prosecutor did not make any racially motivated comments or ask racially motivated questions. Considering these factors, the trial court did not err in finding that the defendant failed to establish a prima facie case with respect to jurors Layden and Humphrey.

With respect to juror Landry, the court noted that the defendant raised his second *Batson* challenge after the State had exercised its ninth peremptory challenge. The trial court noted that the State had used seven out of nine peremptory challenges to excuse black prospective jurors and that the defendant had established a prima facie case. The State's proffered reasoning for striking Landry were: he believed drugs and alcohol can make people do things they did not want to do; he mentored individuals with substance abuse issues in his church; his uncle died in prison while serving two life sentences; he stated that he believed a life sentence was taking a life; he left several questions on the juror questionnaire unanswered; he gave some "perplexing" responses to questions; he allegedly walked out of court once singing "the sun will come out tomorrow"; he nodded affirmatively when another juror, who was excused for cause, mentioned her religious belief against the death penalty; he had been in a gang and had heard that the defendant was in a gang; he failed to appear in court on previous occasions; and he stated he would hold it against the State if it did not present all the evidence. The defendant failed to show any error in the trial court's conclusion that the State's reasons for dismissing the juror were race neutral. Although the defendant argued that there were similar concerns with several white jurors who were not excused, he does not specify the white jurors in question. Considering the record, the court found this argument to lack merit. Also, while some jurors had one factor in common with Landry, none presented the same range of issues.

With respect to juror McNeill, the defendant's third *Batson* challenge was asserted after the State had exercised its eleventh peremptory challenge. At the time of this challenge, the State had used eight out of eleven peremptory challenges to excuse black prospective jurors and had passed eight black prospective jurors to the defendant. Two of those jurors were seated on the panel, one was dismissed for cause, and five of the prospective black jurors were struck by the defendant's peremptory challenges. The State asserted that McNeill hesitated to reply when asked if he could vote to impose the death penalty, and then stated he preferred life in prison over the death penalty. Additionally he disclosed he had family members with substance abuse issues, a sister with apparent anxiety, and as a pastor, had often counseled individuals with substance abuse issues. The State presented valid, race neutral reasons for excusing this juror.

Trial court may determine race of prospective jurors based on its observations for Batson challenge where race is "clearly discernable"

State v. Bennett, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). In this drug case, the court rejected the defendant's *Batson* claim, concluding that the defendant failed to make a prima facie case. With respect to the trial court's findings regarding the jurors' race, the court rejected the notion "that the only method a trial court may use to support a finding concerning the race of a prospective juror is to ask that juror (and, apparently, just accept the juror's racial self-identification)." It held, in part:
[I]f the trial court determines that it can reliably infer the race of a prospective juror based upon its observations during voir dire, and it thereafter makes a finding of fact based upon its observations, a defendant's burden of preserving that prospective juror's race for the record has been met. Absent evidence to the contrary, it will be presumed that the trial court acted properly – i.e. that the evidence of the prospective juror's race was sufficient to support the trial court's finding in that regard. If the

State disagrees with the finding of the trial court, it should challenge the finding at trial and seek to introduce evidence supporting its position. Questioning the juror at that point could be warranted. Here, however, the State clearly agreed with the trial court's findings related to the race of the five identified prospective jurors. Absent any evidence that the trial court's findings were erroneous, "we must assume that the trial court's findings of fact were supported by substantial competent evidence."

The court continued, noting that nothing in the case law requires "the trial court to engage in needless inquiry if a prospective juror's race is clearly discernable without further inquiry." Citing the record, the court determined that here it was clearly discernable to the trial court and the lawyers that five African-Americans had been questioned on voir dire, that three made it onto the jury, and that the other two were excused pursuant to the State's peremptory challenges. The trial court found that on these facts, the defendant failed to make a prima facie case. Assuming arguendo, that defendant's argument was properly preserved for appeal, the court found no error. One judge concurred only in the result, concluding that the defendant had waived the *Batson* issue by failing to preserve an adequate record setting forth the race of the jurors.

Juvenile Cases

Trial court committed reversible error by failing to advise juvenile of his right against self-incrimination before he testified

In re J.B., ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018), *temp. stay allowed*, ___ N.C. ___, 818 S.E.2d 640 (Oct. 8, 2018). The petition in this case alleged that the juvenile committed an assault on a teacher. After the State rested, the juvenile took the stand and testified, admitting that he assaulted his teacher. After closing arguments, the trial court informed the juvenile that he had forgotten to advise him of his right against self-incrimination before his testimony. The trial court then asked the juvenile if he understood that right and the juvenile replied "yes." Defense counsel unsuccessfully moved for a dismissal because of the trial court's failure to advise the juvenile. The juvenile was adjudicated delinquent and appealed. The court held that the juvenile was prejudiced by the trial court's violation of the statutory mandate in G.S. 7B-2405, requiring a colloquy between the trial court and the juvenile to ensure that the juvenile understands his right against self-incrimination before testifying. Asking the juvenile whether he understood those rights after his testimony does not satisfy the statute.

Miranda and Custodial Interrogation

On discretionary review of a unanimous decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 33 (2017), the court reversed, holding that the trial court's order denying the defendant's motion to suppress contained sufficient findings of fact to support its conclusion that the defendant knowingly and voluntarily waived his juvenile rights pursuant to G.S. 7B-2101 before making certain incriminating statements

State v. Saldierna, ___ N.C. ___, 817 S.E.2d 174 (Aug. 17, 2018). After the trial court denied the defendant's suppression motion, the defendant entered a negotiated plea reserving his right to seek review of the denial of suppression motion. After sentencing, the defendant appealed. The Court of Appeals held that the trial court erred by denying the suppression motion because the defendant's statement, "Can I call my mom," required the officer to clarify whether the defendant was invoking his right to have a parent present during the interview. The Supreme Court granted the State's petition

seeking discretionary review of that decision, reversed that decision, and remanded to the Court of Appeals for consideration of the defendant's other challenges to the suppression order.

In reversing the Court of Appeals in *Saldierna I,* the Supreme Court concluded that the statement "Can I call my mom" did not constitute a clear and unambiguous invocation of his right to have his parent or guardian present. On remand in (*Saldierna II)* the Court of Appeals found that the trial court's findings of fact did not support its conclusion of law that the State carried its burden of showing that the defendant knowingly, willingly, and understandingly waived his juvenile rights. The Supreme Court granted the State's petition for discretionary review of the Court of Appeals' remand decision in *Saldierna II.* The court noted that the totality of the circumstances analysis requires inquiry into all of the circumstances surrounding the interrogation, including evaluation of the juvenile's age, experience, education, background, and intelligence, and into whether the juvenile has the capacity to understand the warnings given, the nature of his or her rights, and the consequences of waiving those rights. In applying this test to the custodial interrogation of juveniles, the record must be carefully scrutinized, with particular attention to both the characteristics of the accused and the details of the interrogation. However, a defendant's juvenile status does not compel a determination that the juvenile did not knowingly and intelligently waive his or her rights. Instead, the juvenile's age is a factor to consider in the analysis.

Turning to the record before it, the court found that the trial court's findings of fact have adequate evidentiary support and that those findings support the trial court's conclusion that the defendant knowingly and voluntarily waived his juvenile rights. In reaching a contrary conclusion, the Court of Appeals failed to focus on the sufficiency of the evidence to support the findings of fact that the trial court actually made and to give proper deference to those findings. Thus, the Court of Appeals erred in determining that the record did not support the trial court's findings to the effect that the defendant understood his juvenile rights. Although the record contains evidence that would have supported a different determination, it was, at most, in conflict. Evidentiary conflicts are a matter for the trial court, which has the opportunity to see and hear the witnesses. The court further found that the trial court's findings support its conclusion of law that the defendant knowingly, willingly, and understandingly waived his juvenile rights.

Plea Agreement

Although the trial court erred by ordering the defendant to pay restitution for pecuniary losses arising from his alleged perpetration of charges in three indictments dismissed by the State pursuant to a plea agreement, the plea agreement need not be set aside

State v. Murphy, ___ N.C. App. __, 819 S.E.2d 604 (Aug. 21, 2018). The defendant asserted that because he agreed to pay the invalid restitution as part of the plea deal, the appropriate remedy is to set aside the plea agreement. Although agreeing that the restitution order was improper, the court disagreed with the defendant that the plea agreement needed to be set aside. According to the transcript of plea, the plea arrangement provided that "[defendant] will plea to 7 counts of breaking and/or entering in lieu of the charges listed on the back of this transcript[,]" and defendant checked the following box in that same section: 'The defendant stipulates to restitution to the party(ies) in the amounts set out on 'Restitution Worksheet, Notice And Order (Initial Sentencing)' (AOC-CR-611).'" In a plea colloquy with the defendant the trial court specified: "And the plea bargain is that upon your plea of guilty to these seven charges the State will dismiss all other charges," to which the defendant responded, "Yes, sir." The court found that despite the defendant's stipulation to restitution as provided in the State's restitution

worksheet, the defendant never agreed to pay restitution as part of the plea agreement. Rather, as described in the transcript of plea and explained during the plea colloquy, the essential and fundamental terms of the plea agreement were that the defendant would plead to seven counts of felony breaking or entering, and the State would drop the remaining charges. It concluded: "As defendant never agreed to pay restitution as part of the plea agreement, the invalidly ordered restitution was not an "essential or fundamental" term of the deal. Accordingly, we hold the proper remedy here is not to set aside defendant's entire plea agreement but to vacate the restitution order and remand for resentencing solely on the issue of restitution." Jamie Markham blogged about the case here.

Pretrial Release

(1) No statutory right to appeal the denial of motion to dismiss after pleading guilty in DWI case; (2) On remand from the Supreme Court, __ N.C. __, 814 S.E.2d 39 (June 8, 2018), the Court of Appeals declined to exercise its discretion to grant the defendant's petition for a writ of certiorari to review her claim that the trial court erred by denying her motion to dismiss

State v. Ledbetter, ___ N.C. App. __, 819 S.E.2d 591 (Aug. 21, 2018), *temporary stay allowed*, ___ N.C. ___, 818 S.E.2d 695 (Oct. 15, 2018). (1) In a case where the defendant pled guilty to DWI pursuant to a plea agreement and in which the court declined to exercise its discretion to grant the defendant's petition for writ of certiorari, the court noted that the defendant had no right to appeal from an order denying her motion to dismiss, entered prior to her guilty plea. It explained: "This issue is not listed as one of the grounds for appeal of right set forth in N.C. Gen. Stat. § 15A-1444. Defendant has no statutory right to plead guilty, while preserving a right to appeal the denial of her motion to dismiss."

(2) The defendant's motion to dismiss asserted that the State violated G.S. 20-38.4, G.S. 15A-534, and State v. Knoll, 322 N.C. 535 (1988), when the magistrate failed to provide her a written copy of form AOC-CR-271, advising of her right to have witnesses observe her demeanor in jail; and failed to enter sufficient findings of fact to show that the defendant was a danger to herself and others to justify imposing a secured bond pursuant to G.S. 15A-534. Dismissal of charges for violations of statutory rights is a drastic remedy which should be granted sparingly. Before a motion to dismiss should be granted it must appear that the statutory violation caused irreparable prejudice to the preparation of the defendant's case.

On the first issue, the State conceded that the magistrate did not comply with G.S. 20-38.4 in that the magistrate did not inform the defendant in writing of the established procedure to have others appear at the jail to observe her condition and failed to require her to list all persons she wanted to contact and telephone numbers on the relevant form. However, the State argued that the defendant could not demonstrate irreparable prejudice to the preparation of her case because the magistrate orally informed the defendant of her right to have witnesses present to observe her condition. In denying the motion to dismiss, the trial court found that the magistrate told the defendant of her right to have individuals come to the detention center to observe her condition and that once she was placed in the detention center, the defendant was allowed to make phone calls to several identified people. These findings are supported by competent evidence.

With respect to the defendant's argument that the magistrate violated G.S. 15A-534, the magistrate testified that he considered the defendant's condition in deciding whether to impose a secured bond

and initially entered his reasons on his computer for imposing a secured bond into the "FINDINGS" section of form AOCCR-270. However, he accidently deleted his reasons listed on form AOC-CR-270 and they were replaced with the text and finding of "BLOOD TEST." Competent evidence supports the trial court's findings that the magistrate considered the factors in G.S. 15A-534 in setting the defendant's bond, and found by clear, cogent, and convincing evidence that the defendant's physical or mental faculties were impaired and that she was a danger to herself, others or property if released.

The defendant failed to show that she was denied access to witnesses, her right to have witnesses observe her condition, or her right to collect evidence and did not demonstrate irreparable prejudice to the preparation of her case by the magistrate's statutory violations and failures to provide her with a copy of form AOCCR-271 or to make additional factual findings to justify imposing a secured bond under G.S. 15A-534. The court noted that the defendant was informed of her right to have witnesses observe her and had the means and was provided the opportunity to contact potential witnesses. Additionally, the magistrate's detention order required the defendant to remain in custody for a twelve-hour period or until released into the custody of a sober, responsible adult. In fact, the defendant was released into the custody of a sober acquaintance after spending only two hours and fifty-three minutes in jail.

The court went on to reject the defendant's argument that she was per se prejudiced by the magistrate's statutory violations, pursuant to *State v. Hill*, 277 N.C. 547 (1971). Distinguishing *Hill* the court noted that no evidence in the record suggests the State took affirmative steps to deprive the defendant of any access to potential witnesses or an attorney, such as by preventing them from talking to the defendant or entering the jail to observe her. It continued: "Unlike the defendant in *Hill*, Defendant was told of her right to have observers present, was not limited to one phone call following her arrest, was allowed and did make numerous calls to multiple individuals and was released to a sober adult within less than three hours. Additionally, the Supreme Court later acknowledged in *Knoll* that the per se prejudice rule stated in *Hill* is no longer applicable."

Ultimately the court found that the defendant's arguments failed to demonstrate "irreparable prejudice to the preparation of defendant's case" and that that she did not raise any "good and sufficient cause" to support the court's exercise of its discretion to grant her petition and issue the writ of certiorari.

Superior court lacked subject-matter jurisdiction to grant habeas relief for allegedly unlawful immigration detention

Chavez v. Carmichael, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). In this appeal by the Mecklenburg County Sheriff from orders of the Superior Court ordering the Sheriff to release two individuals from his custody, the court vacated and remanded to the trial court to dismiss the habeas corpus petitions for lack of subject matter jurisdiction. Defendant Lopez was arrested for common law robbery and other charges and was incarcerated in the County Jail after arrest on a $400 secured bond. He then was served with an administrative immigration arrest warrant issued by the Department of Homeland Security (DHS). Additionally DHS served the Sheriff with an immigration detainer, requesting that the Sheriff maintain custody of Lopez for 48 hours to allow DHS to take custody of him. Defendant Chavez was arrested for impaired driving and other offenses and detained at the County Jail on a $100 cash bond. He also was served with a DHS administrative immigration warrant, and the Sheriff's office was served with a DHS immigration detainer for him. On October 13, both defendants satisfied the conditions of release set on their state charges, but the Sheriff continued to detain them pursuant to the immigration detainers and arrest warrants. That day they filed petitions for writs of habeas corpus in Superior Court. The Superior Court granted both petitions and, after a hearing, determined that the defendant's detention was unlawful and ordered their immediate release. However, before the court

issued its orders, the Sheriff's office had turned physical custody of both of the defendants over to ICE officers. The Sheriff sought appellate review.

The court began by rejecting the defendants' argument that the cases were moot because they were in ICE custody. The court found that the matter involves an issue of federal and state jurisdiction invoking the "public interest" exception to mootness, specifically, the question of whether North Carolina state courts have jurisdiction to review habeas petitions of alien detainees held under the authority of the federal government.

The court also rejected the defendants' argument that it should not consider the 287(g) Agreement between the Sheriff and ICE because the Agreement was not submitted to the Superior Court. It noted, in part, that the Agreement is properly in the record on appeal and an appellate court may consider materials that were not before the lower court to determine whether subject matter jurisdiction exists. On the central issue, the court held that the Superior Court lacked subject matter jurisdiction to review the defendants' habeas petitions. It began by rejecting the defendants' argument that the Superior Court could exercise jurisdiction because North Carolina law does not allow civil immigration detention, even when a 287(g) Agreement is in place. Specifically, they argued that G.S. 162-62 prevents local law enforcement officers from performing the functions of immigration officers or assisting DHS in civil immigration detentions. The court declined to adopt a reading of the statute that would forbid Sheriffs from detaining prisoners who were subject to immigration detainers and administrative warrants beyond the time they would otherwise be released from custody or jail under state law. Moreover, the court noted that G.S. 128-1.1 specifically authorizes state and local law enforcement officers to enter into 287(g) agreements and perform the functions of immigration officers, including detaining aliens. Finding the reasoning of cases from other jurisdictions persuasive, the court held that "[a] state court's purported exercise of jurisdiction to review the validity of federal detainer requests and immigration warrants infringes upon the federal government's exclusive federal authority over immigration matters." As a result, the trial court did not have subject matter jurisdiction or any other basis to receive and review the habeas petitions or issue orders other than to dismiss for lack of jurisdiction.
Further, it held that even if the 287(g) Agreement between the Sheriff and ICE did not exist or was invalid, federal law—specifically, 8 U.S.C. § 1357(g)(10)(A)-(B)--allows and empowers state and local authorities and officers to communicate with ICE regarding the immigration status of any person or otherwise to cooperate with ICE in the identification, apprehension, detention, or removal of aliens unlawfully in the United States. It continued: "A state court's purported exercise of jurisdiction to review petitions challenging the validity of federal detainers and administrative warrants issued by ICE, and to potentially order alien detainees released, constitutes prohibited interference with the federal government's supremacy and exclusive control over matters of immigration."

The court added: "[a]n additional compelling reason that prohibits the superior court from exercising jurisdiction to issue habeas writs to alien petitioners, is a state court's inability to grant habeas relief to individuals detained by federal officers acting under federal authority." The court cited Supreme Court decisions as standing for the proposition that no state judge or court after being judicially informed that a person is imprisoned under the authority of the United States has any right to interfere with the person or require the person to be brought before the court. On this point it stated: "In sum, if a prisoner's habeas petition indicates the prisoner is held: (1) under the authority, or color of authority, of the federal government; and, (2) by an officer of the federal government under the asserted "authority of the United States", the state court must refuse to issue a writ of habeas corpus." Here, it was undisputed that the Sheriff's continued detention of the defendants after they were otherwise released from state custody was pursuant to federal authority delegated to the Sheriff's office under the 287(g)

Agreement, and after issuance of immigration arrest warrants and detainers. Additionally, 8 U.S.C. § 1357(g)(3) indicates state and local law enforcement officers act under color of federal authority when performing immigration functions authorized under 287(g) agreements. Thus, the Sheriff was acting under the actual authority of the United States by detaining the defendants under the immigration enforcement authority delegated to him under the agreement, and under color of federal authority provided by the administrative warrants and detainer requests. The court next turned to whether the Sheriff was acting as a federal officer under the 287(g) Agreement by detaining the defendants pursuant to the detainers and warrants, noting that the issue was one of first impression. Considering federal authority on related questions, the court concluded: "To the extent personnel of the Sheriff's office were deputized or empowered by DHS or ICE to perform immigration functions, including detention and turnover of physical custody, pursuant to the 287(g) Agreement, we find . . . federal cases persuasive to conclude the Sheriff was empowered and acting as a federal officer by detaining Petitioners under the detainer requests and administrative warrants." Because the defendants were being detained under express, and color of, federal authority by the Sheriff who was acting as a de facto federal officer, the Superior Court was without jurisdiction, or any other basis, to receive, review, or consider the habeas petitions, other than to dismiss them for lack of jurisdiction, to hear or issue writs, or intervene or interfere with the defendants' detention in any capacity. The court went on to hold that the proper jurisdiction and venue for the defendants' petitions is federal court.

Right to Counsel

Trial court did not err in concluding that defendant forfeited his right to counsel

State v. Forte, ___ N.C. App. ___, 817 S.E.2d 764 (July 3, 2018), *temp. stay allowed*, ___ N.C. ___, 815 S.E.2d 382 (July 18, 2018). When the case came on for trial, the defendant was represented by his third attorney, Smith, who moved to withdraw citing irreconcilable differences with the defendant. The court of appeals described what then transpired as follows:

> Defendant tried to speak twice as the trial court called the case for trial. Defendant interrupted Smith as Smith addressed his motion to withdraw. Smith explained to the trial court how Defendant refused to answer Smith's questions about the case, and how Defendant frequently interrupted him. Defendant argued with Smith about undisputed issues. Defendant also told Smith he would present evidence, but refused to tell Smith the substance of the evidence. Additionally, Defendant did not believe Smith's explanation of the law. Finally, Defendant filed a complaint against Smith with the State Bar.
>
> Defendant constantly interrupted the trial court as it tried to explain to Defendant his right to be represented by counsel. Because Defendant would not allow the trial court to discuss Defendant's rights to counsel, the trial court excused Defendant and Smith from the courtroom in order for Smith to explain involuntary waiver or forfeiture of counsel. Additionally, in addressing a discovery dispute, the trial court instructed Defendant to hand up everything he had for the court to review. Defendant obstructed handing discovery to Smith to hand to the trial court. The court found Defendant continually interrupted the court for two hours, and he often refused to listen to questions and answer the questions as the trial court was trying to go over his right to counsel. The trial court found Defendant was not trying to understand the process, but was rather just being difficult.

The trial court determined that the defendant's actions in refusing to cooperate with his lawyer and to be argumentative with his lawyer and the trial court were willful and intentional and designed to obstruct and delay the proceedings. The trial court therefore found that the defendant had forfeited his right to counsel. Noting that there is no bright line rule as to the degree of misconduct that justifies a forfeiture of the right to counsel, the court held that the trial court properly found a forfeiture in this case.

Statute of Limitations

On discretionary review of a unanimous, unpublished decision below, the court reversed, ruling on the "*Turner* issue" presented in this case and holding that the misdemeanor DWI prosecution was not barred by the two-year statute of limitations in G.S. 15-1

State v. Curtis, ___ N.C. ___, 817 S.E.2d 187 (Aug. 17, 2018). On August 1, 2012, the defendant was cited for DWI. A magistrate's order was issued on August 9, 2012. On April 21, 2015, the defendant objected to trial on the citation and moved for a statement of charges and to dismiss. The defendant argued that because she was filing a pretrial objection to trial on a citation, the State typically would be required to file a statement of charges. However, she further argued that because G.S. 15-1 establishes a two-year statute of limitations for misdemeanors, the charges must be dismissed. In a Preliminary Indication, the District Court found a statute of limitations bar and dismissed the charges. The State appealed to Superior Court, arguing that the magistrate's order tolled the statute of limitations. The Superior Court affirmed the District Court's Preliminary Indication and the State appealed to the Court of Appeals. That court found the procedural and legal issues identical to those in State v. Turner, ___ N.C. App. ___, 793 S.E.2d 287 (2016), adopted the reasoning of that decision, and held that the District Court did not err by granting the motion to dismiss. The State again sought review, arguing that any criminal pleading that establishes jurisdiction in the district court tolls the two-year statute of limitations. The Supreme Court agreed. The Supreme Court found the citation was a constitutionally and statutorily proper criminal pleading that conveyed jurisdiction to the District Court to try the defendant for the charged misdemeanor. The court went on to hold that the citation tolled the statute of limitations. The court found itself unable to "conclude that the General Assembly intended the illogical result that an otherwise valid criminal pleading that vests jurisdiction in the trial court would not also toll the statute of limitations." Jeff Welty blogged about the case here.

Sentencing

Aggravating and Mitigating factors

Trial court did not err by denying defendant's MAR challenging his aggravated sentence

State v. Edwards, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). In a case involving convictions for attempted first-degree murder, statutory sex offense with a child by an adult, assault with a deadly weapon inflicting serious injury, first-degree kidnapping, and taking indecent liberties with a child, the trial court did not err by denying the defendant's MAR challenging his aggravated sentence. The defendant's MAR asserted that the State failed to allege the aggravating factors in the indictment and to narrowly define the aggravating factors in violation of *Apprendi*. The court began by rejecting the defendant's argument that aggravating factors must be alleged in the indictment. Here, the State

complied with G.S. 15A-1340.16, filing a written notice of aggravating factors months before trial that informed the defendant that the State sought to prove two identified statutory aggravating factors. After the jury convicted the defendant of the underlying offenses, the court allowed the State to proceed on the aggravating factors, and the jury found that each offense was especially heinous, atrocious, or cruel and that the victim was very young. The State complied with the statute and the procedure prescribed by the statute satisfies *Apprendi.* The court went on to reject the defendant's argument that the jury instruction for the heinous, atrocious, or cruel aggravating factor was unconstitutionally vague, citing controlling precedent.

Juveniles and Miller Claims

Trial court's finding that the defendant's potential for rehabilitation was speculative rendered him ineligible for life without parole

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018), *temporary stay allowed*, ___ N.C. ___, 818 S.E.2d 639 (Oct. 5, 2018). In a case where the trial court found that the juvenile's likelihood of rehabilitation was uncertain and sentenced him to life in prison without parole, the court vacated and remanded for the defendant to be resentenced to life with the possibility of parole. The defendant was convicted of two counts of first-degree murder. He was 17 years old at the time of the crimes. The trial court sentenced the defendant to two consecutive terms of life in prison without the possibility of parole. Following the United States Supreme Court's *Miller* decision, the defendant sought and obtained a new sentencing hearing. After considering the evidence and arguments by counsel at the new hearing, the trial court entered an order that concluded, in part: "There is no certain prognosis of Defendant[']s possibility of rehabilitation. The speculation of Defendant's ability to be rehabilitated can only be given minimal weight as a mitigating factor." The trial court sentenced the defendant to two consecutive sentences of life without parole and the defendant appealed.

Citing state Supreme Court precedent, the court quickly rejected the defendant's argument that G.S. 15A-1340.19B (the post-*Miller* sentencing scheme for juveniles) is unconstitutional on its face.

However, the court agreed with the defendant that the trial court's finding that the defendant's potential for rehabilitation was speculative rendered him ineligible for life without parole. The court noted that the case required it to address a question of first impression: whether the Supreme Court's holdings require trial courts to determine, as a threshold matter, whether a juvenile defendant is eligible for such punishment independent of other relevant factors, or whether it merely identifies additional factors that the trial court must consider as it weighs the totality of circumstances in making its sentencing decision. Considering the case law, the court stated:

> [W]e hold that whether a defendant qualifies as an individual within the class of offenders who are irreparably corrupt is a threshold determination that is necessary before a life sentence without parole may be imposed by the trial court. This holding is not inconsistent with the North Carolina Supreme Court's rejection of a specific factfinding requirement. Rather, we hold that, when a trial court does make a finding about a juvenile offender's possibility of rehabilitation that is inconsistent with the limited class of offenders defined by the United States Supreme Court, a sentence of life in prison without the possibility of parole is unconstitutional as applied to that offender.

Turning to the case at hand, the court concluded that "the trial court erred by imposing a sentence of life in prison without the possibility of parole after making a finding contrary to the defined class of

irreparably corrupt offenders described in our precedent." The trial court made an explicit finding that "there is no certain prognosis" for the defendant's potential for rehabilitation. This finding directly conflicts with the limitation of life in prison without parole for juveniles who are "irreparably corrupt" and "permanently incorrigible." It concluded: "Because the trial court made an explicit finding contrary to a determination that Defendant is one of those rarest of juvenile offenders for whom rehabilitation is impossible and a worthless endeavor, we hold the trial court erred by imposing a life sentence without the possibility of parole."

Trial court did not err by imposing a sentence of life imprisonment without parole on the juvenile defendant

State v. Sims, ___ N.C. App. ___, 818 S.E.2d 401 (Aug. 7, 2018). In 2001 the defendant was tried capitally and convicted of first-degree murder, first-degree kidnapping and burning of personal property. The jury recommended a sentence of life imprisonment without parole, and the trial court entered judgment. The defendant's direct appeal was unsuccessful. In 2013 the defendant filed an MAR requesting a new sentencing hearing in light of the United States Supreme Court's decision in *Miller* which held that mandatory life without parole for juvenile offenders of violates the eighth amendment. The trial court granted the defendant's MAR and ordered a new sentencing hearing. At the end of that hearing the trial court ordered that the defendant's sentence remain life without parole. The defendant appealed. On appeal the defendant argued that the trial court violated his eighth amendment constitutional protection against cruel and unusual punishment by imposing a sentence of life without parole and erred by imposing a sentence of life without parole because it failed to make findings on the presence or absence of *Miller* factors and the findings it did make do not support the conclusion that the sentence was warranted. The court disagreed finding that the trial court complied with the statutory requirements in determining that life imprisonment without parole was warranted. Additionally, the trial court properly made ultimate findings of fact on each of the *Miller* factors as set forth in section 15A1340.19B(c) and did not abuse its discretion in weighing those factors and concluding that life imprisonment without parole was appropriate in the defendant's case.

***Miller* challenges by 18 and 19 year old codefendants rejected**

U.S. v. Chavez, 894 F.3d 593, 2018 WL 3215914 (4th Cir. July 2, 2018). This multi-defendant case from the eastern district of Virginia involved charges of murder in aid of racketeering or conspiracy to commit murder in aid of racketeering for each of the defendants, among other offenses. The prosecution was aimed at disrupting the MS-13 organization. After being convicted at trial, two defendants challenged their life sentences under *Miller v. Alabama,* 543 U.S. 470 (2012). The two defendants were 18 and 19 years old at the time of the commission of the offenses, and argued that their mandatory life sentences violated the Eighth Amendment under *Miller v. Alabama*, 567 U.S. 460 (2012), pointing to the fact that they were "barely over this threshold of adulthood" at the time of their offenses. Rejecting *Miller's* application in this context, the court stated:

> Individual differences in maturity will necessarily mean that age-based rules will have an element of arbitrariness, particularly when they have such stark differences in effect between those just one week below the cut-off and those just one week above. . . But we cannot say this makes them unconstitutional.

Eighth Amendment and Adults

Argument that 138 year minimum sentence for sexual assault of a child was unpreserved and therefore waived

State v. Hill, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). In this child sexual assault case, the court rejected the defendant's argument that the trial court's consecutive sentences, totaling a minimum of 138 years, violated his constitutional right to be free from cruel and unusual punishment under the Eighth Amendment. The court began by finding that because the defendant failed to object to the sentencing on constitutional grounds in the trial court, he failed to preserve the issue for appellate review. The court went on however to reject the defendant's argument on the merits. It noted that a punishment may be cruel or unusual if it is not proportionate to the crime for which the defendant has been convicted. Here, the trial court exercised its discretion and consolidated the 70 verdicts into six identical judgments, each of which were sentenced in the presumptive range, and the trial court ordered that these 276-month sentences be served consecutively.

Probation

Insufficient evidence of absconding where probation officer visited home once, was told the defendant no longer lived there by an unidentified person, and then ceased any effort to contact the defendant

State v. Krider, ___ N.C. ___, 818 S.E.2d 102 (Sept. 21, 2018) (per curiam). On appeal from the decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 810 S.E.2d 828 (2018) (here), the court affirmed per curiam, holding that the State failed to carry its burden of presenting sufficient evidence to support the trial court's decision to revoke the defendant's probation based upon a finding that the defendant willfully absconded probation. It went on, however, to "disavow the portion of the opinion analyzing the pertinence of the fact that defendant's probationary term expired prior to the date of the probation violation hearing and holding 'that the trial court lacked jurisdiction to revoke defendant's probation after his case expired.'" In the opinion below, the Court of Appeals 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. The Court of Appeals held that the evidence was insufficient to establish absconding. It went on to hold that 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 the case here.

Prior Record Level

Divided N.C. Supreme Court holds that defendant's stipulation on record level worksheet to classification of prior murder conviction as a B1 offense was binding and not an improper stipulation to a matter of law

State v. Arrington, ___ N.C. ___, 819 S.E.2d 329 (Oct. 26, 2018). On appeal from a decision of a divided panel of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 845 (2017), the court reversed, holding that

as part of a plea agreement a defendant may stipulate on his sentencing worksheet that a second-degree murder conviction justified a B1 classification. In 2015 the defendant entered into a plea agreement with the State requiring him to plead guilty to two charges and having attained habitual felon status. Under the agreement, the State consolidated the charges, dismissed a second habitual felon status count, and allowed the defendant to be sentenced in the mitigated range. As part of the agreement, the defendant stipulated to the sentencing worksheet showing his prior offenses, one of which was a 1994 second-degree murder conviction, designated as a B1 offense. Over a dissent, the Court of Appeals vacated the trial court's judgment and set aside the plea, holding that the defendant improperly stipulated to a legal matter. The Court of Appeals reasoned that because the legislature divided second-degree murder into two classifications after the date of the defendant's second-degree murder offense, determining the appropriate offense classification would be a legal question inappropriate for a stipulation. Reversing, the Supreme Court noted that the crime of second-degree murder has two potential classifications, B1 and B2, depending on the facts. It continued: "By stipulating that the former conviction of second-degree murder was a B1 offense, defendant properly stipulated that the facts giving rise to the conviction fell within the statutory definition of a B1 classification. Like defendant's stipulation to every other offense listed in the worksheet, defendant's stipulation to second-degree murder showed that he stipulated to the facts underlying the conviction and that the conviction existed."

The court went on to reject the defendant's argument that he could not legally stipulate that his prior second-degree murder conviction constituted a B1 felony. It noted that before 2012, all second-degree murders were classified at the same level for sentencing purposes. However, in 2012 the legislature amended the statute, elevating second-degree murder to a B1 offense, except when the murder stems from either an inherently dangerous act or omission or a drug overdose. Generally, a second-degree murder conviction is a B1 offense which receives nine sentencing points; when the facts of the murder meet one of the statutory exceptions thereby making it a B2 offense, it receives six points. It is undisputed that the State may prove a prior offense through a stipulation. "Thus," the court continued "like a stipulation to any other conviction, when a defendant stipulates to the existence of a prior second-degree murder offense in tandem with its classification as either a B1 or B2 offense, he is stipulating that the facts underlying his conviction justify that classification." Here, the defendant could properly stipulate to the facts surrounding his offense by either recounting the facts at the hearing or stipulating to a general second-degree murder conviction that has a B1 classification. By stipulating to the worksheet, the defendant simply agreed that the facts underlying his second-degree murder conviction fell within the general B1 category because the offense did not involve either of the two factual exceptions recognized for B2 classification.

Where record silent as to proper classification of defendant's prior conviction for possession of drug paraphernalia and the defendant did not stipulate, reversible error to treat conviction as a Class 1 misdemeanor

State v. McNeil, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). Because the State failed to meet its burden of proving that the defendant's 2012 possession of drug paraphernalia conviction was related to a drug other than marijuana, the court remanded for resentencing. Since 2014, state law has distinguished possession of marijuana paraphernalia, a Class 3 misdemeanor, from possession of paraphernalia related to other drugs, a Class 1 misdemeanor. Here, where the State failed to prove that the 2012 conviction was for non-marijuana paraphernalia, the trial court erred in treating the conviction as a Class 1 misdemeanor. Jamie Markham blogged about the case here.

Restitution

Trial court improperly ordered the defendant to pay restitution for losses arising from his alleged perpetration of charges in three indictments dismissed by the State pursuant to a plea agreement

State v. Murphy, ___ N.C. App. __, 819 S.E.2d 604 (Aug. 21, 2018). The defendant appealed judgments entered upon his guilty pleas to seven counts of felony breaking and entering into seven different residences on different dates, and a civil judgment ordering he pay $23,113.00 in restitution to fourteen alleged victims identified in the State's restitution worksheet. In return for the defendant's pleas and his stipulation to restitution as provided in the State's restitution worksheet, the State dismissed thirteen indictments against him, three of which contained the only charges linked to losses suffered by four of the fourteen alleged victims to whom the trial court ordered he pay restitution. The court concluded that "[b]ecause a trial court is only statutorily authorized to order restitution for losses attributable to a defendant's perpetration of crimes for which he or she is convicted, . . . trial court invalidly ordered defendant to pay restitution for pecuniary losses arising from his alleged perpetration of the charges in the three indictments the State dismissed pursuant to the plea agreement." The court vacated the restitution order and remanded for resentencing on the issue of restitution. Jamie Markham blogged about the case here.

Post-conviction

Motions for Appropriate Relief

In this drug trafficking case, the trial court erred by denying the defendant's motion for appropriate relief (MAR) which asserted ineffective assistance of appellate counsel

State v. Baskins, ___ N.C. App. ___, 818 S.E.2d 381 (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 586 (Aug. 27, 2018). Drug were discovered after a vehicle stop. The defendant lost his motion to suppress and after being convicted appealed. On appeal appellate counsel did not challenge the trial court's findings of fact in connection with the suppression motion, and thus they were binding on appeal. After the Court of Appeals affirmed, the defendant filed a MAR alleging ineffective assistance of appellate counsel. Specifically he asserted that there was no evidence to support the finding of fact that the officer was aware of an inspection violation at the time of the stop. The defendant asserted that if appellate counsel had properly challenged this finding of fact, the court would have reversed the trial court's denial of the motion to suppress and vacated the convictions. The trial court denied the defendant's MAR, concluding that to rule favorably would require the court to reverse the order denying the motion to suppress and thus violate the rule that one Superior Court Judge cannot overrule another. The defendant filed a petition for writ of certiorari, which the Court of Appeals granted.

The court began by finding that the rule that one Superior Court Judge cannot overrule another "is generally inapplicable where a judge is tasked with deciding the merits of a defendant's motion for appropriate relief." The court noted that such action is authorized by the MAR statute. Thus, the trial court acted under a misapprehension of the law when it denied the defendant's MAR on grounds that it would impermissibly require the MAR court to overrule another Superior Court Judge.

The court went on to find that the defendant was denied ineffective assistance of appellate counsel. Appellate counsel's failure to challenge the trial court's findings of fact regarding the inspection violation was not a reasonable strategic decision but rather an oversight. In fact, appellate counsel's affidavit stated that counsel had "missed" the issue. Thus, the defendant satisfied the first prong of his ineffective assistance of counsel claim: deficient performance. The court went on to conclude that the defendant was prejudiced by counsel's deficient performance. Here, had appellate counsel challenged the trial court's findings of fact, there is a reasonable probability that the Court of Appeals would have concluded that the trial court's finding that the stop was initiated because of an inspection violation was not supported by competent evidence and thus could not support the trial court's conclusion as to the stop's validity. Specifically, the DMV printout at issue contained no information concerning the vehicle's inspection status and the officers did not claim any other knowledge of the vehicle's inspection violation. In light of the actual DMV information presented, the officers could not have known that the vehicle's inspection was expired at the time of the stop. Given the reasonable probability that the inspection status would not have been found to support the validity of the stop, this court would have proceeded to examine the defendant's arguments pertaining to the two other grounds upon which the trial court based its denial of his motion to suppress, and it likely have found for the defendant on both.

Satellite-Based Monitoring

The court of appeals vacated the trial court's SBM order, which was imposed without a hearing, and remanded for a hearing

State v. White, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 18, 2018). Citing prior case law, the court held that because the trial court failed to conduct a hearing to determine whether it would be constitutional to subject the defendant to SBM upon his release from a prison sentence for rape, the trial court's order enrolling the defendant in SMB for life must be vacated and the matter remanded for a hearing. The court rejected the defendant's argument that the appropriate remedy was to reverse without remanding for a hearing, noting that in this case no hearing whatsoever had been held on the matter.

The court vacated the trial court's order requiring lifetime SBM, concluding that the State cannot establish, at this time, that the defendant's submission to SBM will constitute a reasonable fourth amendment search when the defendant is eventually released from prison

State v. Gordon, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 4, 2018); *temp. stay allowed*, ___ N.C. ___, 818 S.E.2d 112 (Sept. 21, 2018) . The court vacated the trial court's order requiring lifetime SBM, concluding that the State cannot establish, at this time, that the defendant's submission to SBM will constitute a reasonable fourth amendment search when the defendant is eventually released from prison. After the defendant pleaded guilty to statutory rape and other charges, the trial court sentenced the defendant and ordered him to enroll in lifetime SBM upon his release from prison. At the SBM hearing, a probation and parole officer in the sex offender unit explained, among other things, how the SBM device currently in use operates. The defendant's Static-99 score was moderate/low and the officer agreed that based on that score it was not likely that the defendant would commit another sex crime. On appeal the defendant argued that the trial court erred by ordering lifetime SBM because the State failed to meet its burden of proving that imposing SBM was reasonable under the fourth amendment. The court agreed. Because enrollment in the SBM program constitutes a fourth amendment search, the reasonableness of the search must be assessed to determine its constitutionality. The court viewed the SBM order as a general warrant. It explained:

> The satellite-based monitoring program grants . . . expansive authority to State officials. State officials have the ability to access the details of a monitored defendant's private life whenever they see fit. A defendant's trip to a therapist, a church, or a family barbecue are revealed in the same manner as an unauthorized trip to an elementary school. At no point are officials required to proffer a suspicion or exigency upon which their searches are based or to submit to judicial oversight. Rather, the extent of the State's ability to rummage through a defendant's private life are left largely to the searching official's discretion, constrained only by his or her will.

The court noted that it "will not exhibit a more generous faith in our government's benign use of general warrants than did the Founders," and concluded that "Given the unlimited and unfettered discretion afforded to State officials with the satellite-based monitoring system, the State's burden of establishing that the use of satellite-based monitoring will comply with the Fourth Amendment's demand that all searches be "reasonable" is especially weighty."

Here, the State failed to meet its burden of showing that SBM of the defendant will be reasonable. Specifically, the State did not established the circumstances necessary for the court to determine the reasonableness of a search 15 to 20 years before its execution. The general balancing approach ordinarily involves examination of the circumstances existing at the time of the search, including the nature of the privacy interest upon which the search intrudes; the character of the intrusion itself and the information it discloses; as well as the nature and immediacy of the government concerns at issue and the efficacy of the means for meeting it. In prior decisions the court was able to determine the reasonableness of SBM orders because the defendants had already become subject to the monitoring at the time of the court's decisions. Thus, the court could examine the totality of the circumstances to determine the reasonableness of the search. Here, there is a lack of knowledge concerning the future circumstances relevant to the analysis. For example, the court explained, we do not yet know the extent of the invasion that the search will entail when the SBM eventually is implemented on the defendant. The State focuses on the limited impact of the monitoring device itself, but provides no indication that the monitoring device currently in use will be similar to that which may be used 15 to 20 years in the future. Additionally, the State has been unable to adequately establish the government's need to conduct the search. Among other things, the State's evidence "falls short of demonstrating what Defendant's threat of recidivism it will be after having been incarcerated for roughly 15 years." The only individualized measure of the defendant's risk of reoffending was the Static-99, which the State's witness characterized as indicating that the defendant was not likely to recidivate. The court concluded:

> Without reference to the relevant circumstances that must be considered, the State has not met its burden of establishing that it would otherwise be reasonable to grant authorities unlimited discretion in searching—or "obtaining"—Defendant's location information upon his release from prison. Authorizing the State to conduct a search of this magnitude fifteen to twenty years in the future based solely upon scant references to present circumstances would defeat the Fourth Amendment's requirement of circumstantial reasonableness altogether.

The court vacated the trial court's order and remanded with instructions for the trial court to dismiss the State's application for SBM monitoring without prejudice to the State's ability to reapply.

Following *State v. Grady*, __ N.C. App. __, 817 S.E.2d 18 (May 15, 2018), the court held, over a dissent, that absent any evidence that SBM is effective to protect the public from sex offenders, the trial court erred by imposing SBM for 30 years

State v. Griffin, ___ N.C. App. ___, 818 S.E.2d 336 (Aug. 7, 2018), *temp. stay allowed*, ___ N.C. ___, 817 S.E.2d 210 (Aug. 24, 2018). The defendant proffered an Alford plea to first-degree sex offense with a child. The defendant was sentenced and released from prison. Eleven years later, he was subjected to a "bring-back" hearing to determine whether he would be required to participate in SBM. At that hearing, the trial court ordered the defendant to enroll in SBM for 30 years. The defendant appealed, arguing that the trial court violated his fourth amendment rights by ordering him to submit to SBM for 30 years. The court agreed. *Grady* held that absent evidence that SBM is effective in serving the State's compelling interest in protecting the public from sex offenders, the State fails to meet its burden to prove that SBM is reasonable as required by the fourth amendment. Here, as in *Grady,* the State presented no evidence regarding the efficacy of the SBM program. Having found that the State failed to prove that SBM is a reasonable search compliant with the fourth amendment because it presented no evidence that the program is effective to serve the State's interest in protecting the public against sex offenders, the court declined to reach the issue of whether the trial court's order or the State's evidence regarding the defendant's individual threat of reoffending meets minimum constitutional standards. Jamie Markham blogged about the case here.

Defendant failed to preserve for appellate review his claim that the trial court erred by requiring him to enroll in satellite-based monitoring (SBM)

State v. Lindsey, ___ N.C. App. ___, 818 S.E.2d 344 (Aug. 7, 2018). The defendant failed to preserve for appellate review his claim that the trial court erred by requiring him to enroll in satellite-based monitoring (SBM). The defendant asserted that the State failed to meet its burden of proving that imposing SBM is reasonable under the fourth amendment. Because the defendant raised no fourth amendment objection at the SBM hearing and the issue was not implicitly addressed or ruled upon by the trial court, it was not preserved for appellate review. In its discretion, the court declined to grant review under Rule 2, reasoning that the law was well-established at the time of the hearing and the State was not on notice of the need to address *Grady* issues due to the defendant's failure to raise the constitutional issue.

Appellate Issues

Error, but not plain error, to give aiding and abetting instruction unsupported by the evidence

State v. Maddux, ___ N.C. ___, 819 S.E.2d 367 (Oct. 26, 2018). On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 463 (2017), the court held that although the trial court erred in giving an aiding and abetting instruction, the Court of Appeals incorrectly concluded that the error amounted to plain error. The defendant was charged with manufacturing methamphetamine and trafficking in methamphetamine by manufacture and by possession. The trial court instructed the jury—without objection—that it could find the defendant guilty either through a theory of individual guilt or as an aider and abettor. The defendant was convicted and appealed. The Court of Appeals held that the trial court erred in giving the aiding and abetting instruction because it was not supported by the evidence, and that this error constituted plain error. The State sought review. The Supreme Court agreed that the trial court erred in giving the aiding and abetting instruction but held that no plain error occurred. To demonstrate that a trial court committed plain error, the defendant must show that a fundamental error occurred. To show this, a defendant must establish prejudice—that after examining the entire record, the error had a probable impact on the jury's finding of guilt. Because plain error is to be applied cautiously and only in the exceptional case,

the error will often be one that seriously affects the fairness, integrity or public reputation of judicial proceedings. Here, the Court of Appeals indicated that the lack of overwhelming and uncontroverted evidence required the conclusion that a jury probably would have reached a different result had the erroneous instruction not been given. The Supreme Court found that this was error, clarifying that its precedent does not hold that plain error is shown, and a new trial is required, unless the evidence against the defendant is overwhelming and uncontroverted. Considering the entire record, the court held that ample evidence of the defendant's individual guilt made it unlikely that the improper instruction had a probable impact on the jury's finding that the defendant was guilty. Specifically, the court noted all of the items found throughout the defendant's residence that the State's witnesses identified as being commonly used in the production of methamphetamine, including immediate precursor chemicals to the manufacture of methamphetamine, and all of the evidence found inside the one-pot meth lab and burn barrel on the defendant's property, including the plastic bottles that tested positive for methamphetamine and pseudoephedrine. It concluded: "After examining the entire record, we conclude that the erroneous aiding and abetting instruction did not have a probable impact on the jury's finding that defendant was guilty because of the evidence indicating that defendant, individually, used the components found throughout his house to manufacture methamphetamine in the one-pot meth lab on his own property."

Where trial transcript was missing critical portions of testimony and defendant made significant (but unsuccessful) efforts to reconstruct the missing portions on appeal, meaningful appellate review was impossible and warranted a new trial

State v. Yates, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). In this case involving convictions for kidnapping, communicating threats, assaults, breaking or entering, rape, and sexual assault, the court held that because a recording equipment malfunction prevented the court reporter from producing a full transcript of the trial, including crucial portions of the victim's testimony such as cross-examination, the defendant is entitled to a new trial. The defendant's trial began on 16 August 2016. On 19 August 2016 the jury returned its verdicts. On appeal the defendant argued that he was denied a meaningful appeal because a portion of the trial transcript from 18 August 2016 is missing. The court found that the defendant had made sufficient efforts (described in the opinion) to reconstruct the missing portion of the transcript and that the alternative was inadequate. On the latter point, appellate counsel was able only to verify that cross-examination of the victim took place at this time, but not the substance of that testimony. The court further found that the lack of an adequate alternative to a verbatim transcript denied the defendant of meaningful appellate review such that a new trial is required.

(1) Challenge to 404(b) evidence not preserved where no objection made during trial; (2) where defendant solicited unqualified expert opinion on cross, any error was invited and the issue waived on appeal

State v. Hairston, ___ N.C. App. ___, ___ S.E.2d ___ (Oct. 16, 2018). (1) The defendant failed to preserve for appellate review his argument that the trial court erred by admitting 404(b) evidence. The defense objected to the witness's testimony outside the presence of the jury and before the witness was sworn. After a voir dire, the trial court overruled the defendant's objection. The jury then was called back to the courtroom and the witness testified without objection. As such, the defendant failed to preserve the issue.
(2) The defendant failed to preserve for appellate review his assertion of error regarding testimony by the State's expert in firearms and tool mark examination. On appeal, the defendant argued that the trial court committed plain error in allowing the expert's testimony, asserting that unqualified tool mark identification is too unreliable to comply with *Daubert.* The court declined to reach the issue, finding that the defendant invited the error by eliciting the expert's unqualified opinion. At no point in the State's questioning did the expert state any particular degree of certainty, posit that her finding was absolutely conclusive, claim that her

opinion was free from error, or expressly discount the possibility that the casings could have been fired from different guns. That testimony came instead on cross-examination by defense counsel.

Where the record is silent regarding the district court disposition of a DWI charge, the court exercises discretion to treat appeal of DWI conviction in Superior Court as petition for writ of certiorari and reach the merits

State v. McNeil, ___ N.C. App. ___, ____ S.E.2d ___ (Nov. 20, 2018). Notwithstanding the fact that the court was unable to determine whether the trial court had jurisdiction when it entered judgment in this DWI case, the court held—over a dissent--that it would exercise its discretion to treat the defendant's appeal as a petition for certiorari in order to reach the merits of her argument.

Court grants relief on unpreserved double jeopardy argument where defendant was sentenced for possession of stolen goods and armed robbery for the same property

State v. Guy, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). Although the defendant failed to object on double jeopardy grounds to being sentenced for both armed robbery and possession of stolen goods taken during the robbery, the court addressed the merits of the defendant's argument, noting that it may consider whether a sentence is unauthorized even in the absence of an objection at trial.

Variance argument not raised at trial was waived on appeal

State v. Nickens, ___ N.C. App. ___, ___ S.E.2d ___ (Nov. 6, 2018). By failing to object at trial to a fatal variance between a second-degree trespass indictment and the evidence at trial, the defendant failed to preserve the issue. The court declined to invoke Rule 2 to address the issue on the merits.