John Rubin, 919.962.2498, rubin@sog.unc.edu

Summer 2019 Criminal Law Case Update

June 3, 2019

Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decided between October 2, 2018 and May 21, 2019. The summaries were prepared primarily by Jessica Smith. To view all of the summaries, go to the Criminal Case Compendium. To obtain the summaries automatically by email, sign up for the Criminal Law Listserv.

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Investigative Stops

Vague anonymous tip without corroboration was insufficient to support vehicle stop

State v. Carver, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 28, 2019). Over a dissent, the court held that no reasonable suspicion supported the warrantless traffic stop based on an anonymous tip. A sheriff's deputy received a dispatch call, originating from an anonymous tipster, just before 11 PM. The deputy was advised of a vehicle in a ditch on a specified road, possibly with a "drunk driver, someone intoxicated" and that "a truck was attempting—getting ready to pull them out." The tip provided no description of the car, truck or driver, nor was there information regarding the caller or when the call was received. When the deputy arrived at the scene about 10 minutes later, he noticed a white Cadillac at an angle partially in someone's driveway. The vehicle had mud on the driver's side and the deputy opined from gouges in the road that it was the vehicle that had run off the road. However he continued driving and saw a truck traveling away from his location. He estimated that the truck was travelling approximately 15 to 20 miles below the posted 55 mph speed limit. He testified that the truck was the only one on the highway and that it was big enough to pull the car out. He did not see any chains, straps, or other devices that would indicate it had just pulled the vehicle out of the ditch. He initiated a traffic stop. His sole reason for doing so was "due to what was called out from communications." The truck was driven by Griekspoor; the defendant was in the passenger seat. When the deputy explained to the driver that there was a report

of a truck attempting to pull a vehicle out of the ditch, the driver reported that he had pulled the defendant's car out of the ditch and was giving him a ride home. The deputy's supervisor arrived and went to talk with the defendant. The defendant was eventually charged with impaired driving. At trial he unsuccessfully moved to suppress, was convicted and appealed. The court found that the stop was improper. As the State conceded, the anonymous tip likely fails to provide sufficient reliability to support the stop. It provided no description of either the car or the truck or how many people were involved and there is no indication when the call came in or when the anonymous tipster saw the car in the ditch with the truck attempting to pull it out. The State argued however that because nearly every aspect of the tip was corroborated by the officer there was reasonable suspicion for the stop. The court disagreed. When the deputy passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or was able to pull, a car out of the ditch and could not see how many people were in the truck. He testified that it was not operating in violation of the law. "He believed it was a suspicious vehicle merely because of the fact it was on the highway." The details in the anonymous tip were insufficient to establish identifying characteristics, let alone allow the deputy to corroborate the details. The tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After the deputy passed the scene and the Cadillac he noticed a truck driving under the posted speed limit. He provided no testimony to show that the truck was engaging in unsafe, reckless, or illegal driving. He was unable to ascertain if it contained a passenger. The court concluded: "At best all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." Under the totality of the circumstances the deputy lacked reasonable suspicion to conduct a warrantless stop of the truck.

Stop based on profanity yelled from car lacked reasonable suspicion and was not justified by community caretaking exception

State v. Brown, ___ S.E. 2d ___, ___ N.C. App. ___ (April 16, 2019). In this DWI case, neither reasonable suspicion nor the community caretaking exception justified the vehicle stop. While standing outside of his patrol car in the early morning hours, a deputy saw a vehicle come down the road and heard the words "mother fucker" yelled in the vehicle. Concerned that someone might be involved in a domestic situation or argument, he pursued the vehicle and stopped it to "make sure everybody was okay." The deputy did not observe any traffic violations or other suspicious behavior. The defendant was subsequently charged with DWI. In the trial court, the defendant moved to suppress arguing that no reasonable suspicion supported the stop. The trial court denied the motion to suppress, finding "that the officer's articulable and reasonable suspicion for stopping the vehicle was a community caretaking function." The defendant was convicted and he appealed. The court began by noting that the trial court conflated the reasonable suspicion and community caretaking exceptions to the warrant requirement. Analyzing the exceptions separately, the court began by holding that no reasonable suspicion supported the stop where the sole reason for it was that the deputy heard someone yelling a profanity in the vehicle. Turning to the community caretaking doctrine, it held: "we do not think the totality of the circumstances establish an objectively reasonable basis for a community caretaking function." The sole basis for the stop was that the deputy heard someone in the vehicle yell a profanity. The deputy did not know if the driver or a passenger yelled the words, if the vehicle contained passengers, if the windows were opened, or who the words were directed to. Among other things, he acknowledged that they could have been spoken by someone on the telephone. The court concluded: "We do not believe these facts . . . establish an objectively reasonable basis for a stop based on the community caretaking doctrine." The court went on to note that it has previously made clear that the community caretaking

exception should be applied narrowly and carefully to mitigate the risk of abuse. In cases where the community caretaking doctrine has been held to justify a warrantless search, the facts unquestionably suggested a public safety issue. Here no such facts exist. Jeff Welty blogged about the case here.

In a case involving an anonymous tip regarding a suspicious person, the trial court erred by finding that there was reasonable suspicion for an investigative stop

State v. Horton, ___ N.C. App. ___, ___ S.E.2d ___ (April 2, 2019). In this drug case, the trial court erred by denying the defendant's motion to suppress evidence obtained in a traffic stop. Sometime after 8:40 PM, an officer received a dispatch relating an anonymous report concerning a "suspicious white male," with a "gold or silver vehicle" in the parking lot, walking around a closed business, Graham Feed & Seed. The officer knew that a business across the street had been broken into in the past and that residential break-ins and vandalism had occurred in the area. When the officer arrived at the location he saw a silver vehicle in the parking lot. The officer parked his vehicle and walked towards the car as it was approaching the parking lot exit. When he shined his flashlight towards the driver's side and saw the defendant, a black male, in the driver's seat. The defendant did not open his window. When the officer asked the defendant, "What's up boss man," the defendant made no acknowledgment and continued exiting the parking lot. The officer considered this behavior a "little odd" and decided to follow the defendant. After catching up to the defendant's vehicle on the main road, and without observing any traffic violations or furtive movements, the officer initiated a traffic stop. Contraband was found in the subsequent search of the vehicle and the defendant was arrested and charged. The trial court denied the defendant's motion to suppress the evidence seized as a result of the stop. The defendant was convicted and he appealed. The court determined that the officer's justification for the stop was nothing more than an inchoate and unparticularized suspicion or hunch. The anonymous tip reported no crime and was only partially correct. Although there was a silver car in the parking lot, the tip also said it could have been gold, and there was no white male in the lot or the vehicle. Additionally, the tip merely described the individual as "suspicious" without any indication as to why, and no information existed as to who the tipster was and what made the tipster reliable. As a result there is nothing inherent in the tip itself to allow a court to deem it reliable and provide reasonable suspicion. Additionally the trial court's findings of fact concerning the officer's knowledge about criminal activity refer to the area in general and to no particularized facts. The officer did not say how he was familiar with the area, how he knew that there had been break-ins, or how much vandalism or other crimes had occurred there. Additionally the trial court's findings stipulated that there was no specific time frame given for when the previous break-ins had occurred. The court rejected the State's argument that the officer either corroborated the tip or formed reasonable suspicion on his own when he arrived at the parking lot. It noted that factors such as a high-crime area, unusual hour of the day, and the fact that businesses in the vicinity were closed can help to establish reasonable suspicion, but are insufficient given the other circumstances in this case. The State argued that the defendant's nervous conduct and unprovoked flight supported the officer's reasonable suspicion. But, the court noted, the trial court did not make either of those findings. The trial court's findings say nothing about the defendant's demeanor, other than that he did not acknowledge the officer, nor do they speak to the manner in which he exited the parking lot. The court went on to distinguish cases offered by the State suggesting that reasonable suspicion can be based on a suspect's suspicious activities in an area known for criminal activity and an unusual hour. The court noted that in those cases the officers were already in the areas in question because they were specifically known and had detailed instances of criminal activity. Here, the officer arrived at the parking lot because of the vague tip about an undescribed white male engaged in undescribed suspicious activity in a generalized area known for residential break-ins and vandalism. The trial court made no findings as to what suspicious activity by the defendant warranted the officer's suspicion. In fact the

officer acknowledged that the defendant was not required to stop when he approached the defendant's vehicle. The court concluded:

> Accordingly, we are unpersuaded by the State's argument and agree with Defendant that the trial court erred in concluding that Officer Judge had reasonable suspicion to stop him. Though the tip did bring Officer Judge to the Graham Feed & Seed parking lot, where he indeed found a silver car in front of the then-closed business with no one else in its vicinity at 8:40 pm, and although Defendant did not stop for or acknowledge Officer Judge, we do not believe these circumstances, taken in their totality, were sufficient to support reasonable suspicion necessary to allow a lawful traffic stop. When coupled with the facts that (1) Defendant was in a parking lot that did "not have a 'no trespassing' sign on its premises"—making it lawful for Defendant to be there; (2) Defendant was not a white male as described in the tip; (3) Defendant's car was possibly in motion when Officer Judge arrived in the parking lot; (4) Defendant had the constitutional freedom to avoid Officer Judge; and (5) Defendant did not commit any traffic violations or act irrationally prior to getting stopped, there exists insufficient findings that Defendant was committing, or about to commit, any criminal activity.

Concluding otherwise would give undue weight to, not only vague anonymous tips, but broad, simplistic descriptions of areas absent specific and articulable detail surrounding a suspect's actions.

Seatbelt violation justified stop and officer did not extend stop when defendant could not produce identification; mission of the stop included verifying identity and lawfully frisking the defendant

State v. Jones, ___ N.C. App. ___, 825 S.E.2d 260 (Mar. 5, 2019). The trial court did not err by denying the defendant's motion to suppress, which argued that officers improperly extended a traffic stop. Officers initiated a traffic stop of the vehicle for a passenger seatbelt violation. The defendant was in the passenger seat. That seat was leaned very far back while the defendant was leaning forward with his head near his knees in an awkward position. The defendant's hands were around his waist, not visible to the officer. The officer believed that based on the defendant's position he was possibly hiding a gun. When the officer introduced himself, the defendant glanced up, looked around the front area of the vehicle, but did not change position. The officer testified that the defendant's behavior was not typical. The defendant was unable to produce an identity document, but stated that he was not going to lie about his identity. The officer testified that this statement was a sign of deception. The officer asked the defendant to exit the vehicle. When the defendant exited, he turned and pressed against the vehicle while keeping both hands around his waist. The defendant denied having any weapons and consented to a search of his person. Subsequently a large wad of paper towels fell from the defendant's pants. More than 56 grams of cocaine was in the paper towels and additional contraband was found inside the vehicle. The defendant was charged with drug offenses. He unsuccessfully moved to suppress. On appeal he argued that the officer lacked reasonable suspicion to extend the traffic stop. The court disagreed, holding that the officer's conduct did not prolong the stop beyond the time reasonably required to complete its mission. When the defendant was unable to provide identification, the officer "attempted to more efficiently conduct the requisite database checks" and complete the mission of the stop by asking the defendant to exit the vehicle. Because the officer's conduct did not extend the traffic stop, no additional showing of reasonable suspicion was required.

Reasonable suspicion existed to seize defendant where he was out late in a high crime area in poor weather, his friend gave a false name and ran from the officer, and both gave vague answers

State v. Augustin, ___ N.C. App. ___, 824 S.E.2d 854 (Feb. 19, 2019). In this carrying a concealed handgun case, the trial court properly denied the defendant's motion to suppress where the officer had reasonable suspicion to seize the defendant. While patrolling a high crime area, the officer saw the defendant and Ariel Peterson walking on a sidewalk. Aware of multiple recent crimes in the area, the officer stopped his car and approached the men. The officer had prior interactions with the defendant and knew he lived some distance away. The officer asked the men for their names. Peterson initially gave a false name; the defendant did not. The officer asked them where they were coming from and where they were going. Both gave vague answers; they claimed to have been at Peterson's girlfriend's house and were walking back to the defendant's home, but were unable or unwilling to say where the girlfriend lived. When the defendant asked the officer for a ride to his house, the officer agreed and the three walked to the patrol car. The officer informed the two that police procedure required him to search them before entering the car. As the officer began to frisk Peterson, Peterson ran away. The officer turned to the defendant, who had begun stepping away. Believing the defendant was about to run away, the officer grabbed the defendant's shoulders, placed the defendant on the ground, and handcuffed him. As the officer helped the defendant up, he saw that a gun had fallen out of the defendant's waistband. Before the trial court, the defendant unsuccessfully moved to suppress discovery of the gun. He pleaded guilty, reserving his right to appeal the denial of his suppression motion. On appeal, the court rejected the defendant's argument that he was unlawfully seized when the officer discovered the gun. Agreeing with the defendant that exercising a constitutional right to leave a consensual encounter should not be used against a defendant "to tip the scale towards reasonable suspicion," the court noted that the manner in which a defendant exercises this right "could, in some cases, be used to tip the scale." However, the court found that it need not determine whether it was appropriate for the trial court to consider the fact that the defendant was backing away in its reasonable suspicion calculus. Rather, the trial court's findings regarding the men's behavior before the defendant backed away from the officer were sufficient to give rise to reasonable suspicion. The defendant was in an area where a "spree of crime" had occurred; Peterson lied about his name; they both gave vague answers about where they were coming from; and Peterson ran away while being searched. This evidence supports the trial court's conclusion that the officer had reasonable suspicion to seize the defendant.

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. ___, 822 S.E.2d 317 (Nov. 20, 2018), *temp. stay allowed*, ___ N.C. ___, 825 S.E.2d 641 (Apr. 17, 2019). 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. Jeff Welty blogged about the case here.

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. ___, 822 S.E.2d 456 (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

Anonymous tip, though not enough on its own, was buttressed by evasive behavior of the defendant and the fact that he failed to inform officers he was armed; this was sufficient to establish reasonable suspicion to stop and to frisk

State v. Malachi, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 5, 2019). In this possession of a firearm by a felon case, the trial court did not err by allowing evidence of a handgun a police officer removed from the defendant's waistband during a lawful frisk that occurred after a lawful stop. Police received an anonymous 911 call stating that an African-American male wearing a red shirt and black pants had just placed a handgun in the waistband of his pants while at a specified gas station. Officer Clark responded

to the scene and saw 6 to 8 people in the parking lot, including a person who matched the 911 call description, later identified as the defendant. As Clark got out of his car, the defendant looked directly at him, "bladed" away and started to walk away. Clark and a second officer grabbed the defendant. After Clark placed the defendant in handcuffs and told him that he was not under arrest, the second officer frisked the defendant and found a revolver in his waistband. The defendant unsuccessfully moved to suppress evidence of the gun at trial. The court held that the trial court did not err by denying the motion to suppress. It began by holding that the anonymous tip was insufficient by itself to provide reasonable suspicion for the stop. However, here these was additional evidence. Specifically, as Clark exited his car, the defendant turned his body in such a way as to prevent the officer from seeing a weapon. The officer testified that the type of turn the defendant executed was known as "blading," which is "[w]hen you have a gun on your hip you tend to blade it away from an individual." Additionally the defendant began to move away. And, as the officers approached the defendant, the defendant did not inform them that he was lawfully armed. Under the totality of the circumstances, these facts support reasonable suspicion.

The court then held that the frisk was proper. In order for a frisk to be proper, officers must have reasonable suspicion that the defendant was armed and dangerous. Based on the facts supporting a finding of reasonable suspicion with respect to the stop, the officers had reasonable suspicion to believe that the defendant was armed. This, coupled with his struggle during the stop and continued failure to inform officers that he was armed, supported a finding that there was reasonable suspicion that the defendant was armed and dangerous. Jeff Welty blogged about issues discussed within this case here.

(1) Officers were lawfully present in defendant's driveway when they smelled marijuana and their presence did not constitute a search; (2) Defendant's argument that his signage on his front door revoked any implied license to approach the home was unpreserved and therefore waived

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018). In this drug case, the trial court did not err by denying the defendant's motion to suppress. After receiving a tip that the defendant was growing marijuana at his home, officers drove there for a knock and talk. They pulled into the driveway and parked in front of the defendant's car, which was parked at the far end of the driveway, beside the home. The garage was located immediately to the left of the driveway. An officer went to the front door to knock, while two detectives remained by the garage. A strong odor of marijuana was coming from the garage area. On the defendant's front door was a sign that reading "inquiries" with his phone number, and a second sign reading "warning" with a citation to several statutes. As soon as the defendant opened the front door, an officer smelled marijuana. The officer decided to maintain the residence pending issuance of a search warrant. After the warrant was obtained, a search revealed drugs and drug paraphernalia. (1) The court began by rejecting the defendant's argument that the officers engaged in an unconstitutional search and seizure by being present in his driveway and lingering by his garage. Officers conducting a knock and talk can lawfully approach a home so long as they remain within the permissible scope afforded by the knock and talk. Here, given the configuration of the property any private citizen wishing to knock on the defendant's front door would drive into the driveway, get out, walk between the car and the path so as to stand next to the garage, and continue on the path to the front porch. Therefore, the officers' conduct, in pulling into the driveway by the garage, getting out of their car, and standing between the car and the garage, was permitted. Additionally the officers were allowed to linger by the garage while their colleague approached the front door. Thus, "the officers' lingering by the garage was justified and did not constitute a search under the Fourth Amendment."

(2) The court went hold that by failing to raise the issue at the trial level, the defendant failed to

preserve his argument that he revoked at the officers' implied license through his signage and that by ignoring this written revocation, the officers of violated the Fourth Amendment.

Search Warrants

Search warrant for premises includes "limited" authority to detain persons on site, and a person presenting a threat to the safe execution of the warrant is deemed an occupant for this purpose; police then developed reasonable suspicion to frisk

State v. Wilson, ___ N.C. ___, 821 S.E.2d 811 (Dec. 21, 2018). On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 803 S.E.2d 698 (2017), in this felon in possession of a firearm case, the court held that *Michigan v. Summers*, 452 U.S. 692 (1981), justifies a seizure of the defendant where he posed a real threat to the safe and efficient completion of a search and that the search and seizure of the defendant were supported by individualized suspicion. A SWAT team was sweeping a house so that the police could execute a search warrant. Several police officers were positioned around the house to create a perimeter securing the scene. The defendant penetrated the SWAT perimeter, stating that he was going to get his moped. In so doing, he passed Officer Christian, who was stationed at the perimeter near the street. The defendant then kept going, moving up the driveway and toward the house to be searched. Officer Ayers, who was stationed near the house, confronted the defendant. After a brief interaction, Officer Ayers searched the defendant based on his suspicion that the defendant was armed. Officer Ayers found a firearm in the defendant's pocket. The defendant, who had previously been convicted of a felony, was arrested and charged with being a felon in possession of a firearm. He unsuccessfully moved to suppress at trial and was convicted. The Court of Appeals held that the search was invalid because the trial court's order did not show that the search was supported by reasonable suspicion. The Supreme Court reversed holding "that the rule in *Michigan v. Summers* justifies the seizure here because defendant, who passed one officer, stated he was going to get his moped, and continued toward the premises being searched, posed a real threat to the safe and efficient completion of the search." The court interpreted the *Summers* rule to mean that a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain occupants who are within the immediate vicinity of the premises to be searched and who are present during the execution of a search warrant. Applying this rule, the court determined that "a person is an occupant for the purposes of the *Summers* rule if he poses a real threat to the safe and efficient execution of a search warrant." Here, the defendant posed such a threat. It reasoned: "He approached the house being swept, announced his intent to retrieve his moped from the premises, and appeared to be armed. It was obvious that defendant posed a threat to the safe completion of the search."

Because the *Summers* rule only justifies detentions incident to the execution of search warrants, the court continued, considering whether the search of the defendant's person was justified. On this issue the court held that "both the search and seizure of defendant were supported by individualized suspicion and thus did not violate the Fourth Amendment." Shea Denning blogged about the case here.

Criminal Offenses

Assault

"Significant" pain and scarring supported serious bodily injury

State v. Fields, ___ N.C. App. ___, 827 S.E.2d 120 (April 16, 2019), *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 458 (May 6, 2019). In an assault inflicting serious bodily injury case involving the defendant's assault on a transgender woman, A.R., the evidence was sufficient to establish that serious bodily injury occurred. A.R.'s injury required stitches, pain medication, time off from work, and modified duties once she resumed work. Her pain lasted for as much as six months, and her doctor described it as "significantly painful." This evidence tends to show a "permanent or protracted condition that causes extreme pain." Moreover, the assault left A.R. with a significant, jagged scar, which would support a finding of "serious permanent disfigurement." There was therefore no error in denying the motion to dismiss the offense of assault inflicting serious bodily injury. Jeff Welty blogged about serious bodily injury here.

Attempt and Solicitation

Meeting and paying undercover officer to kill wife was sufficient to prove solicitation, but insufficient to constitute an overt act for attempted murder

State v. Melton, ___ N.C. ___, 821 S.E.2d 424 (Dec. 7, 2018). On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 801 S.E.2d 392 (2017), the court reversed, holding that the evidence was insufficient to sustain a conviction for attempted murder. The evidence showed that the defendant solicited an undercover officer—who he thought to be a hired killer--to kill his former wife. He gave the officer $2,500 as an initial payment, provided the officer details necessary to complete the killing, and helped the officer plan how to get his former wife alone and how to kill her out of the presence of their daughter. The defendant was arrested after he left his meeting with the officer; he was charged—and later convicted—of attempted murder and solicitation to commit murder. Phil Dixon blogged about the case here.

(1) Sufficient evidence of aiding and abetting where defendant encouraged (but did not directly request) sexual assault on minor; (2) Defendant had requisite intent to commit each sexual assault on child and his actions, in context, were sufficient overt acts to support attempted statutory sex offense

State v. Bauguss, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). (1) In this child sexual assault case, the trial court did not err by denying the defendant's motion to dismiss five statutory sexual offense charges based on a theory of aiding and abetting. The State's theory was that the defendant encouraged the victim's mother to engage in sexual activity with the victim, and that the victim's mother did this to "bait" the defendant into a relationship with her. On appeal the defendant argued that the evidence was insufficient to show that he encouraged or instructed the victim's mother to perform cunnilingus or digitally penetrate the victim, or that any statement by him caused the victim's mother to perform the sexual acts. The court disagreed. The State's evidence included Facebook conversations between the victim's mother and the defendant. The defendant argued that these messages were fantasies and that even if taken at face value, were devoid of any instruction or encouragement to the victim's mother to perform sexual acts, specifically cunnilingus or penetration of the victim. The court rejected this argument, concluding that an explicit instruction to engage in sexual activity is not required. Here, the evidence showed that the defendant knew that the victim's mother wanted a relationship with him and

that he believed she was using the victim to try to initiate that relationship. Numerous messages between the defendant and the victim's mother support a reasonable inference of a plan between them to engage in sexual acts with the victim. The victim's mother testified that she described sexual acts she performed on the victim to the defendant because he told her he liked to hear about them. The defendant argued that this description of sexual acts after the fact is insufficient to support a finding that he knew of or about these acts prior to their occurrence, a requirement for aiding and abetting. However, the court concluded, the record supports an inference that he encouraged the victim's mother to perform the acts. Among other things, the defendant specified nude photos that he wanted of the victim and initiated an idea of sexual "play" between the victim's mother and the victim. After the victim's mother videotaped her act of performing cunnilingus on the victim and send it to the defendant, the defendant replied that he wanted to do engage in that act. After he requested a video of the victim "playing with it," the victim's mother made a video of her rubbing the victim's vagina. This evidence was sufficient to support an inference that the defendant aided and abetted in the victim's mother's sexual offenses against the victim.

(2) The trial court did not err by denying the defendant's motion to dismiss two charges of attempted statutory sex offense of a child by an adult. On appeal, the defendant argued that there was insufficient evidence of his intent to engage in a sexual act with the victim and of an overt act. The court disagreed. The first conviction related to the defendant's attempted statutory sex offense with the victim in a vehicle, which occurred on or prior to 19 July 2013. While the victim sat between the defendant and her mother, the defendant tried to put his hands up the victim's skirt, between her legs. The victim pushed the defendant away and moved closer to her mother. The defendant asserted that an intention to perform a sexual act cannot be inferred from this action. The court disagreed, noting, among other things, evidence that the defendant's phone contained a video and photograph depicting the victim nude; both items were created prior to the incident in question. Additionally, the defendant admitted that the photo aroused him. Moreover, conversations of a sexual nature involving the victim occurred between the defendant and the victim's mother on 9 July 2013. Messages of a sexual nature were also sent on 15 July 2013, including the defendant's inquiries about sexual acts between the victim's mother and the victim, and a request for explicit pictures of the victim. Additional communications indicated that the defendant wanted to see the victim in person. In a conversation on 19 July 2013, the defendant indicated that he had feelings for the victim and expressed the desire to "try something" sexual with the victim. In his interview with law enforcement, the defendant stated he would not have engaged in intercourse with the victim but would have played with her vagina by licking and rubbing it. This evidence supports a reasonable inference that the defendant attempted to engage in a sexual act with the victim when he placed his hands between her legs and tried to put his hand up her skirt. The evidence also supports the conclusion that his act was an overt act that exceeded mere preparation.

The second conviction related to the defendant's attempted statutory sex offense with the victim in a home. The court upheld this conviction, over a dissent. This incident occurred on 27 July 2013 when the defendant instructed the victim's mother to have the victim wear a dress without underwear because he was coming over to visit. The defendant argued that the evidence was insufficient to show his intent to engage in a sexual act with the victim or an overt act in furtherance of that intention. The court disagreed. The evidence showed that the victim's mother and the defendant had an ongoing agreement and plan for the victim's mother to teach the victim to be sexually active so that the defendant could perform sexual acts with her. Evidence showed that the victim's mother sent the defendant numerous photos and at least one video of the victim, including one that showed the victim's mother performing cunnilingus on the victim on 26 July 2013. An exchange took place on 27 July 2013 in which the defendant indicated his desire to engage in that activity with the victim, and her mother's desire to

facilitate it. Specifically the defendant asked the victim's mother whether she could get the victim to put on a dress without underwear because he was coming over to their home. Based on the context in which the defendant instructed the victim's mother to have the victim wear a dress without underwear, there was substantial evidence of his intent to commit a sex offense against the victim. Furthermore, the defendant took overt actions to achieve his intention. The victim's mother admitted that she and the defendant planned to train the victim for sexual acts with the defendant, and the defendant's Facebook messages to the victim's mother and his interview with law enforcement show that he agreed to, encouraged, and participated in that plan. The defendant's instruction to dress the victim without underwear was more than "mere words" because it was a step in his scheme to groom the victim for sexual activity, as was other activity noted by the court.

Contempt

Repeated references to matters outside of evidence supported finding of willful contempt

State v. Salter, ___ N.C. App. ___, 826 S.E.2d 803 (April 2, 2019). The trial court did not err by holding the defendant in direct criminal contempt for statements he made during closing arguments in this pro se case. On appeal, the defendant argued that his actions were not willful and that willfulness must be considered in the context of his lack of legal knowledge or training. The trial court repeatedly instructed the defendant that he could not testify to matters outside the record during his closing arguments, given that he chose not to testify at trial. The trial court reviewed closing argument procedures with the defendant, stressing that he could not testify during his closing argument, and explaining that he could not tell the jury "Here's what I say happened." Although the defendant stated that he understood these instructions, he began his closing arguments by attempting to tell the jury about evidence that he acknowledges was inadmissible. The trial court excused the jury and again admonished the defendant not to discuss anything that was not in evidence. The defendant again told the trial court that he understood its instructions. When the jury returned however the defendant again attempted to discuss matters not in evidence. The trial court excused the jury and gave the defendant a final warning. Once again the defendant informed the trial court that he understood its warnings. However when the jury returned he continued his argument by stating matters that were not in evidence. This final incident served as the basis for the trial court's finding of criminal contempt. On this record, the trial court did not err by finding that the defendant acted willfully in violation of the trial court's instructions.

Drug Offenses

Even under revised interpretation of *Rogers*, evidence of single sale was insufficient to support conviction for maintaining a dwelling/vehicle

State v. Miller, ___ N.C. App. ___, 826 S.E.2d 562 (Mar. 19, 2019). In this maintaining a dwelling case on remand from the state Supreme Court for reconsideration in light of *State v. Rogers*, __ N.C. __, 817 S.E.2d 150 (2018), the court held that the evidence was insufficient to support the conviction. The State's evidence showed that the drugs were kept at the defendant's home on one occasion. Under *Rogers*, "the State must produce other incriminating evidence of the "totality of the circumstances" and more than just evidence of a single sale of illegal drugs or "merely having drugs in a car (or other place)" to support a conviction under this charge." Here, the State offered no evidence showing any drugs or paraphernalia, large amounts of cash, weapons or other implements of the drug trade at the defendant's home. The State offered no evidence of any other drug sales occurring there, beyond the

one sale at issue in the case. It stated: "Under "the totality of the circumstances," "merely having drugs in a car [or residence] is not enough to justify a conviction under subsection 90-108(a)(7)."" It concluded, stating that *Rogers* was distinguishable because it involved keeping of drugs in a motor vehicle, where other drugs and incriminating evidence of ongoing drug sales were present. Jessica Smith blogged about *State v. Rogers* case here and Jeff Welty wrote about *State v. Miller* here.

(1) Defendant's admission that she "used" heroin was insufficient to establish the substance as heroin for purposes of possession charge absent a chemical analysis; (2) The evidence was sufficient to support the defendant's conviction for misdemeanor child abuse by using heroin in the presence of a child

State v. Osborne, ___ N.C. App. ___, 821 S.E.2d 268 (Oct. 2, 2018), *review allowed*, ___ N.C. ___, 822 S.E.2d 639 (Jan. 30, 2019). (1) 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 did not dispute that the field tests were 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).

(2) The evidence was sufficient to support the defendant's convictions for misdemeanor child abuse. The charges asserted that the defendant used heroin in the presence of a child. The court rejected the defendant's argument that the State was required to prove, through chemical analysis, that a substance seized at the premises was in fact heroin. Here, the evidence showed that officers discovered the defendant unconscious from an apparent drug overdose; the defendant admitted to officers that she used heroin before becoming unconscious; and drug paraphernalia consistent with heroin use was found in the hotel room occupied by the defendant and her children. This evidence was sufficient to send the charges to the jury.

Phil Dixon blogged about the case here.

Firearms Offenses

Defendant may not be convicted of multiple counts of possession of firearm on educational property where all firearms were possessed during the same incident

State v. Conley, ___ N.C. App. ___, 825 S.E.2d 10 (Feb. 19, 2019), *temp. stay allowed,* ___ N.C. ___, 823 S.E.2d 579 (Mar. 6, 2019). A defendant may not be convicted of multiple offenses of possession of a gun on educational property when the defendant possesses multiple weapon in the same incident. The defendant was found guilty of, among other things, five counts of possession of a gun on educational property. On appeal the defendant argued that G.S. 14-269.2(b) does not permit entry of multiple convictions for the simultaneous possession of multiple guns on educational property. The defendant's argument relied on *State v. Garris*, 191 N.C. App. 276 (2008), a felon in possession case precluding multiple convictions when a defendant possesses several weapons simultaneously. The court agreed with the defendant, holding:

> [T]he language of section 14-269.2(b) describing the offense of "knowingly . . . possess[ing] or carry[ing], whether openly or concealed, any gun, rifle, pistol, or other firearm of any kind on educational property," N.C.G.S. § 14- 269.2(b), is ambiguous as to whether multiple punishments for the simultaneous possession of multiple firearms is authorized. And consistent with this Court's application of the rule of lenity, also as applied in *Garris*, we hold that section 14- 269.2(b) does not allow multiple punishments for the simultaneous possession of multiple firearms on educational property.

The court therefore reversed and remanded for resentencing.

Homicide

Lengthy history of unsafe driving and reckless driving at the time supported element of malice

State v. Schmieder, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). In this case involving a conviction for second-degree murder following a fatal motor vehicle accident, the evidence was sufficient to establish malice. Evidence of the defendant's prior traffic-related convictions are admissible to prove malice in a second-degree murder prosecution based on a vehicular homicide. Here, there was evidence that the defendant knew his license was revoked at the time of the accident and that he had a nearly two-decade-long history of prior driving convictions including multiple speeding charges, reckless driving, illegal passing, and failure to reduce speed. Additionally, two witnesses testified that the defendant was driving above the speed limit, following too close to see around the cars in front of him, and passing across a double yellow line without using turn signals. This was sufficient to establish malice.

(1) Jury instructions on felony-murder constituted reversible error because they allowed the jury to convict the defendant on this theory even if they believed that the defendant intended to shoot the victim he killed; (2) Trial court erred by failing to give self-defense instruction in conjunction with instruction on transferred intent as to victim who was seriously injured

State v. Greenfield, ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed*, ___ N.C. ___, 822 S.E.2d 411 (Jan. 23, 2019). In this case arising out of homicide and assault charges related to a drug

deal gone bad, the trial court erred in its instructions. The defendant was charged with first-degree murder of victim Jon and assault with a deadly weapon with intent to kill inflicting serious injury as to victim Beth. The State's evidence tended to show that the defendant shot the victims. The defendant admitted that he shot the victims but asserted self-defense. Specifically, he testified that Jon shot first; that the defendant returned fire in self-defense; and that the defendant was only trying to hit John not Beth.

With respect to the homicide of Jon, the trial court instructed the jury on felony murder, premeditated and deliberate murder, second-degree murder, and voluntary manslaughter. On its verdict sheet, the jury indicated that it found the defendant guilty of both first-degree felony murder, based on the felony of assault with a deadly weapon with intent to kill inflicting serious injury and second-degree murder. The trial court entered judgment on first-degree felony murder. On appeal, the court held that the jury instructions on felony-murder constituted reversible error because they allowed the jury to convict the defendant on this theory even if they believed that the defendant intended to shoot Jon rather than Beth with the fatal shots. The court stated, "it would be error for the jury to base its felony murder conviction for the killing of Jon on a felony that Defendant *was intending to assault Jon*." Where the defendant intentionally assaults a victim with a gun and causes the victim's death and no other felony is involved, the State cannot elevate the homicide to first-degree murder based solely on the fact that the defendant committed the deadly assault with a deadly weapon. To hold otherwise would mean every homicide with a gun would be first-degree felony murder. If the jury believed that the defendant intended to shoot Beth with the shots that killed John, they were free to convict him on first-degree felony murder based on the underlying assault charge. The court however could not determine from the jury instructions or the verdict sheet whether the jury believed that the defendant intended to shoot Jon or Beth. Thus, the instructions did not clearly inform the jury that it could find the defendant guilty of first-degree felony murder based on the assault charge only if it determined that the fatal bullet was meant for Beth. Here, there was evidence from which the jury could have inferred either finding. Therefore the jury instructions constituted reversible error. However, because the court found no error in the jury instruction as to second-degree murder, it vacated the judgment convicting the defendant of first-degree felony murder and remanded for entry of judgment for second-degree murder. One judge dissented from this aspect of the court's opinion, finding that the defendant was entitled to a new trial as to this charge.

(2) With respect to the assault charge on victim Beth, the trial court instructed the jury that it could convict the defendant of that offense for injuries to Beth; it did not give a self-defense instruction on this charge but did properly instruct on transferred intent. This was error because "we do not know if the jury determined that the shot that struck Beth was meant for Jon, which may have been legally justified under self-defense, or if it was meant for Beth. That is, with the transferred intent instruction, it is possible that the jury convicted Defendant of AWDWIKISI, though believing that Defendant intended all his shots to hit Jon, as he testified. And based on transferred intent, he should have been acquitted if the jury believed he was firing at Jon in self-defense." The defendant was entitled to a new trial on this charge.

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. ___, 822 S.E.2d 456 (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).

Evidence that defendant had an unquantified amount of impairing substances in his blood was sufficient to go to the jury on impairment when defendant admitted taking drugs the day of the crash and his behavior indicated a lack of awareness and poor judgment

State v. Shelton, ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019). In this felony death by vehicle case involving the presence of narcotics in an unknown quantity in the defendant's blood, the evidence was sufficient to establish that the defendant was impaired. The State's expert testified that Oxycodone and Tramadol were present in the defendant's blood; tests revealed the presence of these drugs in amounts equal to or greater than 25 nanograms per milliliter — the "detection limits" used by the SBI for the test; the half-lives of Oxycodone and Tramadol are approximately 3-6 and 4-7 hours, respectively; she was unable to determine the precise quantities of the drugs present in the defendant's blood; and she was unable to accurately determine from the test results whether the defendant would have been impaired at the time of the accident. The defendant's motion to dismiss was denied and the defendant was found guilty of felony death by motor vehicle based on a theory of impairment under G.S. 20-138(a)(1) ("While under the influence of an impairing substance"). On appeal the court rejected the defendant's argument the State's evidence merely showed negligence regarding operation of his vehicle as opposed to giving rise to a reasonable inference that he was impaired. The court noted that it was undisputed that the defendant ingested both drugs on the day of the accident and that they were present in his blood after the crash. It continued: "Taking these facts together with the evidence at trial regarding Defendant's lack of awareness of the circumstances around him and his conduct before and after the collision, reasonable jurors could — and did — find that Defendant was appreciably impaired." Specifically, the court noted: the labels on the medicine bottles warned that they may cause drowsiness or dizziness and that care should be taken when operating a vehicle after ingestion, and these substances are Schedule II and Schedule IV controlled substances, respectively; the defendant testified that he failed to see the victim on the side of the road despite the fact that it was daytime, visibility was clear, the road was

straight, and three eyewitnesses saw the victim before the defendant hit her; the defendant admitted that he was unaware that his vehicle had hit a human being despite the fact that the impact of the crash was strong enough to cause the victim's body to fly 59 feet through the air; and the defendant testified that his brakes had completely stopped functioning when he attempted to slow down immediately before the accident, he decided not to remain at the scene, instead driving his truck out of the ditch and to his home despite the fact that he had no operable brakes. Finding that this was sufficient evidence for the issue of impairment to go to the jury, the court noted that under *Atkins v. Moye*, 277 N.C. 179 (1970), impairment can be shown by a combination of evidence that a defendant has both (1) ingested an impairing substance; and (2) operated his vehicle in a manner showing he was so oblivious to a visible risk of harm as to raise an inference that his senses were appreciably impaired. Shea Denning blogged about the case here.

Error to use aggravating factors in sentencing where no formal notice given; that aggravating factors were used in district court does not excuse State's failure to give notice of aggravating factors in superior court

State v. Hughes, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019) *temp. stay allowed*, ___ N.C. ___, 826 S.E.2d 457 (May 3, 2019). Because the State failed to give notice of its intent to use aggravating sentencing factors as required by G.S. 20-179(a1)(1), the trial court committed reversible error by using those factors in determining the defendant's sentencing level. The case involved an appeal for trial de novo in superior court. The superior court judge sentenced the defendant for impaired driving, imposing a level one punishment based on two grossly aggravating sentencing factors. On appeal, the defendant argued that the State failed to notify him of its intent to prove aggravating factors for sentencing in the superior court proceeding. The State did not argue that it gave notice to the defendant prior to the superior court proceeding. Instead, it argued that the defendant was not prejudiced because he received constructive notice of the aggravating factors when they were used at the earlier district court proceeding. The court rejected this argument, determining that allowing the State to fulfill its statutory notice obligations by relying on district court proceedings "would render the statute effectively meaningless." The court concluded that the State "must provide explicit notice of its intent to use aggravating factors in the superior court proceeding." The court vacated the defendant's sentence and remanded for resentencing. Shea Denning blogged about the case here.

Larceny and Robbery

Where the State failed to present no evidence of felonious intent and all evidence supported defendant's claim of right to the property, trial court erred in failing to grant motion to dismiss robbery

State v. Cox, ___ N.C. App. ___, 825 S.E.2d 266 (Mar. 5, 2019), *temp. stay allowed,* ___ N.C. ___, 824 S.E.2d 127 (Mar. 22, 2019). The trial court erred by denying the defendant's motion to dismiss a charge of conspiracy to commit armed robbery. The Supreme Court has stated that a defendant is not guilty of robbery if he forcefully takes possession of property under a bona fide claim of right or title to the property. Decisions from the Court of Appeals, however, have questioned that case law, rejecting the notion that a defendant cannot be guilty of armed robbery where the defendant claims a good faith belief that he had an ownership interest in the property taken. Although the court distinguished that case law, it noted that to the extent it conflicts with earlier Supreme Court opinions, the court is bound to follow and apply the law as established by the state Supreme Court. Here, the evidence showed that

the defendant and two others—Linn and Jackson--went to the victim's home to retrieve money they provided to her for a drug purchase, after the victim failed to make the agreed-to purchase. All of the witnesses agreed that the defendant and the others went to the victim's house to get money they believed was theirs. Thus, the State presented no evidence that the defendant possessed the necessary intent to commit robbery. Rather, all of the evidence supports the defendant's claim that he and the others went to the victim's house to retrieve their own money. The defendant cannot be guilty of conspiracy to commit armed robbery where he and his alleged co-conspirators had a good-faith claim of right to the money. Because there was no evidence that the defendant had an intent to take and convert property belonging to another, the trial court erred by denying the defendant's motion to dismiss the charge of conspiracy to commit armed robbery.

The court continued, holding that the trial court erred by denying the defendant's motion to dismiss a charge of felonious breaking or entering, where the felonious intent was asserted to be intent to commit armed robbery inside the premises. The court remanded for entry of judgment on misdemeanor breaking or entering, which does not require felonious intent. Phil Dixon blogged about the case here.

Sexual Assaults

(1) No error where trial court failed to instruct on lack of consent; lack of consent implied where rape predicated on physical helplessness; (2) Evidence was sufficient to show victim physically helpless

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). (1) In this second-degree rape case, the trial court did not commit plain error by failing to instruct the jury that lack of consent was an element of rape of a physically helpless person. Because lack of consent is implied in law for this offense, the trial court was not required to instruct the jury that lack of consent was an essential element of the crime.

(2) The evidence was sufficient to support a conviction of second-degree rape. On appeal the defendant argued that there was insufficient evidence showing that the victim was physically helpless. The State presented evidence that the victim consumed sizable portions of alcohol over an extended period of time, was physically ill in a club parking lot, and was unable to remember anything after leaving the club. When the victim returned to the defendant's apartment, she stumbled up the stairs and had to hold onto the stair rail. She woke up the following morning with her skirt pulled up to her waist, her shirt off, and her underwear on the bed. Her vagina was sore and she had a blurry memory of pushing someone off of her. She had no prior sexual relationship with the defendant. Moreover, the defendant's actions following the incident, including his adamant initial denial that anything of a sexual nature occurred and subsequent contradictory admissions, indicate that he knew of his wrongdoings, specifically that the victim was physically helpless. There was sufficient evidence that the victim was physically unable to resist intercourse or to communicate her unwillingness to submit to the intercourse.

Evidence that defendant supported child by providing her a place to live and financial support, as well as representing himself as her custodian, was sufficient to establish parental role for sexual activity by substitute parent/custodian

State v. Sheridan, ___ N.C. App. ___, 824 S.E.2d 146 (Feb. 5, 2019). There was sufficient evidence that a parent-child relationship existed between the defendant and the victim to sustain a conviction for sexual offense in a parental role. A parental role includes evidence of emotional trust, disciplinary authority,

and supervisory responsibility, with the most significant factor being whether the defendant and the minor "had a relationship based on trust that was analogous to that of a parent and child." The defendant paid for the victim's care and support when she was legally unable to work and maintain herself and made numerous representations of his parental and supervisory role over her. He indicated to police he was her "godfather," represented to a friend that he was trying to help her out and get her enrolled in school, and told his other girlfriends the she was his "daughter." Additionally, while there was no indication that the defendant was a friend of the victim's family, he initiated a relationship of trust by approaching the victim with references to his daughter, who was the same age, and being "always" present when the two girls were "hanging out" at his house. This was sufficient evidence of the defendant's exercise of a parental role over the victim.

Where defendant's out of court confession was corroborated by substantial independent evidence, corpus delecti rule was met

State v. DeJesus, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this child sexual assault case, there was substantial independent evidence to support the trustworthiness of the defendant's extrajudicial confession that he engaged in vaginal intercourse with the victim on at least three occasions and therefore the corpus delicti rule was satisfied. The defendant challenged the trial court's denial of his motion to dismiss two of his three statutory rape charges, which arose following the defendant's confession that he had sex with the victim on three separate occasions. The defendant recognized that there was "confirmatory circumstance" to support one count of statutory rape because the victim became pregnant with the defendant's child. However, he asserted that there was no evidence corroborating the two other charges other than his extrajudicial confession. The court disagreed, finding that there was substantial independent evidence establishing the trustworthiness of his confession that he engaged in vaginal intercourse with the victim on at least three separate occasions. Specifically, the victim's pregnancy, together with evidence of the defendant's opportunity to commit the crimes and the circumstances surrounding his statement to detectives provide sufficient corroboration "to engender a belief in the overall truth of Defendant's confession." The court began by noting that here there is no argument that the defendant's confession was produced by deception or coercion. Additionally, in his confession he admitted that he engaged in intercourse with the victim on at least three occasions "that he could account for," suggesting his appreciation and understanding of the importance of the accuracy of his statements. The trustworthiness of the confession was further reinforced by his ample opportunity to commit the crimes given that he was living in the victim's home during the relevant period. Finally, and most significantly, the undisputed fact that the defendant fathered the victim's child unequivocally corroborated his statement that he had engaged in vaginal intercourse with her. Thus, strong corroboration of the confession sufficiently establishes the trustworthiness of the concurrent statement regarding the number of instances that he had sexual intercourse with the victim.

Stalking

Stalking statute unconstitutional as applied to defendant; social media posts "about" the victim but not "directed at" the victim were protected speech

State v. Shackelford, ___ N.C. App. ___, 825 S.E.2d 689 (Mar. 19, 2019). Concluding that application of the stalking statute to the defendant violated his constitutional free speech rights, the court vacated the convictions. The defendant was convicted of four counts of felony stalking based primarily on the

content of posts made to his Google Plus account. On appeal, the defendant asserted an as-applied challenge to the stalking statute, G.S. 14-277.3A. The court first rejected the State's argument that the defendant's Google Plus posts are excluded from First Amendment protection because they constitute "speech that is integral to criminal conduct." The court reasoned that in light of the statutory language "his speech itself was the crime," and no additional conduct on his part was needed to support his stalking convictions. Thus, the First Amendment is directly implicated by his prosecution under the statute.

The court next analyzed the defendant's free speech argument within the framework adopted by the United States Supreme Court. It began by determining that as applied to the defendant, the statue constituted a content-based restriction on speech, and thus that strict scrutiny applies. It went on to hold that application of the statute to the messages contained in the defendant's social media posts did not satisfy strict scrutiny.

Having determined that the defendant's posts could not constitutionally form the basis for his convictions, the court separately examined the conduct giving rise to each of the convictions to determine the extent to which each was impermissibly premised on his social media activity. The court vacated his first conviction because it was premised entirely upon five social media posts; no other acts supported this charge. The second and third charges were premised on multiple social media posts and a gift delivery to the victim's workplace. The gift delivery, unlike the social media posts, constituted non-expressive conduct other than speech and therefore was not protected under the First Amendment. However, because the statute requires a course of conduct, this single act is insufficient to support a stalking conviction and thus these convictions also must be vacated. The defendant's fourth conviction encompassed several social media posts along with two emails sent by the defendant to the victim's friend. Even if the emails are not entitled to First Amendment protection, this conviction also must be vacated. Here, the jury returned general verdicts, without stating the specific acts forming the basis for each conviction. Because this conviction may have rested on an unconstitutional ground, it must be vacated. Shea Denning blogged about the case here.

Pleadings

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.

Presentments

Simultaneous presentment and indictment is improper and invalidates both documents, but remedy is remand to district court, not dismissal

State v. Baker, ___ N.C. App. ___, 822 S.E.2d 902 (Dec. 18, 2018). Although the State improperly circumvented district court jurisdiction by simultaneously obtaining a presentment and an indictment from a grand jury, the proper remedy is to remand the charges to district court, not dismissal. The defendant was issued citations for impaired driving and operating an overcrowded vehicle. After the defendant's initial hearing in district court, she was indicted by the grand jury on both counts and her case was transferred to Superior Court. The grand jury was presented with both a presentment and an indictment, identical but for the titles of the respective documents. When the case was called for trial in Superior Court, the defendant moved to dismiss for lack of subject matter jurisdiction due to the constitutional and statutory invalidity of the presentment and indictment procedure. The Superior Court granted the defendant's motion and the State appealed.

G.S. 15A-641 provides that "[a] presentment is a written accusation by a grand jury, made on its own motion . . . ." It further provides that "[a] presentment does not institute criminal proceedings against any person, but the district attorney is obligated to investigate the factual background of every presentment . . . and to submit bills of indictment to the grand jury dealing with the subject matter of any presentments when it is appropriate to do so." The plain language of G.S. 15A-641 "precludes a grand jury from issuing a presentment and indictment on the same charges absent an investigation by the prosecutor following the presentment and prior to the indictment." The court rejected the State's argument that G.S. 15A-644 governs the procedure for presentments and that because the presentment met the requirements of that statute it is valid, concluding in part: "It is not the sufficiency of the presentment form and contents that is at issue, but the presentment's simultaneous occurrence with the State's indictment that makes both invalid." Here, the prosecutor did not investigate the factual background of the presentment after it was returned and before the grand jury considered the indictment. Because the prosecutor submitted these documents to the grand jury simultaneously and

they were returned by the grand jury simultaneously in violation of G.S. 15A-641 "each was rendered invalid as a matter of law." The court thus affirmed the superior court's ruling that it did not have subject matter jurisdiction over the case.

The court went on to affirm the lower court's conclusion that the superior court prosecution violated the defendant's rights under Article I, Section 22 of the state constitution, but found that it need not determine whether the defendant was prejudiced by this violation. It further held that the trial court erred in holding that the State violated the defendant's rights under Article I, Sections 19 and 23 of the North Carolina Constitution.

On the issue of remedy, the court agreed with the State that the proper remedy is not dismissal but remand to District Court for proceedings on the initial misdemeanor citations. Shea Denning blogged about the case here.

Indictments

(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

State v. Nickens, ___ N.C. App. ___, 821 S.E.2d 864 (Nov. 6, 2018). 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. Jonathan Holbrook blogged about this case in part here.

On discretionary review of a unanimous, unpublished decision of the Court of Appeals, ___ N.C. App. ___, 805 S.E.2d 563 (2017), in this child sex case, the court held that an indictment identifying the alleged victim only as "Victim #1" is facially invalid

State v. White, ___ N.C. ___, ___ S.E.2d ___ (May 10, 2019). Although the arrest warrant and the original indictment identified the victim by her full name, a superseding indictment charging the defendant with sexual offense with a child by an adult stated that he engaged in a sexual act with "Victim #1, a child who was under the age of 13 years, namely 7 years old." The defendant was found guilty and appealed. The Supreme Court found G.S. 15-144.2(b) to be clear and unambiguous: it requires

that the child be named in the indictment. In common understanding, to name someone is to identify that person in a way that is unique to that individual and enables others to distinguish between the named person and all other people. The phrase "Victim #1" does not distinguish this victim from other children or victims. The court went on to clarify that facial validity of an indictment is determined by evaluating only the allegations in the criminal pleading; it rejected the notion that a court may supplement the allegations in an indictment by referring to extrinsic evidence.

"Sears Roebuck and Company" sufficiently identified corporate victim and was not fatally flawed

State v. Speas, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). An indictment charging the defendant with felony larceny was not defective. The indictment alleged that the victim as "Sears Roebuck and Company." The defendant argued that although the indictment contains the word "company," it does not identify the victim as a company or other corporate entity. The Court disagreed. Noting prior case law holding defective an embezzlement indictment which alleged the victim's name as "The Chuck Wagon," the court noted that in this case the word "company" is part of the name of the property owner, "Sears Roebuck and Company." It noted that that the words corporation, incorporated, limited, or company, or their abbreviated form sufficiently identify a corporation in an indictment.

Statutory rape indictment identifying victim as "Victim #1" was fatally defective and did not confer jurisdiction

State v. Shuler, ___ N.C. App. ___, 822 S.E.2d 737 (Dec. 18, 2018). An indictment charging statutory rape of a person who is 13, 14, or 15 years old was facially defective where it did not identify the victim by name, identifying her only as "Victim #1." An indictment charging this crime must name the victim. The indictment need not include the victim's full name; use of the victim's initials may satisfy the "naming requirement." However, an indictment "which identifies the victim by some generic term is not sufficient."

Trial court erred by allowing the State to amend a second-degree kidnapping indictment to allege that the defendant restrained the victim for the purpose of facilitating the felony of assault inflicting serious *bodily* injury where indictment initially omitted word "bodily"

State v. Hill, ___ N.C. App. ___, 821 S.E.2d 631 (Oct. 16, 2018). The trial court erred by allowing the State to amend a second-degree kidnapping indictment. The indictment alleged that the defendant restrained the victim for the purpose of facilitating the felony of assault inflicting serious injury. However, that offense is a misdemeanor. During trial, the State was allowed to amend the indictment to add the term "bodily" such that the crime specified was "assault inflicting serious bodily injury," which is a felony. The court held that the State was bound by the crime alleged in the original indictment. However, the court continued, the indictment does allege false imprisonment, a lesser-included offense of kidnapping. Here, where the jury found that the defendant committed the acts as alleged in the indictment, the court vacated the judgment and remanded for entry of judgment and resentencing on the lesser-included offense of false imprisonment.

Informations

Bill of information that failed to explicitly waive right to indictment was fatally defective and failed to confer jurisdiction

State v. Nixon, ___ N.C. App. ___, 823 S.E.2d 689 (Feb. 5, 2019). The trial court erred by denying the defendant's motion for appropriate relief alleging that the trial court lacked subject matter jurisdiction to enter judgment where the defendant was charged with a bill of information that did not include or attach a waiver of indictment. G.S. 15A-642 allows for the waiver of indictment in non-capital cases where a defendant is represented by counsel. The statute further requires: "Waiver of Indictment must be in writing and signed by the defendant and his attorney. The waiver must be attached to or executed upon the bill of information." G.S. 15A-642(c). The court rejected the State's argument that the statute's requirements about waiver of indictment were not jurisdictional.

Misdemeanor Statement of Charges

Misdemeanor statement of charges filed in superior court was untimely and deprived the trial court of jurisdiction

State v. Capps, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). Over a dissent, the court held that the trial court lacked jurisdiction to try the defendant for offenses alleged in a misdemeanor statement of charges. A magistrate issued arrest warrants charging the defendant with misdemeanor larceny and injury to personal property. The defendant was convicted in district court and filed notice of appeal to Superior Court for trial de novo. Prior to jury selection, the court allowed the State to amend the charges with a misdemeanor statement of charges. The defendant was found guilty and appealed, arguing that the Superior Court lacked jurisdiction. The court agreed. The timing of arraignment in district court is determinative as to how, when, and for what reason a prosecutor may file a statement of charges. The prosecutor may file a statement of charges on his or her own determination at any time prior to arraignment in district court. After arraignment, the State only may file a statement of charges when the defendant objects to the sufficiency of the pleading and the trial court rules that the pleading is in fact insufficient. Here, the State filed an untimely and unauthorized misdemeanor statement of charges and the trial court lacked jurisdiction to try the defendant.

Evidence

Character Evidence

Evidence of victim's gang membership, tattoos and gun possession did not involve "specific instances of conduct" and was properly excluded under 405(b)

State v. Greenfield, ___ N.C. App. ___, 822 S.E.2d 477 (Dec. 4, 2018), *temp. stay allowed,* ___ N.C. ___, 822 S.E.2d 411 (Jan. 23, 2019). In this case arising out of homicide and assault charges related to a drug deal gone bad, the trial court did not err by excluding evidence that the deceased victim was a gang leader, had a "thug" tattoo, and previously had been convicted of armed robbery. The defendant argued this evidence showed the victim's violent character, relevant to his assertion of self-defense. The court noted that a defendant claiming self-defense may produce evidence of the victim's character tending to

show that the victim was the aggressor. Rule 405 specifies how character evidence may be offered. Rule 405(a) states that evidence regarding the victim's reputation may be offered; Rule 405(b) states that evidence concerning specific instances of the victim's conduct may be offered. Here, the defendant argued that the evidence was admissible under Rule 405(b). The court concluded, however, that the evidence concerning the victim's gang membership, possession of firearms, and tattoo do not involve specific instances of conduct admissible under the rule. Regarding the victim's prior conviction for armed robbery, the court excluded this evidence under Rule 403 finding that prejudice outweighed probative value. Here, the defendant made no argument that the trial court erred in excluding the evidence under Rule 403 and thus failed to meet his burden on appeal as to this issue.

Confrontation Clause

(1) Witness was properly deemed unavailable for purposes of Evidence Rule 804 and the Confrontation Clause where the witness's location was unknown and the State made reasonable efforts to procure her attendance at trial; (2) Defendant's Confrontation Clause rights were forfeited by wrongdoing where witnesses were intimidated by the defendant and his family

State v. Allen, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). (1) In this murder, robbery and assault case, the trial court properly found that a witness was unavailable to testify under Evidence Rule 804 and the Confrontation Clause. The witness, Montes, was arrested in connection with the crimes at issue. She cooperated with officers and gave a statement that incriminated the defendant. She agreed to appear in court and testify against the defendant, but failed to do so. Her whereabouts were unknown to her family, her bondsman and the State. The State successfully moved to allow her recorded statement into evidence on grounds that she was unavailable and that the defendant forfeited his constitutional right to confrontation due to his own wrongdoing. The defendant was convicted and appealed. Considering the issue, the court noted that the evidence rule requires that a finding of unavailability be supported by evidence of process or other reasonable means. To establish unavailability under the Confrontation Clause, there must be evidence that the State made a good-faith effort to obtain the witness's presence at trial. Here, the State delivered a subpoena for Montes to her lawyer, and Montes agreed to appear in court to testify against the defendant. These findings support a conclusion both that the State used reasonable means and made a good-faith effort to obtain the witness's presence at trial. (2) The trial court properly found that the defendant forfeited his Confrontation Clause rights through wrongdoing. The relevant standard for determining forfeiture by wrongdoing is a preponderance of the evidence and the State met this burden. Here, the defendant made phone calls from jail showing an intent to intimidate Montes into not testifying, and threatened another testifying witness. Additionally, his mother and grandmother, who helped facilitate his threatening calls to Montes, showed up at Montes' parents' house before trial to engage in a conversation with her about her testimony. The trial court properly found that the net effect of the defendant's conduct was to pressure and intimidate Montes into not appearing in court and not testifying.

(1) No confrontation clause violation where substitute analyst conducted independent analysis; (2) Testimony of analyst regarding weight of drugs was machine-generated and therefore not testimonial or hearsay

State v. Pless, ___ N.C. App. ___, 822 S.E.2d 725 (Dec. 18, 2018). (1) In this drug case, the court held—with one judge concurring in result only—that the trial court did not err by admitting evidence of the

identification and weight of the controlled substances from a substitute analyst. Because Erica Lam, the forensic chemist who tested the substances was not available to testify at trial, the State presented Lam's supervisor, Lori Knops, who independently reviewed Lam's findings to testify instead. The defendant was convicted and he appealed, asserting a confrontation clause violation. The court found that no such violation occurred because Knops's opinion resulted from her independent analysis of Lam's data. As to the identity of the substances at issue, Knops analyzed the data and gave her own independent expert opinion that the substance was heroin and oxycodone. (2) With respect to the weight of the substances, Knops's opinion was based on her review of Lam's "weights obtained on that balance tape." Because weight is machine generated, it is non-testimonial.

(1) Stipulation to lab result waived any Confrontation Clause objections and the trial court need not address the defendant personally before accepting such stipulation; (2) oral stipulation treated no differently than written stipulation

State v. Loftis, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 26, 2019). (1) In this drug case, the trial court did not err by admitting a forensic laboratory report after the defendant stipulated to its admission. The defendant argued that the trial court erred by failing to engage in a colloquy with her to ensure that she personally waived her sixth amendment right to confront the analyst whose testimony otherwise would be necessary to admit the report. *State v. Perez*, __ N.C. App. __, __, 817 S.E.2d 612, 615 (2018), establishes that a waiver of Confrontation Clause rights does not require the type of colloquy required to waive the right to counsel or to enter a guilty plea. In that case, the defendant argued that the trial court erred by allowing him to stipulate to the admission of forensic laboratory reports without engaging in a colloquy to ensure that he understood the consequences of that decision. The court rejected that argument, declining 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 through a stipulation. In *Perez*, the court noted that if the defendant did not understand the implications of the stipulation, his recourse is a motion for appropriate relief asserting ineffective assistance of counsel. (2) The court rejected the defendant's attempt to distinguish *Perez* on grounds that it involved a written stipulation personally signed by the defendant, while this case involves defense counsel's oral stipulation made in the defendant's presence. The court found this a "distinction without a difference." Here, the stipulation did not amount to an admission of guilt and thus was not the equivalent of a guilty plea. The court continued:

> [W]e . . . decline to impose on the trial courts a categorical obligation "to personally address a defendant" whose counsel stipulates to admission of a forensic report and corresponding waiver of Confrontation Clause rights. That advice is part of the role of the defendant's counsel. The trial court's obligation to engage in a separate, on-the-record colloquy is triggered only when the stipulation "has the same practical effect as a guilty plea."

Phil Dixon blogged about lap report stipulations and the Confrontation Clause here.

Expert Opinions

Error for chemist to testify to identity of pills without explaining testing methodology, but did not rise to the level of plain error warranting a new trial

State v. Piland, ___ N.C. App. ___, 822 S.E.2d 876 (Dec. 18, 2018). In this drug case, the trial court erred but did not commit plain error by allowing the State's expert to testify that the pills were hydrocodone. With no objection from the defendant at trial, the expert testified that she performed a chemical analysis on a single tablet and found that it contained hydrocodone. On appeal the defendant asserted that this was error because the expert did not testify to the methods used in her chemical analysis. The court agreed holding: "it was error for the trial court not to properly exercise its gatekeeping function of requiring the expert to testify to the methodology of her chemical analysis." However, the court concluded that the error does not amount to plain error "because the expert testified that she performed a "chemical analysis" and as to the results of that chemical analysis. Her testimony stating that she conducted a chemical analysis and that the result was hydrocodone does not amount to "baseless speculation," and therefore her testimony was not so prejudicial that justice could not have been done."

Where State's theory did of physical helplessness did not depend on the victim's lack of memory, proposed expert testimony that an impaired person can engage in volitional actions and not remember was properly excluded as not assisting the trier of fact

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). In this second-degree rape case involving a victim who had consumed alcohol, the trial court did not abuse its discretion by refusing to allow testimony of defense expert, Dr. Wilkie Wilson, a neuropharmacologist. During voir dire, Wilson testified that one of his areas of expertise was alcohol and its effect on memory. He explained that he would testify "about what's possible and what's, in fact, very, very likely and [sic] when one drinks a lot of alcohol." He offered his opinion that "someone who is having a blackout might not be physically helpless." The State objected to this testimony, arguing that his inability to demonstrate more than "maybe" possibilities meant that his testimony would not be helpful to the jury. The trial court sustained the objection, determining that the expert would not assist the trier of fact to understand the evidence or to determine a fact in issue in the case. Because the State's theory of physical helplessness did not rest on the victim's lack of memory, the expert's testimony would not have helped the jury determine a fact in issue. Thus, the trial court did not abuse its discretion in excluding this testimony. Even if the trial court had erred, no prejudice occurred given the State's overwhelming evidence of the victim's physical helplessness.

State's expert opinion that child was abused in absence of physical evidence of abuse was impermissible vouching and constituted reversible error

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019). In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused.

The court began by concluding that the testimony offered by the State's expert that Kim had, in fact, been sexually abused was inadmissible. The court reiterated the rule that where there is no physical evidence of abuse, an expert may not opine that sexual abuse has in fact occurred. In this case the State offered no physical evidence that Kim had been sexually abused. On direct examination the State's expert testified consistent with governing law. On cross-examination, however, the expert expressed the opinion that Kim "had been sexually abused." And on redirect the State's expert again opined that Kim had been sexually abused. In the absence of physical evidence of sexual abuse, the expert's testimony was inadmissible.

Criminal Procedure

Brady Material and Discovery

(1) No Brady violation where law enforcement failed to disclose (and subsequently destroyed) blank audio tape; defendant failed to demonstrate materiality or bad faith of potentially useful evidence; (2) No abuse of discretion for trial court to refuse to impose sanctions for alleged discovery violation; (3) No error to refuse jury instruction on lost evidence where defendant couldn't demonstrate bad faith or exculpatory value of lost tape

State v. Hamilton, ___ N.C. App. ___, 822 S.E.2d 548 (Dec. 4, 2018). (1) In this drug trafficking case, the trial court did not err by denying the defendant's motion to dismiss all charges due to the State's failure to preserve and disclose a blank audio recording of a conversation between an accomplice and the defendant. After the accomplice Stanley was discovered with more than 2 pounds of methamphetamine in his vehicle, he told officers that the defendant paid him and a passenger to pick up the drugs in Atlanta. Stanley agreed to help officers establish that the defendant was involved by arranging a control delivery of artificial methamphetamine. With Lt. Moody present, Stanley used a cell phone to call the defendant to arrange a pick up at a specified location. The defendant's associates were arrested when they arrived at the site and testified as witnesses for the State against the defendant. During trial, defense counsel asked Moody on cross-examination if he attempted to record the telephone conversations between Stanley and the defendant. Moody said that he tried to do so with appropriate equipment but realized later that he had failed to record the call. Defense counsel told the trial court that no information had been provided in discovery about Moody's attempt to record the call. After questioning Moody outside of the presence of the jury, the defendant filed a motion for sanctions seeking dismissal of the charges for a willful violation of the discovery statutes and his constitutional rights. The trial court denied the motion. The defendant was convicted and appealed. The defendant argued that the State violated his *Brady* rights by not preserving and disclosing the blank audio recording of the conversation. The court disagreed. The defendant had the opportunity to question Stanley about the phone call, cross-examine Moody about destruction of the blank recording, and argue the significance of the blank recording to the jury. Although the blank recording could have been potentially useful, the defendant failed to show bad faith by Moody. Moreover, while the evidence may have had the potential to be favorable, the defendant failed to show that it was material. In this respect, the court rejected the notion that the blank recording implicated Stanley's credibility.

(2) The court rejected the defendant's argument that the trial court erred by denying his motion for sanctions for failure to preserve and disclose the blank recording. Under the discovery statutes, Moody should have documented his efforts to preserve the conversation by audio recording and provided the blank audio file to the District Attorney's Office to be turned over to the defendant in discovery. The

court noted that when human error occurs with respect to technology used in investigations "[th]e solution in these cases is to document the attempt and turn over the item with that documentation, even if it appears to the officer to lack any evidentiary value." However, failure to do so does not always require dismissal or lesser sanctions. Here, the trial court considered the materiality of the blank file and the circumstances surrounding Moody's failure to comply with his discovery obligations. In denying sanctions, it considered the evidence presented and the arguments of counsel concerning the recording. The trial court found Moody's explanation of the events surrounding the recording to be credible. On this record, the trial court did not abuse its discretion in denying sanctions.

(3) The trial court did not err by failing to provide a jury instruction with respect to the audio recording. The court noted that in *State v. Nance*, 157 N.C. App. 434 (2003), it held that the trial court did not err by declining to give a special instruction requested by the defendant concerning lost evidence when the defendant failed to establish that the police destroyed the evidence in bad faith and that the missing evidence possessed an exculpatory value that was apparent before it was lost. As in this case, the defendant failed to make the requisite showing and the trial court did not err by declining to give the requested instruction.

Closing Argument

Over a dissent, new trial ordered for prosecutor's closing argument which implied the defendant acted out of racial animus when no evidence supported racial motivations for the shooting

State v. Copley, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019). In this first-degree murder case, the court held, over a dissent, that the trial court committed prejudicial error by allowing the prosecutor to argue that the defendant shot the victim because he was black where that argument was not supported by the evidence and was "wholly gratuitous and inflammatory." The defendant argued that the trial court erred by overruling his objections to the prosecutor's statements during closing argument that the "undercurrent" of the case and the "elephant in the room" was that the defendant was scared of black males who had congregated outside of his home. The prosecutor argued that when considering self-defense, jurors could ask themselves whether the situation would have been different if the people outside of the house were young white males. The prosecutor asserted that fear "based out of race is not a reasonable fear" and that the defendant was afraid of the group outside because he thought they may be in a gang. Long-standing precedents of the US and NC Supreme Courts "prohibit superfluous injections of race into closing arguments." However, where race is relevant, reference to it may be appropriate. Here, no evidence was presented to the jury suggesting that the defendant had a racially motivated reason for shooting the victim. In fact, the prosecutor prefaced his final argument by acknowledging the absence of any evidence of racial bias. Despite that, the prosecutor argued that because the defendant is white, he was motivated to shoot and kill the victim because he was black. The court concluded: "Race was irrelevant to the defendant's case." The court rejected the State's argument that any evidence supported the prosecutor's argument that the defendant feared the black males because he thought they were in a gang. The court assessed the State's argument as "equat[ing] gang membership to black males." It continued:

> The State's argument insinuates Defendant could have believed the individuals outside his house were gang members because they were black. No admitted evidence suggests Defendant might have thought the individuals were gang members because of their race. The State's argument that Defendant might have inferred the individuals were gang

members because of their race is offensive, invalid, and not supported by any evidence before the jury.

The court concluded that the prosecutor's comments "are a wholly gratuitous injection of race into the trial and were improper." It continued: "The prosecutor's comments improperly cast Defendant as a racist, and his comment implying race was "the elephant in the room" is a brazen and inflammatory attempt to interject race as a motive into the trial and present it for the jury's consideration." Finding the error to be prejudicial, the court ordered a new trial.

No error for court to fail to intervene *ex mero motu* in prosecutor's closing argument; (1) standard for impairment was correctly stated when viewed in full context; (2) Argument that jury could "send a message" and was the "moral voice" of the community were not improper

State v. Shelton, ___ N.C. App. ___, 824 S.E.2d 136 (Feb. 5, 2019) (1) In this felony death by vehicle case, the prosecution did not incorrectly state the standard for impairment in jury argument. The defendant asserted that the prosecutor's statements suggested that the jury could find the defendant guilty merely if impairing substances were in his blood. The court disagreed finding that the when viewed in totality, the prosecutor's statements made clear that the defendant could only be convicted if he was, in fact, legally impaired. (2) The prosecutor did not improperly appeal to the jury's passion and prejudice requiring the trial court to intervene ex mero motu. The prosecutor asserted that the jury "can send a message" with its verdict and told the jury that it was "the moral voice and conscience of this community." Neither of these argument are improper.

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. ___, 821 S.E.2d 887 (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. ___, 821 S.E.2d 188 (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.

Defenses

Reversible error not to instruct on self-defense; instruction was supported by the evidence when viewed in the light most favorable to the defendant

State v. Parks, ___ N.C. App. ___, 824 S.E.2d 881 (Feb. 19, 2019). In this assault case, the trial court committed prejudicial error by failing to instruct the jury on self-defense. Aubrey Chapman and his friend Alan McGill attended a party. During the party, the defendant punched McGill in the face. Chapman saw the confrontation and hit the defendant. Security escorted the defendant out of the venue. Chapman followed, as did others behind him. The evidence conflicts as to what occurred next. Chapman claimed that the defendant charged him with a box cutter. Reggie Penny, a security guard who was injured in the incident, said that people rushed the defendant and started an altercation. Sherrel Outlaw said that while the defendant had his hands up, a group of guys walked towards him. When the defendant took a couple of steps back, someone hit him in the face and a group of guys jumped on him. Outlaw did not see the defendant with a weapon. The trial court denied the defendant's request for a self-defense instruction. The defendant was convicted and appealed. The court found that the trial court erred by failing to instruct the jury on self-defense, finding that the defendant presented competent evidence that he reasonably believed that deadly force used was necessary to prevent imminent death or great bodily harm. Citing Penny and Outlaw's testimony, it held that evidence is sufficient to support the defendant's argument that the assault on him gave rise to his reasonable apprehension of death or great bodily harm. Although the State correctly asserts that some of the evidence shows that the defendant was the initial aggressor, conflicting evidence indicates that he was not brandishing a weapon and was attacked without provocation. The court noted that it must view the evidence in the light most favorable to the defendant. The court went on to conclude that the trial court's error was prejudicial.

In case involving convictions of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon, the court held, over a dissent, that the trial court committed prejudicial error by declining to instruct the jury on self-defense and defense of habitation

State v. Coley, ___ N.C. App. ___, 822 S.E.2d 762 (Dec. 18, 2018), *temporary stay allowed*, ___ N.C. ___, 821 S.E.2d 836 (Jan. 4, 2019). In this case involving convictions of assault with a deadly weapon inflicting serious injury and possession of a firearm by a felon, the court held—over a dissent—that the trial court committed prejudicial error by declining to instruct the jury on self-defense and defense of habitation. The case involved the defendant's shooting of Derrick Garris. The events began when Garris punched the defendant while he was sitting outside of his neighbor's house. The defendant was recovering from a broken leg and was using crutches and a wheelchair; the punch caused him to fall out of his chair. The defendant got up and began walking home on crutches. When he arrived home, Garris grabbed the defendant and threw him against the door, over two chairs, and into a recliner, while suggesting that the defendant had "snitched" on Garris's brothers. Garris left but then returned, punched the defendant again and left. The defendant testified that by the time he had climbed from the floor into his wheelchair, Garris re-entered the house. The defendant reached down beside his wheelchair, retrieved a gun, and shot Garris. The trial court denied the defendant's request for a jury instruction on self-defense and defense of habitation. The defendant was convicted and he appealed.

The court began by concluding that the trial court erred by failing to instruct on self-defense. Here, the defendant's testimony supports his argument that he intentionally shot at Garris. In so holding the court rejected the State's argument that the evidence showed that the defendant made only a warning shot, and did not intend to hit Garris. Here, the defendant's testimony indicates that he had a reasonable belief that Garris would continue to severely injure or kill him and that he shot Garris to prevent further assault or death. The defendant testified to his fear of Garris due to Garris's suggestion that he was a snitch. He further testified to his uncertainty as to whether Garris was armed and to his need to protect himself. Viewed as a whole, the jury could reasonably infer that the defendant intended to strike a blow when he aimed and shot at Garris. Ample testimony was presented showing that the defendant had an objectively reasonable belief that he needed to use deadly force to repel another physical attack to his person by Garris. Because of Garris's previous assaults the defendant, who required a wheelchair and crutches to ambulate, was reasonably afraid of further injury or death. He did not know whether or not Garris had retrieved a weapon before he returned. The State's argument focuses on a very brief portion of the defendant's testimony in which he stated that he fired a "warning shot," but neglects to review it in the light most favorable to the defendant. Although contradictory evidence exists, sufficient evidence was presented for an instruction on self-defense.

The trial court also erred by refusing to give an instruction on defense of habitation. The defendant was inside his home when Garris entered. Garris had repeatedly assaulted the defendant that evening and the defendant barely managed to get himself off the floor and into his wheelchair when Garris returned. The court rejected the notion that Garris also had a right to be in the house, negating the defense of home presumption in G.S. 14-51.2(b). The defendant testified that Garris "stayed" in the house occasionally, and Garris testified that he had some clothes, but no other belongings, at the house. Presuming a conflict in the evidence exists as to whether Garris had a right to be in the home, it should have been resolved by the jury. Because the defendant intended to and did shoot at Garris while under attack inside his home, the trial court erred by denying the instruction on defense of habitation.

Court flags inadequate jury instruction for definition of "home" and "curtilage" in Criminal Pattern Jury Instruction 308.80 (Defense of Habitation/Workplace/Motor Vehicle)

State v. Copley, ___ N.C. App. ___, ___ S.E.2d ___ (May 7, 2019), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 23, 2019). In this first-degree murder case involving a shooting outside of the defendant's home that was reversed on other grounds, the court noted an error in the trial court's jury instructions with respect to defense of habitation. Noting a problem in the current pattern jury instruction on defense of habitation, the court stated:

> In the instant case, the trial court failed to provide a definition for "home" in the jury instructions. While not argued, a discrepancy exists between N.C.P.I. Crim. 308.80 and the controlling N.C. Gen. Stat. § 14-51.2. The jury could have potentially believed that Defendant could only have exercised his right of self-defense and to defend his habitation only if [the victim] was attempting to enter the physical confines of Defendant's house, and not the curtilage or other areas.
>
> The absence of a definition for "home" or "curtilage" in the pattern instruction, and the reference to *State v. Blue* and the now repealed statute, is not consistent with the current statute. The pattern instruction should be reviewed and updated to reflect the formal and expanded definition of "home" as is now required by N.C. Gen. Stat. § 14-51.2.

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.

Divided Court of Appeals affirms denial of entrapment instruction

State v. Keller, ___ N.C. App. ___, ___ S.E.2d ___ (May 21, 2019). In this solicitation of a minor by computer case, the court held, over a dissent, that the trial court did not err by failing to submit the defense of entrapment to the jury. The majority determined that the defendant failed to prove that he was entitled to an instruction on entrapment where the evidence supports the defendant's predisposition and willingness to engage in the crime charged.

Pleas

No error to reject guilty plea where defendant maintained innocence during plea colloquy

State v. Chandler, ___ N.C. App. ___, ___ S.E. 2d ___ (April 16, 2019). In a child sexual assault case, the court held, over a dissent, that the trial court did not err by refusing to accept a tendered guilty plea. The defendant was indicted for first-degree sex offense with a child and indecent liberties. The defendant reached a plea agreement with the State and signed the standard Transcript of Plea form. The form indicated that the defendant was pleading guilty, as opposed to entering a no contest or Alford plea. However, during the trial court's colloquy with the defendant at the plea proceeding, the defendant stated that he did not commit the crime. Because the defendant denied his guilt, the trial court declined to accept the plea. At trial, the defendant continued to maintain his innocence. The defendant was convicted and appealed, asserting that the trial court improperly refused to accept his guilty plea in violation of G.S. 15A-1023(c). That provision states that if the parties have entered into a plea agreement in which the prosecutor has not agreed to make any recommendations regarding sentence, the trial court must accept the plea if it determines that it is the product of informed choice and that there is a factual basis. Here, the trial court correctly rejected the plea where it was not the product of informed choice. When questioned about whether he understood his guilty plea, the defendant maintained his innocence. Because of the conflict between the defendant's responses during the colloquy and the Transcript of Plea form, the trial court could not have found that the plea was knowingly, intelligently, and understandingly entered. The court explained: "To find otherwise would be to rewrite the plea agreement as an *Alford* plea." In a footnote, it added:

> [I]f we were to accept Defendant's argument, the likelihood that factually innocent defendants will be incarcerated in North Carolina increases because it removes discretion and common sense from our trial judges. Judges would be required to accept guilty pleas, not just *Alford* pleas, when defendants maintain innocence. Such a result is incompatible with our system of justice.

John Rubin blogged about the case here.

Pretrial Release

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

Chavez v. Carmichael, ___ N.C. App. ___, 822 S.E.2d 131 (Nov. 6, 2018), *review allowed*, ___ N.C. ___, 824 S.E.2d 399 (Mar. 27, 2019). 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. Jonathan Holbrook blogged about the case here.

Sentencing

Aggravating Factors

DWI conviction in superior court appealed to court of appeals and pending at time of sentencing hearing for another DWI properly counted as grossly aggravating factor

State v. Cole, ___ N.C. App. ___, 822 S.E.2d 456 (Nov. 20, 2018). The trial court did not err by sentencing the defendant as a Level Two offender after finding the existence of a grossly aggravating factor based on upon his prior DWI conviction. The defendant was convicted in superior court of DWI on 15 September 2016. He appealed that conviction on 26 September 2016, which remained pending at the time of the instant 31 August 2017 sentencing hearing. The defendant argued that his prior DWI conviction could not be used to enhance his sentence because the prior conviction was pending on appeal and thus not final. The court disagreed, finding no statutory language limiting convictions that

can be used as grossly aggravating factors to only those not challenged on appeal. The court noted however that if the earlier DWI conviction is later overturned, the defendant would be entitled to be resentenced.

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. Jamie Markham blogged about the case here.

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. ___, 821 S.E.2d 862 (Nov. 6, 2018), *temp. stay allowed,* ___ N.C. ___, 820 S.E.2d 519 (Nov. 28, 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.

Fines

Excessive Fines Clause of the 8th Amendment is incorporated and applies to the states

Timbs v. Indiana, 586 U.S. ___, 139 S. Ct. 682 (Feb. 20, 2019). The Court held that the Eighth Amendment's Excessive Fines Clause is an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause. Tyson Timbs pleaded guilty in Indiana state court to dealing in a controlled substance and conspiracy to commit theft. The trial court sentenced him to one year of home detention and five years of probation, which included a court-supervised addiction-treatment program. The sentence also required Timbs to pay fees and costs totaling $1,203. At the time of Timbs's arrest, the police seized his vehicle, a Land Rover SUV Timbs had purchased for about $42,000. Timbs paid for the vehicle with money he received from an insurance policy when his father died. The State engaged a law firm to bring a civil suit for forfeiture of the Land Rover, charging that the vehicle had been used to transport heroin. After Timbs's guilty plea in the criminal case, the trial court held a hearing on the forfeiture. Although finding that Timbs's vehicle had been used to facilitate violation of a criminal statute, the court denied the requested forfeiture, observing that Timbs had recently purchased the vehicle for $42,000, more than four times the maximum $10,000 monetary fine assessable against him for his drug conviction. Forfeiture of the Land Rover, the court determined, would be grossly disproportionate to the gravity of Timbs's offense, hence unconstitutional under the Eighth Amendment's Excessive Fines Clause. The Indiana Court of Appeals affirmed that determination, but the Indiana Supreme Court reversed. The state Supreme Court did not decide whether the forfeiture would be excessive. Instead, it held that the Excessive Fines Clause constrains only federal action and is inapplicable to state impositions. The US Supreme Court granted certiorari. The question presented was: Is the Eighth Amendment's Excessive Fines Clause an "incorporated" protection applicable to the States under the Fourteenth Amendment's Due Process Clause? The Court answered in the affirmative, stating:

Like the Eighth Amendment's proscriptions of "cruel and unusual punishment" and "[e]xcessive bail," the protection against excessive fines guards against abuses of government's punitive or criminal law-enforcement authority. This safeguard, we hold, is "fundamental to our scheme of ordered liberty," with "dee[p] root[s] in [our] history and tradition." *McDonald v. Chicago*, 561 U. S. 742, 767 (2010) (internal quotation marks omitted; emphasis deleted). The Excessive Fines Clause is therefore incorporated by the Due Process Clause of the Fourteenth Amendment.

The Court went on to reject the State of Indiana's argument that the Excessive Fines Clause does not apply to its use of civil in rem forfeitures. Jamie Markham blogged about the case here.

Post-conviction

Motions for Appropriate Relief

(1) Failure to raise issue of ineffective assistance of trial counsel on direct appeal procedurally barred the related MAR claim where the record was sufficient to determine the issue; (2) MAR should have been granted on issue of ineffective assistance of appellate counsel

State v. Casey, ___ N.C. App. ___, 823 S.E.2d 906 (Jan. 15, 2019). In this child sexual assault case, the court reversed the trial court's order denying the defendant's Motion for Appropriate Relief (MAR) seeking a new trial for ineffective assistance of counsel related to opinion testimony by the State's expert. The defendant was convicted of sexual offenses against Kim. On appeal the defendant argued that the trial court should have granted his MAR based on ineffective assistance of both trial and appellate counsel regarding expert opinion testimony that the victim had in fact been sexually abused. The court agreed with the defendant that this expert opinion was improper vouching and inadmissible in the absence of physical evidence of abuse. (1) The court held that because the defendant failed to raise the issue on direct appeal, his claim that trial counsel was ineffective by failing to move to strike the expert's opinion that victim Kim had in fact been sexually abused was procedurally defaulted. The record from the direct appeal was sufficient for the court to determine in that proceeding that trial counsel provided ineffective assistance of counsel. Defense counsel failed to object to testimony that was "clearly inadmissible" and the court could not "fathom any trial strategy or tactic which would involve allowing such opinion testimony to remain unchallenged." And in fact, the trial transcript reveals that allowing the testimony to remain unchallenged was not part of any trial strategy. Moreover trial counsel's failure to object to the opinion testimony was prejudicial. Because the "cold record" on direct appeal was sufficient for the court to rule on the ineffective assistance of counsel claim, the MAR claim was procedurally barred under G.S. 15A-1419(a)(3).

(2) The court continued, however, by holding that the defendant was denied effective assistance of appellate counsel in his first appeal when appellate counsel failed to argue that it was error to allow the expert's testimony that Kim had, in fact, been sexually abused. The court noted that the ineffective assistance of appellate counsel claim was not procedurally barred. And, applying the *Strickland* attorney error standard, the court held that appellate counsel's failure to raise the issue on direct appeal constituted ineffective assistance of counsel. The court thus reversed and remanded for entry of an order granting the defendant's MAR.

Satellite-Based Monitoring

(1) Where State raised the issue of reasonableness of SBM but failed to present any evidence, SBM issue was preserved and order reversed; (2) Preservation rules for SBM vary depending on which party (if any) raises the issue of reasonableness

State v. Lopez, ___ N.C. App. ___, 826 S.E.2d 498 (Mar. 19, 2019). (1) In this second-degree rape case, the trial court erred by ordering lifetime SBM where the State did not meet its burden of proving that

SBM was a reasonable Fourth Amendment search. The United States Supreme Court has held that SBM is a search. Therefore, before subjecting a defendant to SBM, the trial court must first examine whether the monitoring program is reasonable. Here, the State failed to carry its burden of proving the SBM was a reasonable Fourth Amendment search where it failed to put on any evidence regarding reasonableness. The State will have only one opportunity to prove that SBM is a reasonable search. Here, because it failed to do so, the court reversed the trial court's SBM order.

(2) The opinion acknowledged that it was a "tumultuous time" in SBM litigation. It noted three basic scenarios that can impact preservation of the claim. Where the defendant fails to object, the State doesn't raise reasonableness and the court doesn't rule on the issue, the claim is not preserved. Where the defendant objects to the imposition of SBM but fails to mention *Grady* or the Fourth Amendment, the issue is preserved, at least when apparent from context. Where the State raises the issue of reasonableness (as it did here), the defendant fails to object, and the court considers the issue, the issue is preserved for appellate review. While the defendant must object to preserve the issue where the trial court fails to consider reasonableness, the issue is preserved when the State raises the issue and the trial court rules on it, even without an objection from the defendant.

Appellate Issues

***Strickland* prejudice presumed where defense counsel failed to file notice of appeal despite instructions from defendant to do so, appeal waiver notwithstanding**

Garza v. Idaho, 586 U.S. ___, 139 S. Ct. 738 (Feb. 27, 2019). The presumption of prejudice recognized in *Roe v. Flores-Ortega*, 528 U. S. 470 (2000), applies regardless of whether the defendant has signed an appeal waiver. Defendant Garza signed two plea agreements arising from charges brought by the State of Idaho. Each agreement included a provision stating that Garza waived his right to appeal. The trial court accepted the agreements and sentenced Garza. Shortly thereafter Garza told his trial counsel that he wanted to appeal. Although Garza continuously reminded his attorney of this directive, counsel did not file a notice of appeal informing Garza that appeal was problematic because of the waiver. About four months after sentencing Garza sought post-conviction relief in state court, alleging that trial counsel provided ineffective assistance by failing to file notices of appeal despite his requests. The trial court denied relief, and this ruling was affirmed by the state appellate courts. The U.S. Supreme Court granted certiorari to resolve a split of authority on this issue.

As a general rule, a defendant claiming ineffective assistance of counsel must prove that counsel's representation fell below an objective standard of reasonableness and that prejudice occurred. In certain circumstances however prejudice is presumed, such as where the defendant is denied counsel at a critical stage or where counsel entirely fails to subject the prosecution's case to meaningful adversarial testing. Additionally, in *Flores-Ortega*, 528 U.S. 470 (2000), the Court held that when an attorney's deficient performance costs a defendant an appeal that the defendant would have otherwise pursued, prejudice is presumed. The question presented in this case was: whether that rule applies even when the defendant has, in the course of pleading guilty, signed an "appeal waiver"—that is, an agreement forgoing certain, but not all, possible appellate claims. The Court held that it does.

The Court first determined that Garza's lawyer provided deficient performance: "Where, as here, a defendant has expressly requested an appeal, counsel performs deficiently by disregarding the

defendant's instructions." Turning to the crux of the case, the Court held that the *Flores-Ortega* presumption of prejudice applied despite the appeal waiver. The Court reasoned that because there is no dispute that Garza wished to appeal, a direct application of that case resolves this one. It held: When counsel's constitutionally deficient performance deprives a defendant of an appeal that he otherwise would have taken, the defendant has made out a successful ineffective assistance of counsel claim entitling him to an appeal, with no need for a further showing of the merit of his claim, regardless of whether an appeal waiver was signed.