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Criminal Case Update

Summer 2017 Criminal Law Webinar

(includes selected cases decided between December 6, 2016 and May 16, 2017)

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

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Warrantless Stops and Searches

Applying *California v. Hodari*, 499 U.S. 621 (1991), court rules that no seizure occurred until the defendant's vehicle stopped and submitted to the officer's authority. The circumstances arising between the activation of the officer's blue lights and the defendant submitting to the officer's authority may be considered as part of the inquiry into reasonable suspicion.

State v. Mangum, ___ N.C. App. ___, 795 S.E.2d 106 (Dec. 6, 2016). (1) In this impaired driving case, the defendant was not seized within the meaning of the fourth amendment until he submitted to the officer's authority by stopping his vehicle. The court rejected the defendant's argument that the seizure occurred when the officer activated his blue lights. Because the defendant continued driving after the blue lights were activated, there was no submission to the officer's authority and no seizure until the defendant stopped his vehicle. As a result, the reasonable suspicion inquiry can consider circumstances that arose after the officer's activation of his blue lights but before the defendant's submission to authority. (2) The vehicle stop was supported by reasonable suspicion. An officer received an anonymous report that a drunk driver was operating a black, four-door Hyundai headed north on Highland Capital Boulevard. The officer located the vehicle as reported and observed that the defendant drove roughly 15 miles below the 35 mph speed limit; that the defendant stopped at an intersection without a stop sign or traffic signal for "longer than usual"; that the defendant stopped at a railroad crossing and remained motionless for 15 to 20 seconds, although no train was coming and there was no signal to stop; that after the officer activated his blue lights, the defendant continued driving for approximately two minutes, eventually stopping in the middle of the road, and in a portion of the road with no bank or curb, having passed several safe places to pull over. [Bob Farb blogged about the case here.]

Where uniformed officer on foot waved his hands for a vehicle to stop to seek information on another person but did not obstruct or otherwise formally display police authority, the encounter was consensual and no seizure occurred under the totality of the circumstances.

State v. Wilson, ___ N.C. App. ___, 793 S.E.2d 737 (Dec. 6, 2016). In this impaired driving case, the court held, over a dissent, that the trial court properly denied the defendant's motion to suppress where no seizure occurred. An officer went to a residence to find a man who had outstanding warrants for his arrest. While walking towards the residence, the officer observed a pickup truck leaving. The officer waved his hands to tell the driver—the defendant—to stop. The officer's intention was to ask the defendant if he knew anything about the man with the outstanding warrants; the officer had no suspicion that the defendant was the man he was looking for or was engaged in criminal activity. The officer was in uniform but had no weapon drawn; his police vehicle was not blocking the road and neither his vehicle's blue lights nor sirens were activated. When the defendant stopped the vehicle, the officer almost immediately smelled an odor of alcohol from inside the vehicle. After the defendant admitted that he had been drinking, the officer arrested the defendant for impaired driving. Because a

reasonable person would have felt free to decline the officer's request to stop, no seizure occurred; rather, the encounter was a consensual one. [Shea Denning blogged about the case here.]

Stop was supported by reasonable suspicion.

State v. Evans, ___ N.C. App. ___, 795 S.E.2d. 444 (Jan. 17, 2017). Reasonable suspicion supported the stop. An officer patrolling a "known drug corridor" at 4 am observed the defendant's car stopped in the lane of traffic. An unidentified pedestrian approach the defendant's car and leaned in the window. The officer found these actions to be indicative of a drug transaction and thus conducted the stop.

That a state allows the concealed carry of firearms pursuant to a permit system does not alter the ability of an officer to frisk an individual otherwise lawfully stopped where reasonable suspicion exists to believe they are armed and dangerous. The 4th Circuit holds 'armed and dangerous' is a unitary concept.

United States v. Robinson, 846 F.3d 694 (4th Cir. Jan. 23, 2017) (*en banc*). "After receiving a[n anonymous] tip that a man in a parking lot well known for drug-trafficking activity had just loaded a firearm and then concealed it in his pocket before getting into a car as a passenger . . . police stopped the car after observing that its occupants were not wearing seatbelts. Reasonably believing that the . . . passenger . . . was armed, the police frisked him and uncovered the firearm, leading to his arrest for the possession of a firearm by a felon." The defendant moved to suppress, arguing that the officers lacked reasonable suspicion to believe that he was armed and dangerous, as they had no reason to believe that he was not a concealed carry permit holder. The Fourth Circuit disagreed, "concluding that an officer who makes a lawful traffic stop and who has a reasonable suspicion that one of the automobile's occupants is armed may frisk that individual for the officer's protection and the safety of everyone on the scene." The court determined that a risk of danger sufficient to justify a frisk arises "from the combination of a forced police encounter and the presence of a weapon," even if the weapon is possessed legally. Indeed, the court stated that "traffic stops alone are inherently dangerous for police officers." It also emphasized that whether a detainee is armed and dangerous does not require two separate inquiries; one who is "armed [is] therefore dangerous." The dissent would have rejected the idea that "armed" implies "dangerous" and argued that "there is no reason to think that a person carrying or concealing a weapon during a traffic stop—[when] fully sanctioned by state law—is anything but a law-abiding citizen who poses no threat to the authorities." [Bob Farb blogged about this case here.]

Extension of vehicle stop by supported by reasonable suspicion under the totality of circumstances where vehicle not registered to the defendant, the defendant was visibly nervous and vague about travel plans, and possessed a prepaid cell phone and particular air freshener commonly used by drug traffickers, among other factors.

State v. Downey, ___ N.C. App. ___, 796 S.E.2d 517 (Feb. 7, 2017). Over a dissent, the court held that reasonable suspicion supported extension of the traffic stop. After an officer stopped the defendant for a traffic violation, he approached the vehicle and asked to see the driver's license and registration. As the defendant complied, the officer noticed that his hands were shaking, his breathing was rapid, and

that he failed to make eye contact. He also noticed a prepaid cell phone inside the vehicle and a Black Ice air freshener. The officer had learned during drug interdiction training that Black Ice freshener is frequently used by drug traffickers because of its strong scent and that prepaid cell phones are commonly used in drug trafficking. The officer determined that the car was not registered to the defendant, and he knew from his training that third-party vehicles are often used by drug traffickers. In response to questioning about why the defendant was in the area, the defendant provided vague answers. When the officer asked the defendant about his criminal history, the defendant responded that he had served time for breaking and entering and that he had a cocaine-related drug conviction. After issuing the defendant a warning ticket for the traffic violation and returning his documentation, the officer continued to question the defendant and asked for consent to search the vehicle. The defendant declined. He also declined consent to a canine sniff. The officer then called for a canine unit, which arrived 14 minutes after the initial stop ended. An alert led to a search of the vehicle and the discovery of contraband. The court rejected the defendant's argument that the officer lacked reasonable suspicion to extend the traffic stop, noting that before and during the time in which the officer prepared the warning citation, he observed the defendant's nervous behavior; use of a particular brand of powerful air freshener favored by drug traffickers; the defendant's prepaid cell phone; the fact that the defendant's car was registered to someone else; the defendant's vague and suspicious answers to the officer's questions about why he was in the area; and the defendant's prior conviction for a drug offense. These circumstances constituted reasonable suspicion to extend the duration of stop.

Once the purpose of the insurance violation stop was completed and no independent reasonable suspicion was developed, the officer unreasonably extended the stop to search for contraband.

State v. Miller, ___ N.C. App. ___, 795 S.E.2d 374 (Dec. 20, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 534 (Jan. 4, 2017). (1) An officer unlawfully extended a traffic stop under *Rodriguez*. An officer stopped the vehicle for speeding and failure to pay insurance premiums. The owner of the vehicle was in the passenger seat; the defendant was driving. The officer asked the defendant for his driver's license. When he learned that the passenger was the registered owner of the vehicle, the officer inquired about the status of his insurance. The passenger handed the officer an insurance card showing that he recently purchased car insurance. At the officer's request the passenger also produced his driver's license and told the officer they were coming from a friend's house on Randleman Road. The officer found this response interesting in light of where the vehicle was stopped. He then ordered the passenger out of the vehicle. As the passenger complied, the officer asked him if he had any weapons or drugs. When the passenger said that he did not, he was motioned to stand with another officer who had arrived on the scene. The officer then asked the defendant to step out of the vehicle. As the defendant complied, the officer asked him if he had any weapons or drugs. The defendant said that he did not. According to the officer he then asked the defendant, "Do you mind if I check?" To which the defendant allegedly responded, "No." The officer then search the defendant and found cocaine. The defendant was charged with possession of cocaine and convicted. Applying *Rodriguez*, the court held that the officer unduly extended the traffic stop. The court noted that the officer "was more concerned with discovering contraband than issuing traffic tickets." It noted:

> He readily accepted [the passenger's] insurance card as proof that [the passenger] had been paying the premiums, and he even testified at trial that he had no way to determine if the insurance card was invalid. Thereafter, [the] Officer . . . took no action to issue a citation, to address the speeding violation, or to otherwise indicate a diligent investigation into the reasons for the traffic stop. Instead, he ordered [the passenger] and defendant out of the vehicle and began an investigation into the presence of weapons and drugs.

Here, the State did not allege, nor did the evidence show, that the encounter had become consensual. Moreover, the court rejected the State's argument that the officer had reasonable suspicion to extend the stop. The only facts offered by the State to support this conclusion were that the officer observed the vehicle while patrolling "problem areas," that the defendant gave supposedly "incongruent" answers to questions about his travel, that the defendant raised his hands as he stepped out of the vehicle, and that the defendant was driving the vehicle instead of the passenger, its registered owner. The court noted in part that the defendant's responses in fact were not "incongruent." (2) Even assuming that the traffic stop was lawful up to the point when the defendant consented to the search, his consent was not valid. Although the officer testified that the defendant verbally agreed to the search, footage from the body camera revealed a different version of the interaction. Specifically, the officer had the defendant turned around, facing the rear of the vehicle with his arms and legs spread before he asked for his consent. The court concluded: "this was textbook coercion. If defendant did respond to Officer Harris's request—and it is still not apparent that he did—it was certainly not a free and intelligent waiver of his constitutional rights." [Phil Dixon blogged about the case here.]

Search of vehicle for evidence of driving while impaired justified by search incident to arrest where officers reasonably believed evidence of the crime would be found inside (and in fact was found inside).

State v. Martinez, ___ N.C. App. ___, 795 S.E.2d 386 (Dec. 20, 2016). After the defendant's arrest for impaired driving, officers properly searched his vehicle as a search incident to arrest. Applying *Arizona v. Gant*, the court found that the officer had a reasonable basis to believe that evidence of impaired driving might be found in the vehicle. The defendant denied ownership, possession, and operation of the vehicle to the officer both verbally and by throwing the car keys under the vehicle. Based on the totality of the circumstances, including the strong odor of alcohol on the defendant, the defendant's efforts to hide the keys and refusal to unlock the vehicle, and the officer's training and experience with regard to impaired driving investigations, the trial court properly concluded that the officer reasonably believed that the vehicle may contain evidence of the offense. In the factual discussion, the court noted that the officer had testified that he had conducted between 20-30 impaired driving investigations, that at least 50% of those cases involved discovery of evidence associated with impaired driving inside the vehicle, such as open containers of alcohol, and that he had been trained to search a vehicle under these circumstances. [Jeff Welty blogged about the case here.]

Other Warrantless Actions

Where officers had reasonable suspicion to stop the defendant's vehicle for driving while license revoked, activated their blue lights and commanded him to stop, the failure of the defendant to do so justified warrantless entry into the home under the doctrine of hot pursuit.

State v. Adams, ___ N.C. App. ___, 794 S.E.2d 357 (Dec. 6, 2016). Exigent circumstances justified the officers' warrantless entry into the defendant's home to arrest him. It was undisputed that the officers had reasonable suspicion to stop the defendant for driving while license revoked. They pulled into the defendant's driveway behind him and activated blue lights as the defendant was exiting his vehicle and making his way toward his front door. The defendant did not stop for the blue lights and continued hurriedly towards the front door after the officers told him to stop. "At that point," the court explained, "the officers had probable cause to arrest defendant for resisting a public officer and began a 'hot pursuit' of defendant." The officers arrived at the front door just as the defendant was making his way across the threshold and were able to prevent him from closing the door. The officers then forced the front door open and detained and arrested the defendant just inside the door. The court held that the warrantless entry and arrest was proper under *United States v. Santana*, 427 U.S. 38 (1976). It explained: Hot pursuit has been recognized as an exigent circumstance sufficient to justify a warrantless entry into a residence where there is probable cause, without consideration of immediate danger or destruction of evidence.

Court rejects community caretaking and knock and talk as justifications for warrantless search of curtilage of a home where basis for officer's suspicion was a car in the driveway with a door open.

State v. Huddy, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). Because an officer violated the defendant's fourth amendment rights by searching the curtilage of his home without a warrant, the trial court erred by denying the defendant's motion to suppress. The officer saw a vehicle with its doors open at the back of a 150-yard driveway leading to the defendant's home. Concerned that the vehicle might be part of a break-in or home invasion, the officer drove down the driveway, ran the vehicle's tags, checked—but did not knock—on the front door, checked the windows and doors of the home for signs of forced entry, "cleared" the sides of the house, and then went through a closed gate in a chain-link fence enclosing the home's backyard and approached the storm door at the back of the house. As the officer approached the door, which was not visible from the street, he smelled marijuana, which led to the defendant's arrest for drug charges. At the suppression hearing, the State relied on two exceptions to the warrant requirement to justify the officer's search of the curtilage: the knock and talk doctrine and the community caretaker doctrine. The court found however that neither exception applies. First, the officer did more than nearly knock and talk. Specifically, he ran a license plate not visible from the street, walked around the house examining windows and searching for signs of a break-in, and went first to the front door without knocking and then to a rear door not visible from the street and located behind a closed gate. "These actions went beyond what the U.S. Supreme Court has held are the permissible actions during a knock and talk." Likewise, the community caretaker doctrine does not support the officer's action. "The presence of a vehicle in one's driveway with its doors open is not the sort of emergency that justifies the community caretaker exception." The court also noted that because

the fourth amendment's protections "are at their very strongest within one's home," the public need justifying the community caretaker exception "must be particularly strong to justify a warrantless search of a home."

Search Warrants

Where confidential informant had bought drugs from the defendant within the last two weeks under law enforcement supervision, had seen drug evidence in the defendant's home within the last 48 hours, and had demonstrated to police a familiarity with drug trafficking in the city, the informant was sufficiently reliable to establish probable cause for a search warrant.

State v. Brody, ___ N.C. App. ___, 796 S.E.2d 384 (Feb. 7, 2017). In this drug case, a search warrant application relying principally upon information obtained from a confidential informant was sufficient to support a magistrate's finding of probable cause and a subsequent search of the defendant's home. The court rejected the defendant's argument that the affidavit failed to show that the confidential informant was reliable and that drugs were likely to be found in the home. The affidavit stated that investigators had known the confidential informant for two weeks, that the informant had previously provided them with information regarding other people involved in drug trafficking and that the detective considered the informant to be reliable. The confidential informant had demonstrated to the detective that he was familiar with drug pricing and how controlled substances are packaged and sold for distribution. Moreover, the informant had previously arranged, negotiated and purchased cocaine from the defendant under the detective's direct supervision. Additionally, the confidential informant told the detective that he had visited the defendant's home approximately 30 times, including within 48 hours before the affidavit was prepared, and saw the defendant possessing and selling cocaine each time. The court noted: "The fact that the affidavit did not describe the precise outcomes of the previous tips from the [informant] did not preclude a determination that the [informant] was reliable." It added: "although a general averment that an informant is 'reliable' -- taken alone -- might raise questions as to the basis for such an assertion," the fact that the detective also specifically stated that investigators had received information from the informant in the past "allows for a reasonable inference that such information demonstrated the [confidential informant's] reliability." Moreover, the detective had further opportunity to gauge his reliability when the informant arranged, negotiated and purchased cocaine from the defendant under the detective's supervision. [Jeff Welty blogged about the case here.]

Attempted knock and talk where officers observed signs of a marijuana grow operation at the front door and the smell of marijuana at the side door, along with information from confidential informant, supported issuance of search warrant.

State v. Kirkman, ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). (1) In this drug case, a search warrant was properly supported by probable cause. In this drug case, an officer lawfully approached the front of the defendant's home and obtained information that was later used to procure a search warrant. Specifically, he heard a generator and noticed condensation and mold, factors which in his experience and training were consistent with the conditions of the home set up to grow marijuana. The court stated, "It is well-established that an officer may approach the front door of a home, and if he is

able to observe conditions from that position which indicate illegal activity, it is completely proper for him to act upon that information." Also at issue was whether information provided by a confidential informant was sufficiently reliable to support a finding of probable cause. The affidavit noted that the confidential informant was familiar with the appearance of illegal narcotics and that all previous information the informant provided had proven to be truthful and accurate. This information was sufficient to establish the confidential informant's reliability.

Search of rental vehicle belonging to an overnight guest of the residence and parked within the home's curtilage was within the scope of the search warrant for the home.

State v. Lowe, ___ N.C. ___, 794 S.E.2d 282 (Dec. 21, 2016). (1) Affirming the Court of Appeals, the court held that a search warrant authorizing a search of the premises where the defendant was arrested was supported by probable cause. The affidavit stated that officers received an anonymous tip that Michael Turner was selling, using and storing narcotics at his house; that Turner had a history of drug related arrests; and that a detective discovered marijuana residue in the trash from Turner's residence, along with correspondence addressed to Turner. Under the totality of the circumstances there was probable cause to search the home for controlled substances. (2) Reversing the Court of Appeals, the court held that a search of a vehicle located on the premises was within the scope of the warrant. The vehicle in question was parked in the curtilage of the residence and was a rental car of the defendant, an overnight guest at the house. If a search warrant validly describes the premises to be searched, a car on the premises may be searched even though the warrant contains no description of the car. In departing from this general rule, the Court of Appeals held that the search of the car was invalid because the officers knew that the vehicle in question did not belong to the suspect in the drug investigation. Noting that the record was unclear as to what the officers knew about ownership and control of the vehicle, the court concluded; "Nonetheless, regardless of whether the officers knew the car was a rental, we hold that the search was within the scope of the warrant." [Bob Farb blogged about the case here.]

Defendant's misrepresentation as to his address coupled with his history of drug convictions and drug-dealing evidence seized from a vehicle supported a search warrant for his residence, despite no clear nexus to the home.

State v. Allman, ___ N.C. ___, 794 S.E.2d 301 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that because the magistrate had a substantial basis to find that probable cause existed to issue the search warrant, the trial court erred by granting the defendant's motion to suppress. The affidavit stated that an officer stopped a car driven by Jeremy Black. Black's half-brother Sean Whitehead was a passenger. After K-9 alerted on the car, a search found 8.1 ounces of marijuana packaged in a Ziploc bag and $1600 in cash. The Ziploc bag containing marijuana was inside a vacuum sealed bag, which in turn was inside a manila envelope. Both individuals had previously been charged on several occasions with drug crimes. Whitehead maintained that the two lived at Twin Oaks Dr. The officer went to that address and found that although neither individual lived there, their mother did. The mother informed the officer that the men lived at 4844 Acres Drive and had not lived at Twin Oaks Drive for years. Another officer went to the Acres Drive premises and determined that its description matched that given by the mother and that a truck outside the house was registered to Black. The officer had experience with drug

investigations and, based on his training and experience, knew that drug dealers typically keep evidence of drug dealing at their homes. Supported by the affidavit, the officer applied for and received a search warrant to search the Acres Drive home. Drugs and paraphernalia were found. Based on the quantity of marijuana and the amount of cash found in the car, the fact that the marijuana appeared to be packaged for sale, and Whitehead's and Black's criminal histories, it was reasonable for the magistrate to infer that the brothers were drug dealers. Based on the mother's statement that the two lived at the Acres Drive premises, the fact that her description of that home matched its actual appearance, and that one of the trucks there was registered to Black, it was reasonable for the magistrate to infer that the two lived there. And based on the insight from the officer's training and experience that evidence of drug dealing was likely to be found at their home and that Whitehead lied about where the two lived, it was reasonable for the magistrate to infer that there could be evidence of drug dealing at the Acres Drive premises. Although nothing in the affidavit directly connected the defendant's home with evidence of drug dealing, federal circuit courts have held that a suspect drug dealer's lie about his address in combination with other evidence of drug dealing can give rise to probable cause to search his home. Thus, under the totality of the circumstances there was probable cause to support search warrant. [Bob Farb blogged about this case here.]

Interrogations

Cumulative effect of officer's coercive statements and actions while interrogating the defendant rendered confession involuntary, although error was harmless based on substantial other evidence of guilt. **When confronted with forensic evidence sufficient to support murder charge, defendant was functionally under arrest and should have been Mirandized then.**

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d. 625 (Jan. 17, 2017). Although the trial court erred by concluding that the defendant's confession was voluntary, the error was harmless beyond a reasonable doubt. The defendant was asked to voluntarily show up at the police department for an interview in connection with a murder, after previously having denied ever having had contact with the murder victim. Approximately 20 minutes into the interview the defendant was shown a DNA analysis, indicating that his DNA was retrieved from under the victim's fingernails. At this point, a reasonable person would have believed that he was under arrest and the officer should have given *Miranda* warnings. The court noted that the detectives continued to reinforce the position that the defendant was not free to leave through their subsequent and continuing interrogation. They continued to challenge the defendant for over four hours until he was finally told that he was under arrest and given *Miranda* warnings. He subsequently confessed. The entirety of the interrogation, from when the defendant first should have been Mirandized, up until his inculpatory statements, rendered the inculpatory statements involuntary even though the defendant never confessed before being Mirandized. Finding these circumstances coercive, the court concluded:

> Defendant was questioned for hours after he should have been Mirandized and, throughout this questioning, the detectives repeatedly told Defendant they knew he was lying; that they had DNA proof of Defendant's guilt; that only a guilty person would have known [the victim] was shot in the back of the neck; that this could be a

> capital case, and that Defendant's treatment would depend on his cooperation; that the district attorney's office would usually work with those who cooperated; that Detective Ward would consider testifying on Defendant's behalf; that Defendant would feel better if he confessed and did right by God and his children; and that Defendant should get the "best seat on the bus" by giving statements against the two other men involved. It is also clear that the detectives decided to arrest Defendant at the time they did in order to shake him up and, in Detective Ward's words: "I felt in my heart like the only thing that's going to make you understand that this isn't going to go away is to charge you with murder. So I charged you with murder."

The court, however, went on to find that the State proved that the error was harmless beyond a reasonable doubt in light of the overwhelming evidence of guilt.

No *Miranda* violation where officer read warrants to defendant and co-defendant together, and defendant volunteered that the cocaine belonged to him.

State v. Burton, ___ N.C. App. ___, 796 S.E.2d. 65 (Jan. 17, 2017). The court rejected the defendant's claim that counsel was ineffective by failing to object to the admission of his statement to an officer that the cocaine in question belonged to him and not a passenger in the vehicle. The court rejected the defendant's argument that the statements were obtained in violation of his Fifth Amendment rights because the officer failed to advise him of his *Miranda* rights before reading the warrants to him and the passenger in each other's presence. After the two were arrested and taken to the county detention center, the officer read the arrest warrants to the defendant and the passenger in each other's presence. When the officer finished reading the charges, the defendant told the officer that the cocaine belonged to him. The court concluded that the defendant's admission is properly classified as a spontaneous statement, not the product of an interrogation.

No *Miranda* violation where defendant contacted the detective, agreed to come to the station and provided a voluntary inculpatory statement.

State v. Parlier, ___ N.C. App. ___, 797 S.E.2d 340 (Mar. 7, 2017). In this child sexual assault case, the court rejected the defendant's argument that his confession was obtained in violation of *Miranda*. During an interview at the sheriff's department, the defendant admitted that he had sex with the victim. The transcript and videotape of the interview were admitted at trial. The court rejected the defendant's argument that a custodial interrogation occurred. The defendant contacted a detective investigating the case and voluntarily traveled to the sheriff's department. After the detective invited the defendant to speak with her, the defendant followed her to an interview room. The defendant was not handcuffed or restrained and the interview room door and hallway doors were unlocked. The defendant neither asked to leave nor expressed any reservations about speaking with the detective. A reasonable person in the defendant's position would not have understood this to be a custodial interrogation.

Court rejects Court of Appeals holding on need of officer to clarify ambiguous statement of juvenile defendant; "Can I call my mom" not a clear and unequivocal invocation of right to have parent present during interrogation; remand for inquiry into voluntariness of waiver of rights.

State v. Saldierna, ___ N.C. ___, 794 S.E.2d 474 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the juvenile defendant's request to telephone his mother while undergoing custodial questioning by police investigators was not a clear indication of his right to consult with a parent or guardian before proceeding with the questioning. The trial court had found that the defendant was advised of his juvenile rights and after receiving forms setting out these rights, indicated that he understood them; that the juvenile informed the officer that he wished to waive his juvenile rights and signed a form to that effect; and that although the defendant unsuccessfully tried to contact his mother by telephone, he did not at any time indicate that he had changed his mind regarding his desire to speak to the officer, indicate that he revoked his waiver of rights, or make an unambiguous request to have his mother present during questioning. The trial court found that the defendant's rights were not violated under G.S. 7B-2101 or the constitution. The Court of Appeals concluded that a juvenile need not make a clear and unequivocal request in order to exercise his or her right to have a parent present during questioning. Instead, it concluded that when a juvenile between the ages of 14 and 18 makes an ambiguous statement that potentially pertains to the right to have a parent present, an interviewing officer must clarify the juvenile's meaning before proceeding with questioning. The court granted the State's petition for discretionary review. It first held that the defendant's statement--"Um. Can I call my mom?"—was not a clear and unambiguous invocation of his right to have his parent or guardian present during questioning and thus his rights under G.S. 7B-2101 were not violated. The court remanded for a determination of whether the defendant knowingly, willingly, and understandingly waived his rights. [LaToya Powell blogged about the case here.]

No Miranda violation where the officer had taken the defendant's license and asked questions about travel and drinking. The defendant was not formally arrested or restrained to a degree associated with formal arrest and thus was not in custody for purposes of Miranda.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the court rejected the defendant's argument that the trial court erred by denying his motion to suppress self-incriminating statements made without *Miranda* warnings, finding that the defendant was not in custody at the time. The standard for determining whether an individual is in custody for purposes of *Miranda* is, based on the totality of the circumstances, whether there was a formal arrest or restraint on freedom of movement to a degree associated with a formal arrest. In this case, the defendant argued that when the detective retained his drivers license he was seized, not free to leave, and thus entitled to *Miranda* warnings. The court found that the defendant had erroneously conflated the *Miranda* custody standard with the standard for a seizure. Noting that the defendant was not under formal arrest at the time he was questioned, the court determined that under the totality of the circumstances the defendant's movement was not restrained to the degree associated with a formal arrest. The court noted that the inquiry is an objective one, not a subjective one. Here, the defendant was standing outside of his own vehicle while speaking with the detective. He was not told he was under arrest or handcuffed, and other than his license being retained, his movement was not stopped or limited further.

No mention of any possible suspicion of the defendant being involved in criminal activity, impaired driving or otherwise, had yet been made. A reasonable person in these circumstances would not have believed that he was under arrest at the time.

No interrogation, and therefore no Miranda violation, where the defendant gave statements in response to questions from a dispatcher to the arresting officer over the radio.

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The trial court properly denied the defendant's suppression motion where the defendant's statements were not made in response to police interrogation. Here, there was no dispute that the defendant made inculpatory statements while in custody and without being given his *Miranda* rights. The defendant made the statements in question after being arrested and while being transported to the police department. While en route to the police department, the defendant heard the officer's lieutenant asking questions of the officer over the police radio and offered the statements in question. The trial court found that the defendant's statements were spontaneous utterances and not made in response to questions posed to him. The court of appeals agreed, relying on prior case law and holding that the defendant's statements were not the result of an interrogation.

Pretrial and Trial Procedure

Discovery

Where near two-month continuance granted for defense counsel to review and prepare for untimely expert discovery provided on the eve of trial, no abuse of discretion in allowing experts to testify at later trial.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, the court rejected the defendant's argument that the trial court erred by permitting certain testimony by the State's experts because of a discovery violation. The defendant argued that the State violated G.S. 15A-903(a)(2) by not timely providing the expert reports and records, and that as a result, he was prejudiced by lack of time to adequately prepare for cross-examination. The State served notice of expert witnesses on November 24, 2014, listing the expert names, and indicating that the State would make the expert's reports available during discovery and that their CVs would be forthcoming. The State provided initial discovery on December 2, 2014, including a report from each expert. On January 29, 2015, the defendant filed a motion for additional materials, requesting that each expert prepare a meaningful and detailed report. At a hearing on February 2, 2015, the trial court instructed the State to have the State's experts couch their diagnoses in the form of opinions. In mid-February 2015, the State provided further discovery, including additional therapy notes and a revised letter from one expert outlining the basis of her opinion, as well as a DVD recording of the other expert's interview with the child. The defendant then asked the trial court to either exclude the expert opinions or give the defense additional time to prepare. The trial court continued the matter until April 13, 2015. On these facts, the

court rejected the defendant's argument that he did not have time to adequately prepare to effectively cross-examine the experts.

No *Brady* violation where defendant's former trial counsel viewed, but did not copy or otherwise preserve, a video of the incident that was subsequently destroyed between the district court trial and trial *de novo*.

State v. Mylett, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this assault on a government officer case, no *Brady* violation occurred when recordings from police body cameras were reviewed by the defendant's original trial counsel and then destroyed pursuant to the police department's evidence retention schedule. The defendant's original trial counsel reviewed the video recordings but opted not to obtain copies or use the footage at the defendant's district court trial. The defendant was convicted and appealed for trial de novo to superior court. In the meantime, the original recordings were destroyed in accordance with the police department's evidence retention schedule. The defendant's new trial counsel moved for a continuance to allow time for counsel to prepare a motion to dismiss, arguing that such a remedy was warranted because the recordings had been destroyed and thus were unavailable for use by the defense. The trial court denied the motion. The defendant was convicted and appealed. The court stated: "Defense counsel's decision not to make or preserve copies of the videos — regardless of counsel's reason for declining to do so — cannot serve as a basis for arguing a *Brady* violation was committed by the State."

Pleadings

Amendment of child abuse indictment from "negligent failure to treat child's wounds" to "failure to provide a safe environment" was a substantial alteration and was improperly allowed.

State v. Frazier, ___ N.C. App. ___, 795 S.E.2d 654 (Feb. 7, 2017). In this child abuse case the trial court erred by allowing the State to amend the indictment. The defendant was indicted for negligent child abuse under G.S. 14-318.4(a5) after police discovered her unconscious in her apartment with track marks on her arms and her 19-month-old child exhibiting signs of physical injury. Under that statute, a parent is guilty of negligent child abuse if the parent's "willful act or grossly negligent omission in the care of the child shows a reckless disregard for human life" and the parent's act or omission "results in serious bodily injury to the child." The indictment charged that the defendant committed this offense by negligently failing to treat her child's wounds. At trial, the trial court allowed the State to amend the indictment "to include failure to provide a safe environment as the grossly negligent omission as well." This amendment was improper because it constituted a substantial alteration of the indictment. The amendment alleged conduct that was not alleged in the original indictment and which constituted the "willful act or grossly negligent omission," an essential element of the charge. The amendment thus allowed the jury to convict the defendant of conduct not alleged in the original indictment. Additionally, the amendment violated the North Carolina Constitution, which requires the grand jury to indict and the petit jury to convict for offenses charged by the grand jury.

Indictment for discharging a weapon within an occupied building to incite fear was fatally flawed and failed to confer jurisdiction where the language of the indictment substituted 'into' for 'within' a building.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). The State conceded, and the court held, that the indictment was insufficient to support a conviction for discharging a firearm within an enclosure to incite fear. The indictment improperly alleged that the defendant discharged a firearm "into" an occupied structure; the statute, G.S. 14-34.10, requires that the defendant discharge a firearm "within" an occupied building.

No variance where indictment served to provide defendant sufficient notice of the charges and accuser.

State v. Fink, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). There was no fatal variance in a larceny by employee indictment where the indictment alleged that the defendant's employer was "Precision Auto Care, Inc. (PACI), a corporation" but the evidence at trial showed the actual name of the corporation to be "Precision Franchising, Inc." doing business as "Precision Tune Auto Care." The court noted in part: "Our courts have repeatedly held that minor variations between the name of the corporate entity alleged in the indictment and the evidence presented at trial are immaterial, so long as [t]he defendant was adequately informed of the corporation which was the accuser and victim. A variance will not be deemed fatal where there is no controversy as to who in fact was the true owner of the property." The court noted that the variation in names did not impair the defendant's ability to defend against the charges.

Larceny indictment fatally flawed where it failed to show the corporate victim was an entity capable of ownership; the same defect was not fatal for the offense of possession of stolen goods.

State v. Garner, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). A felonious larceny indictment alleging that the defendant took the property of "Pinewood Country Club" was fatally defective. The State conceded that the indictment was defective because it failed to allege that the named victim was an entity capable of owning property. The court noted however that the indictment's failure to specify the country club as an entity capable of owning property was not fatal with respect to a separate charge of possession of stolen goods.

Amendment of indictment from Schedule II hydrocodone to Schedule III hydrocodone not a substantial alteration and not prejudicial.

State v. Stith, ___ N.C. ___, 796 S.E.2d 784 (Mar. 17, 2017). The court *per curiam* affirmed the decision below, *State v. Stith*, ___ N.C. App. ___, 787 S.E.2d 40 (April 5, 2016). In that decision, the court of appeals held, over a dissent, that an indictment charging the defendant with possessing hydrocodone, a Schedule II controlled substance, was sufficient to allow the jury to convict the defendant of possessing hydrocodone under Schedule III, based on its determination that the hydrocodone pills were under a certain weight and combined with acetaminophen within a certain ratio to bring them within Schedule III. The original indictment alleged that the defendant possessed "acetaminophen and hydrocodone

bitartrate," a substance included in Schedule II. Hydrocodone is listed in Schedule II. However, by the start of the trial, the State realized that its evidence would show that the hydrocodone possessed was combined with a non-narcotic such that the hydrocodone is considered to be a Schedule III substance. Accordingly, the trial court allowed the State to amend the indictment, striking through the phrase "Schedule II." At trial the evidence showed that the defendant possessed pills containing hydrocodone bitartrate combined with acetaminophen, but that the pills were of such weight and combination to bring the hydrocodone within Schedule III. The court concluded that the jury did not convict the defendant of possessing an entirely different controlled substance than what was charged in the original indictment, stating: "the original indictment identified the controlled substance . . . as hydrocodone, and the jury ultimately convicted Defendant of possessing hydrocodone." It also held that the trial court did not commit reversible error when it allowed the State to amend the indictment. The court distinguished prior cases, noting that here the indictment was not changed "such that the identity of the controlled substance was changed. Rather, it was changed to reflect that the controlled substance was below a certain weight and mixed with a non-narcotic (the identity of which was also contained in the indictment) to lower the punishment from a Class H to a Class I felony." Moreover, the court concluded, the indictment adequately apprised the defendant of the controlled substance at issue. The court of appeals applied the same holding with respect to an indictment charging the defendant with trafficking in an opium derivative, for selling the hydrocodone pills.

(1) No variance where indictment named several items in a possession of burglary tools indictment and the court instructed that the jury could convict if they found he possessed any of the several tools or an additional item, unnamed in the indictment. (2) An indictment for injury to personal property need not allege the owner of the property is an entity capable of ownership where a different count in the same indictment for breaking and entering of a place of worship expressly identified the owner as a place of worship, following *State v. Campbell*

State v. McNair, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) There was no fatal variance in a possession of burglar's tools indictment. The indictment identified the tools as a prybar and bolt cutters. The trial court instructed the jury that it could find the defendant guilty if he possessed either a prybar, bolt cutters, *or work gloves*. The court held that the indictment's identification of the specific tools was mere surplusage, and the indictment charged the essential elements of the crime. (2) There was no fatal defect in an indictment charging the defendant with injury to personal property. The defendant asserted that the indictment was invalid because it failed to allege that the owner, a church, as an entity capable of owning property. In *State v. Campbe*ll, 368 N.C. 83 (2015), the Supreme Court held that alleging ownership of property in an entity identified as a church or other place of religious worship is sufficient to allege an entity capable of owning property. Here, count one of the indictment alleged breaking or entering a place of religious worship and identified the church expressly as "a place of religious worship." The count alleging injury to personal property simply referred to the church by name. The court found that identifying the church as a place of religious worship in the first count and subsequently listing the church as the owner of the personal property in a later count was sufficient. A contrary ruling, requiring the church to be identified as a place of worship in each portion of the indictment, "would constitute a hypertechnical interpretation of the requirements for indictments." (3)

By failing to assert a claim of fatal variance between the indictment and the evidence with respect to a charge of injury to personal property, the defendant failed to preserve the issue for appellate review. Nevertheless, the court considered the issue and rejected the defendant's claim. The indictment alleged that the defendant injured the personal property of the church, specifically a lock on a door. The defendant asserted that the evidence showed that the damaged device was owned not by the church but rather by the lessor of the property. The court concluded however that the evidence was sufficient to allow the jury to find that the church owned the lock and that it was damaged.

Fatal defect where indictment for possession of methamphetamine precursors failed to allege that the defendant knew or reasonably should have known that the precursors would be used to manufacture methamphetamine.

State v. Maloney, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). An indictment charging the defendant with possession of methamphetamine precursors was fatally defective and the defect could not be cured by amendment. Specifically, the indictment failed to allege that the defendant possessed the precursors knowing or having reasonable cause to believe that they would be used to manufacture methamphetamine. The trial court allowed the State to amend the indictment to add this allegation at trial. The amendment was improper and the indictment was fatally defective.

Motions to Suppress and Exclude

Defendant's motion to suppress on the same grounds as a previously-denied motion to suppress in a related case was properly denied by application of collateral estoppel.

State v. Williams, ___ N.C. App. ___, 796 S.E.2d 823 (Mar. 7, 2017). The trial court properly applied the doctrine of collateral estoppel when it denied the defendant's second motion to suppress. The defendant was in possession of a bag containing two separate Schedule I substances, Methylone and 4-Methylethcathinone. He was charged with possession with intent to manufacture, sell or deliver Methylone (Charge 1) and with possession with intent to manufacture, sell or deliver Methylethcathinone (Charge 2). Before trial, he filed a motion to suppress, which the court denied. He was convicted on both counts. On appeal, the court affirmed his conviction on the first charge but vacated the second because of a defective indictment. The State then re-indicted on the second charge. The then defendant filed a motion to suppress, functionally identical to the motion to suppress filed before his first trial. The trial court denied the second motion based on the doctrine of collateral estoppel. The defendant was tried and convicted. The trial court properly applied the doctrine of collateral estoppel when it denied the defendant's second motion where the parties and the issues raised by the motions were the same; the issues were raised and fully litigated during the hearing on the first motion; the issue was material and relevant to the disposition of the prior action; and the trial court's determination was necessary and essential to the final judgment.

Where trial counsel did not object during testimony about the defendant's prior incarceration and appellate counsel failed to argue plain error, appellate review of the issue was waived.

State v. China, ___ N.C. App. ___, 797 S.E.2d 324 (Feb. 21, 2017), *temporary stay allowed*, ___ N.C. ___, 797 S.E.2d 303 (Mar. 27, 2017). The defendant failed to preserve for appellate review a challenge to the admission of evidence at trial concerning the defendant's previous incarceration. Although the defendant objected to the admission of the evidence during a hearing outside of the jury's presence and in a pretrial motion, he did not subsequently object when the evidence was actually introduced at trial. Appellate counsel did not specifically argue that admission of this testimony constituted plain error. Thus, the defendant failed to preserve for appellate review the trial court's decision to admit this evidence.

Appellate review waived where trial counsel failed to object to evidence at trial that was the subject of a pretrial motion to suppress.

State v. Gullette, ___ N.C. App. ___, 796 S.E.2d. 396 (Feb. 21, 2017). In this drug trafficking case, the defendant did not preserve for appellate review his argument that the trial court erred by denying his motion to suppress in-court and out-of-court identifications. The trial court denied the defendant's pretrial motion to suppress, based on alleged violations of the Eyewitness Identification Reform Act (EIRA), concluding that the current version of the EIRA did not apply to the defendant's case because the statute came into force after the identification at issue. When the relevant evidence was offered at trial, the defendant did not object. A trial court's evidentiary ruling on a pretrial motion to suppress is not sufficient to preserve the issue of admissibility for appeal unless the defendant renews the objection during trial. The court rejected the defendant's argument that he could raise the issue on appeal because the trial court failed to apply a statutory mandate in the EIRA and that violations of statutory mandates are preserved without the need for an objection at trial. It concluded that the trial court did not violate any statutory mandate because the mandates of the statute only arise if the court determines that the EIRA applies to the case in question.

Pleas

Considering the totality of the transcript of the plea hearing, defendant's plea was voluntary and knowing where the trial court warned him that the guilty plea could result in waiver of his 15A-711 claim and transcript of plea otherwise did not reflect a conditional plea.

State v. Ross, ___ N.C. ___, 794 S.E.2d 289 (Dec. 21, 2016). Reversing the Court of Appeals, the court held that the defendant's plea was knowing and voluntary. The Court of Appeals had held that because the defendant conditioned his plea on the appealability of an issue that was not appealable, the plea was not knowing and voluntary. The court however concluded that the defendant's plea was not conditionally entered on such a right of appeal. Thus, the terms and conditions of the plea agreement did not attempt to preserve the right to appellate review of a non-appealable matter. The defendant received the benefit of his plea bargain.

A defendant is entitled to appellate review after a guilty plea and a denial of a motion to withdraw the plea. No error in denying the motion to withdraw the plea where the trial court imposed a sentence (including a fine) authorized under the terms of the plea agreement and the defendant offered no specific reason to withdraw the plea.

State v. Zubiena, ___ N.C. App. ___, 796 S.E.2d 40 (Dec. 30, 2016). (1) Over a dissent, the court held that it had jurisdiction to consider the defendant's appeal under G.S. 15A-1444(e). After the trial court announced the sentence in open court, defense counsel indicated that the defendant would like to strike her plea because she would like "to take it to trial." The court declined to strike the plea and the defendant appealed. The court held that notwithstanding *State v. Carriker*, 180 N.C. App. 470 (2006), under G.S. 15A-1444(e) and *State v. Dickens*, 299 N.C. 76 (1980), a defendant has a right to appeal when a motion to withdraw a guilty plea has been denied. (2) The trial court did not err by denying the defendant's post-sentence motion to withdraw her guilty plea. On appeal the defendant argued that the trial court erred by denying her motion because the plea agreement and plea colloquy contained no indication that a fine would be imposed as part of her punishment. In fact, a fine of $1000 was imposed.

The court noted that under G.S. 15A-1024, if at the time of sentencing a judge decides to impose a sentence other than that provided for in a plea arrangement, the judge must inform the defendant of that fact and inform the defendant that he may withdraw the plea. If, however, the sentence imposed is consistent with the plea agreement, the defendant is entitled to withdraw his plea after sentencing only upon a showing of manifest injustice. Here, the plea agreement specified only three things: the crime to which the defendant would plead guilty; the charges that would be dismissed; and the defendant's prior record level and number of prior record level points. The plea agreement did not contain any specific terms regarding the sentence. Thus, the court found itself unable to conclude that the trial court imposed a sentence other than that provided for in the plea arrangement. Having determined that the sentence was not inconsistent with the plea agreement and that the defendant was not entitled to relief under G.S. 15A-1024 the court went on to conclude that no manifest injustice supported granting the post-sentence motion to withdraw the guilty plea. Here, the defendant provided no specific reason in support of her motion to withdraw, except that she had decided she would like to take her case to trial.

Where the defendant received a sentence greater than what was specified in his plea agreement, error not to provide defendant an opportunity to withdraw his plea.

State v. Kirkman, ___ N.C. App. ___, 795 S.E.2d 379 (Dec. 20, 2016). As conceded by the State, the trial court erred by resentencing the defendant to a sentence greater than that provided for in his plea agreement without giving the defendant an opportunity to withdraw his plea, as required by G.S. 15A-1024.

While a defendant generally has the right to withdraw a guilty plea before sentencing for any fair and just reason, no error to deny motion to withdraw plea where no evidence offered to support defendant's contentions that the plea was made under duress. Court rejects argument that an *Alford* plea is evidence of the defendant's assertion of legal innocence of purposes of the motion.

State v. Whitehurst, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by denying the defendant's motion to withdraw his *Alford* plea. After finding that there was no support in the record for various factual assertions made by the defendant on appeal, the court found that the defendant had offered no fair and just reason for withdrawal of his plea. Among other things, the court rejected the defendant's argument that he entered his plea while under duress because he was in custody at the time, holding: "Defendant cites no authority for the proposition that the fact that a defendant is incarcerated is *per se* evidence of coercion, and we decline to adopt the position proposed by defendant." That the defendant entered an Alford plea was not adequate evidence of his assertion of innocence for purposes of withdrawing his plea. Thus, the defendant failed to meet his burden of demonstrating a fair and just reason to set aside the plea.

Right to Counsel

In requiring the defendant to proceed *pro se*, the trial court relied on a misrepresentation of the prosecutor that an earlier trial judge had stated the defendant must have counsel at the next setting or be ready to proceed *pro se*. Because the first judge had not made that statement, it was error for the trial court to require the defendant to proceed *pro se*.

State v. Curlee, ___ N.C. App. ___, 795 S.E.2d 266 (Dec. 20, 2016). The trial court erred by requiring the defendant to proceed to trial *pro se*. On February 7, 2013, the defendant was determined to be indigent and counsel was appointed. On May 30, 2014, the defendant waived his right to assigned counsel, indicating that he wished to hire a private lawyer, Mr. Parker. Between May 2014 and May 2015 the trial was continued several times to enable the defendant to obtain funds to pay Parker. On May 11, 2015, Parker informed the court that the defendant had not retained him and that if the court would not agree to continue the case, Parker would move to withdraw. Although the defendant was employed when he first indicated his desire to hire Parker, he subsequently lost his job and needed time to obtain funds to pay counsel. The trial court continued the case for two months, to give the defendant more time to obtain funds to pay Parker. On June 29, 2015, Parker filed a motion to withdraw for failure to pay. On July 6, 2015, after the trial court allowed Parker to withdraw, the defendant asked for new counsel. The trial court declined this request, the case proceeded *pro se*, and the defendant was convicted. The court found that the trial court's ruling requiring the defendant to proceed pro se was based in part on the ADA's false representation that at the May 11, 2015 hearing the defendant was asked if he wanted counsel appointed, was warned that the case would be tried in July regardless of whether he were able to hire Parker, and was explicitly warned that if he had not retained counsel by July he would be forced to proceed to trial *pro se*. The court concluded: "None of these representations are accurate." Thus, the court held that the trial court's denial of defendant's request for appointed counsel and its ruling that the defendant had waived the right to appointed counsel were not supported by competent evidence.

No *Harbison* error where defense counsel admitted some but not all elements of the charges.

State v. Cholon, ___ N.C. App. ___, 796 S.E.2d 504 (Feb. 7, 2017). In this case, involving charges of statutory sexual offense and taking indecent liberties with a child, no *Harbison* error occurred when defense counsel admitted some elements of the charged offenses. In his closing argument to the jury, defense counsel conceded that the victim was a minor and that the defendant's oral and written confessions to the police were true. In those statements, the defendant admitted engaging in sexual activity with the victim, who had represented himself to be 18 years old. With respect to those statements, counsel argued to the jury that the defendant was truthful with the police. The court rejected the defendant's argument that this constituted a *Harbison* error, reasoning that counsel "only implicitly conceded some--but not all--of the elements of each charge and urged jurors to find Defendant not guilty of each charge." The court noted that *Harbison* and its progeny applies when counsel concedes the defendant's guilt to either the offense charged or to a lesser included offense without the defendant's consent. It continued, stating that the courts have distinguished cases, like this one, where counsel did not expressly concede guilt or admitted only certain elements of the charged offense. Finally, the court held that even if the defendant could establish that counsel's conduct was deficient under the *Strickland* standard, he could not show prejudice in light of the overwhelming evidence of guilt. [Jessica Smith blogged about the case here.]

Where the record was silent as to the nature and extent of the impasse between the defendant and his counsel concerning cross-examination of the State's witness, further findings required to determine defendant's claim of ineffective assistance of counsel.

State v. Floyd, ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The court reversed the Court of Appeals' determination that the defendant was entitled to a new trial based on the trial court's alleged failure to recognize and address an impasse between the defendant and his attorney during trial. The court concluded that the record did not allow it to determine whether the defendant had a serious disagreement with his attorney regarding trial strategy or whether he simply sought to hinder the proceedings. It remanded for entry of an order dismissing the defendant's ineffective assistance of counsel claim without prejudice to his right to assert it in a motion for appropriate relief.

Defendant failed to meet his burden of presenting evidence to support his motion to suppress a prior conviction under G.S. 15A-980 and could not overcome the presumption of regularity afforded to court records.

State v. Thorpe, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The trial court did not err by denying the defendant's motion to suppress filed under G.S. 15A-980. The defendant argued for suppression of a conviction used in two habitual misdemeanor assault indictments on grounds that it was obtained in violation of his right to counsel. At hearing on the motion the defendant testified that when he pleaded guilty to the charge, he was not represented by counsel and did not waive his right to counsel. At the suppression hearing, an assistant clerk testified that the only remaining records of the proceeding indicated that the defendant was represented by a retained attorney. Specifically, the designations "R" and "N/A" appeared in the electronic record. She testified that the designation "R" was used to reflect

the fact that a defendant had retained counsel. "N/A" was used when the handwritten notes on the shuck were not legible or the attorney's name was unknown and the designation "N/A" was never used when a defendant was unrepresented . Applying the presumption of regularity, the court presumed that the information contained in the records was accurate and found that the defendant failed to rebut the presumption with competent, material and substantial evidence.

While it was error for the State to elicit testimony concerning the defendant's efforts to hire counsel before his arrest, the admission of the evidence on these facts did not have a probable impact on the verdict and did not rise to the level of plain error.

State v. Stroud, ___ N.C. App. ___, 797 S.E.2d 34 (Mar. 7, 2017). Although the trial court erred by allowing the introduction of evidence regarding the defendant's attempts to hire legal counsel prior to his arrest, the error did not rise to the level of plain error. On appeal, the defendant argued that admission of this testimony violated his Six Amendment rights. Although the court had "no difficulty" concluding that the evidence violated the defendant's Sixth Amendment right to counsel and should not have been admitted, the error did not constitute plain error.

In capital sentencing hearing, defendant received ineffective assistance where defense counsel elicited expert opinion that, due to the defendant's race, he was more likely to commit violence in the future.

Buck v. Davis, 580 U.S. ___, 137 S. Ct. 759 (Feb. 22, 2017). In this Texas capital murder case, the defendant's Sixth Amendment right to effective assistance of counsel was violated when his lawyer introduced evidence from a psychologist that the defendant was statistically more likely to act violently because he is black. A Texas jury convicted the defendant of capital murder. Under state law, the jury could impose a death sentence only if it found that the defendant was likely to commit acts of violence in the future. The defendant's attorney called a psychologist to offer his opinion on that issue. The psychologist testified that the defendant probably would not engage in violent conduct. But he also stated that one of the factors pertinent in assessing a person's propensity for violence was his race, and that the defendant was statistically more likely to act violently because he is black. The jury sentenced the defendant to death. With respect to first prong of the *Strickland* attorney error standard, the Court held that counsel's performance fell outside the bounds of competent representation. Counsel knew that the expert's report reflected the view that the defendant's race disproportionately predisposed him to violent conduct; he also knew that the principal point of dispute during the trial's penalty phase was whether the defendant was likely to act violently in the future. Counsel nevertheless called the expert to the stand and specifically elicited testimony about the connection between the defendant's race and the likelihood of future violence. Additionally counsel put into evidence the expert's report stating that the defendant's race, "Black," suggested an "[i]ncreased probability" as to future dangerousness. This report "said, in effect, that the color of [the defendant's] skin made him more deserving of execution. It would be patently unconstitutional for a state to argue that a defendant is liable to be a future danger because of his race." The Court went on to hold that the second prong of the *Strickland* test—prejudice--also was satisfied, finding that it was reasonably probable that the proceeding would have ended differently had counsel rendered competent representation. It noted that the evidence at issue was "potent" and

"appealed to a powerful racial stereotype—that of black men as 'violence prone.'" The expert's opinion "coincided precisely with a particularly noxious strain of racial prejudice, which itself coincided precisely with the central question at sentencing." The court concluded: "the effect of this unusual confluence of factors was to provide support for making a decision on life or death on the basis of race." This effect was heightened because the witness took the stand as a medical expert, "bearing the court's imprimatur." The Court rejected the notion that any mention of race was *de minimis*, concluding "Some toxins can be deadly in small doses." [This case also addresses a number of procedural issues that apply in federal court; because they are not relevant to state court proceedings they are not summarized here.]

Double Jeopardy

Indictment for attempted first-degree murder that failed to allege malice was properly interpreted as charging attempted voluntary manslaughter. Because the indictment was not fatally flawed, it was error for the court to declare a mistrial over the defendant's objection, and double jeopardy precluded retrial.

State v. Schalow, ___ N.C. App. ___, 795 S.E.2d 567 (Dec. 20, 2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 791 (Mar. 16, 2017). The court vacated the defendant's attempted murder conviction on double jeopardy grounds. The defendant was originally charged and indicted for attempted murder of his wife. After the trial began, the trial court, over the defendant's objection, ruled that the indictment was fatally defective because it failed to allege that the defendant acted with malice aforethought and declared a mistrial. When the defendant was re-indicted for attempted murder, he asserted that the second prosecution was barred by double jeopardy. The defendant argued that there was no fatal defect in the first indictment; that the trial court abused its discretion in declaring the mistrial; and that once jeopardy attached on the dismissed indictment for attempted voluntary manslaughter, the defendant could not be prosecuted again for the greater offense of attempted murder. The trial court denied the defendant's motion to dismiss and the defendant was convicted. The court first determined that although the original indictment failed to properly charge attempted first-degree murder, it sufficiently alleged of attempted voluntary manslaughter. Thus, the trial court's decision to terminate the first prosecution was based on the erroneous belief that the defect in the indictment deprived the court of jurisdiction. An order of mistrial after jeopardy has attached may only be entered over the defendant's objection where manifest necessity exists. If a mistrial results from manifest necessity, double jeopardy does not bar retrial. However if there is no manifest necessity and the order of mistrial has been improperly entered over a defendant's objection, jeopardy bars a subsequent prosecution. Here, the original indictment was not fatally defective because it sufficiently alleged attempted voluntary manslaughter. Since the trial court retained jurisdiction, it could have proceeded on attempted voluntary manslaughter, as the defendant requested. The court was careful to distinguish this case from those in which a dismissal or mistrial is entered on the defendant's motion or with the defendant's consent, noting: "if a *defendant* successfully seeks to avoid his trial prior to its conclusion by actions or a motion of mistrial or dismissal, the Double Jeopardy Clause is generally not offended by a second prosecution." Having found that no manifest necessity existed to declare a mistrial on the first

indictment that properly charged attempted voluntary manslaughter, the court held that double jeopardy precluded a second prosecution for the greater offense of attempted first-degree murder. [Phil Dixon blogged about the case here.]

Where jury returns inconsistent verdicts, acquitting on some counts and convicting on others, and where the convictions are subsequently overturned for reasons unrelated to the inconsistency, Double Jeopardy does not bar retrial of the vacated convictions.

Bravo-Fernandez v. United States, 580 U.S. ___, 137 S. Ct. 352 (Nov. 29, 2016). The issue-preclusion component of the Double Jeopardy Clause does not bar the Government from retrying the defendants after a jury has returned irreconcilably inconsistent verdicts of conviction and acquittal and the convictions are later vacated on appeal because of error in the judge's instructions unrelated to the verdicts' inconsistency. Because the jury's inconsistent verdict did not clearly resolve the issues, the defendant cannot prove that the jury resolved the issues in his favor. Under these facts, the acquitted counts do not have preclusive effect as to the counts for which convictions were obtained. Thus, while the government is barred from retrying the defendant on the acquitted counts, Double Jeopardy does not prevent the retrial of the convictions later vacated on other grounds.

Capacity to Proceed

The court has a duty to conduct a competency hearing where there is a *bona fide* doubt about the capacity of the defendant; an expert should have been appointed to determine capacity where the defendant was unable to stay awake during trial, admitted to taking more than 25 medications daily, and the medications had psychoactive side effects.

State v. Mobley, ___ N.C. App. ___, 795 S.E.2d. 437 (Jan. 17, 2017). In this drug trafficking case, the trial court erred by failing to appoint an expert to investigate the defendant's competency to stand trial. Prior to the start of trial, defense counsel expressed concern about the defendant having fallen asleep in the courtroom. The trial court conducted a discussion with the defendant and defense counsel and ruled that the defendant was competent to proceed to trial. The colloquy revealed, among other things, that the defendant was having difficulty hearing and understanding the judge and that the defendant took over 25 medications daily in connection with a heart condition and a diagnosis of bipolar schizophrenia. Defense counsel related never having seen the defendant so lethargic. Although the defendant seemed to understand the charges against him and possible sentences he might receive, he had little memory of meeting with counsel prior to trial. After the trial began, defense counsel informed the court that the defendant was sleeping during the trial. The court concluded that the evidence indicated a significant possibility at the time of trial that the defendant was incompetent, requiring the trial court to appoint an expert to ascertain whether the defendant was competent to proceed to trial. The court noted that its holding was based on "long-standing legal principles" and that it "should not be interpreted as articulating a new rule or standard." It was careful to state that the trial court is not required to order a competency evaluation in every case where a criminal defendant is drowsy or suffers from mental or physical illness.

Protections against Delay

The issuance of a citation and magistrate's order in a driving while impaired case did not toll the statute of limitations under G.S. 15-1, and the failure of the State to prosecute the case within that two-year window of time barred prosecution.

State v. Turner, ___ N.C. App. ___, 793 S.E.2d 287 (Dec. 6, 2016), *review allowed*, ___ N.C. ___, 797 S.E.2d 4 (Mar. 16, 2017). Because the State failed to prosecute the defendant's impaired driving misdemeanor charge within two years, the trial court did not err by dismissing that charge. According to the court, the defendant "received a citation for driving while impaired" and "was arrested and brought before a magistrate, who issued a magistrate's order." The court stated: "The issuance of a citation did not toll the statute of limitations pursuant to N.C. Gen. Stat. § 15-1; the State had two years to either commence the prosecution of its case, or to issue a warrant, indictment, or presentment which would toll the statute of limitations. Because the State failed to do so, the statute of limitations expired, and the State was barred from prosecuting this action. The trial court did not err in dismissing the charge."

No speedy trial violation where the primary cause of the delay attributable to the State was a backlog at the State Crime Lab. Court rejects the defendant's argument that his pre-trial incarceration was prejudicial where he was also incarcerated on additional, unrelated charges at the same time.

State v. Evans, ___ N.C. App. ___, 795 S.E.2d. 444 (Jan. 17, 2017). No violation of the defendant's speedy trial right occurred. The court began by finding that the delay of two years and 10 months was extensive enough to trigger consideration of the other speedy trial factors. Rejecting the defendant's argument to the contrary, the court held that with respect to the second factor--reason for the delay--the defendant has the burden of producing evidence establishing a prima facie case that the delay resulted from the neglect or willfulness of the State. Once that showing is made, the burden shifts to the State to rebut the defendant's evidence. Here, the defendant failed to make the prima facie showing. The court noted that between the time of arrest and trial, the defendant was represented by five different attorneys, each of whom needed time to become familiar with the case and that a significant portion of the delay resulted from delays at the State Crime Lab. With respect to the third factor--the defendant's assertion of a speedy trial right--the court noted that the defendant asserted his right in a timely pro se motion, later adopted by counsel. Turning to the last factor—prejudice--the court noted that the defendant's primary claims of prejudice were supported by his own testimony and no other evidence. Conceding that the trial court did not find his testimony credible, the defendant argued that the trial court failed to give adequate consideration to the prejudice inherent in pretrial incarceration. The court was unpersuaded, noting that during the time that he was incarcerated on the present charges he also was incarcerated on unrelated felony charges. Balancing the factors, the court found no speedy trial violation.

No speedy trial violation under four-part *Barker v. Wingo* test.

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). In a case where the trial was delayed because of backlogs at the crime lab and because of issues with counsel, the trial court properly denied

the defendant's speedy trial motion, made shortly before trial. Applying the *Barker v. Wingo* four-part speedy trial analysis, the court began by noting that the 28-month delay between arrest and trial raises a question of reasonableness requiring the court to consider the additional *Barker* factors. As to the second factor—reason for the delay—it was undisputed that the last four months of delay resulted from issues with defense counsel. Delay caused by the defendant's indecision about counsel, counsel's lapse in communicating with the defendant, and counsel's scheduling conflicts should not be weighed against the State. The primary cause of the delay was a backlog at the state crime lab, a matter over which the prosecutor had no control. Acknowledging that governmental responsibility for delay should be weighed against the State, the court concluded that the defendant failed to make a prima facie showing that either the prosecution or the crime lab negligently or purposefully underutilized resources available to prepare the State's case for trial. Thus, the 18 months of delay caused by crime lab backlogs was a "neutral reason." Turning to the third factor in the analysis—the defendant's assertion of a speedy trial right—the court held that the "eleventh-hour nature of Defendant's speedy trial motion carries minimal weight in his favor." The court was also unpersuaded by the defendant's argument with respect to the fourth factor in the analysis, prejudice.

Closing Argument

The prosecutor arguing that the defendant presented no evidence to support contentions made in opening statements by defense counsel was not an impermissible comment on the defendant's assertion of his right to remain silent. The defense lodged no objection to the actions of the prosecutor in pointing a rifle in evidence at himself during closing, and the court did not err in failing to intervene on its own motion. Various parts of closing, though "troublesome," did not warrant reversal.

State v. Martinez, ___ N.C. App. ___, 795 S.E.2d 386 (Dec. 20, 2016). (1) During closing statements to the jury, the prosecutor did not impermissibly comment on the defendant's failure to take the stand. In context, the prosecutor's statements summarized the evidence before the jury and asserted that no evidence was presented to support defense counsel's assertions in his opening statement. Even if the prosecutor's statements constituted an impermissible comment on the defendant's right to remain silent, the error was harmless beyond a reasonable doubt. (2) The court rejected the defendant's argument that the prosecutor improperly misled the jury during closing argument by asserting facts not in evidence. The defendant failed to show any gross impropriety that was likely to influence the verdict. (3) The defendant failed to show gross impropriety warranting intervention *ex mero motu* to when the prosecutor handled a rifle in evidence by pointing it at himself. The defendant argued that the prosecutor's actions inflamed the jurors' emotions and causing them to make a decision based on fear (4) Notwithstanding these conclusions, the court noted that it found the prosecutor's words and actions "troublesome," stating: "the prosecutor flew exceedingly close to the sun during his closing argument. Only because of the unique circumstances of this case has he returned with wings intact." It went on to emphasize that a prosecutor "has the responsibility of the Minister of Justice and not simply that of an advocate; the prosecutor's duty is to seek justice, not merely to convict" (quotation omitted).

Jury Issues

U.S. Supreme Court recognizes exception to "no impeachment of jury verdict" rule, holding that where there is evidence that racial animus was a significant motivating factor in the verdict, it may violate the 6th Amendment guarantee of a fair trial and may be the subject of judicial inquiry.

Pena-Rodriguez v. Colorado, 580 U.S. __, 137 S. Ct. 855 (Mar. 6, 2017). Where a juror makes a clear statement indicating that he or she relied on racial stereotypes or animus to convict a criminal defendant, the Sixth Amendment requires that the "no-impeachment rule" give way in order to permit the trial court to consider the evidence of the juror's statement and any resulting denial of the jury trial guarantee. A Colorado jury convicted the defendant of harassment and unlawful sexual contact. Following the discharge of the jury, two jurors told defense counsel that, during deliberations, Juror H.C. had expressed anti-Hispanic bias toward the defendant and the defendant's alibi witness. Counsel obtained affidavits from the two jurors describing a number of biased statements by H.C. The trial court acknowledged H.C.'s apparent bias but denied the defendant's motion for a new trial on the ground that Colorado Rule of Evidence 606(b) generally prohibits a juror from testifying as to statements made during deliberations in a proceeding inquiring into the validity of the verdict. The state appellate courts affirmed. The U.S. Supreme Court reversed. The no-impeachment rule evolved to give substantial protection to verdict finality and to assure jurors that, once their verdict has been entered, it will not later be called into question based on the comments or conclusions they expressed during deliberations. As the Court noted, this "case presents the question whether there is an exception to the no-impeachment rule when, after the jury is discharged, a juror comes forward with compelling evidence that another juror made clear and explicit statements indicating that racial animus was a significant motivating factor in his or her vote to convict." The affidavits by the two jurors in the case described a number of biased statements made by Juror H.C. H.C. told the other jurors that he "believed the defendant was guilty because, in [H.C.'s] experience as an ex-law enforcement officer, Mexican men had a bravado that caused them to believe they could do whatever they wanted with women." H.C. also stated his belief that Mexican men are physically controlling of women because of their sense of entitlement, and further stated, "I think he did it because he's Mexican and Mexican men take whatever they want." H.C. further explained that, in his experience, "nine times out of ten Mexican men were guilty of being aggressive toward women and young girls." And H.C. said that he did not find petitioner's alibi witness credible because, among other things, the witness was "an illegal." The Court noted that with respect to this last comment, the witness testified during trial that he was a legal resident of the United States. Noting that "It must become the heritage of our Nation to rise above racial classifications that are so inconsistent with our commitment to the equal dignity of all persons," the Court held that the Constitution requires an exception to the no-impeachment rule when a juror's statements indicate that racial animus was a significant motivating factor in his or her finding of guilt. The Court went on to elaborate that

> Not every offhand comment indicating racial bias or hostility will justify setting aside the no-impeachment bar to allow further judicial inquiry. For the inquiry to proceed, there must be a showing that one or more jurors made statements exhibiting overt

> racial bias that cast serious doubt on the fairness and impartiality of the jury's deliberations and resulting verdict. To qualify, the statement must tend to show that racial animus was a significant motivating factor in the juror's vote to convict. Whether that threshold showing has been satisfied is a matter committed to the substantial discretion of the trial court in light of all the circumstances, including the content and timing of the alleged statements and the reliability of the proffered evidence.

Because the issue was not presented, the Court declined to address what procedures a trial court must follow when confronted with a motion for a new trial based on juror testimony of racial bias. It likewise declined to decide the appropriate standard for determining when evidence of racial bias is sufficient to require that the verdict be set aside and a new trial be granted. [Emily Coward and Alyson Grine blogged about the case here.]

Jury trial properly waived.

State v. Swink, ___ N.C. App. ___, 797 S.E.2d 330 (Mar. 7, 2017). In this child sexual assault case, the court upheld the defendant's conviction, obtained after a bench trial. (1) The court rejected the defendant's argument that the trial court lacked authority to try him without a jury. The defendant asserted that the statute allowing a jury trial waiver applies only to cases arraigned on or after December 1, 2014. The defendant argued that the statute did not apply to him because he was never formally arraigned and thus should not have been allowed to waive his jury trial right. The court noted in part that arraignment is not mandatory, and will be held only if a defendant files a written request for arraignment. Here, the defendant never made such a request. Additionally, the March 2, 2015 hearing on the defendant's motion to waive a jury trial--a hearing date after the statute's effective date--"essentially served the purpose of an arraignment." (2) The defendant's waiver of his jury trial right was knowing and voluntary where the court engaged in a full colloquy with the defendant.

No prejudice found where trial court preemptively informed jurors that a request to review evidence would not be entertained by the court, despite such instruction violating the provisions of G.S. 15A-1233(a).

State v. Lyons, ___ N.C. App. ___, 793 S.E.2d 755 (Dec. 6, 2016). In this murder case, although the trial court erred by making comments prior to closing arguments suggesting to the jury that it would be futile to request to review witness testimony, the error was not prejudicial. The trial judge had stated:

> When you go back and start deliberating, if six of you say, Well, I remember this witness says things this way and the other six of you say, No, I don't remember it that way . . . you don't have the option of saying, Well, let's go ask the judge and let the judge tell us what did that witness really say. Because if you ask that question, my response it going to be, That's part of your job, to figure it out and to make that determination based on your recollection[.]

The court rejected the State's argument that the trial court's comments merely made it clear to the jurors that if they asked for his interpretation of witness testimony, the judge would instruct them to make that determination based on their own recollections. However, the court declined to find that the error was prejudicial.

Evidence supported jury instruction on flight despite the fact that the defendant was not driving the vehicle.

State v. Bradford, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this assault and discharging a firearm into occupied property case, the trial court did not abuse its discretion by providing a jury instruction on flight. The defendant fired his weapon at the victims as a vehicle carrying the defendant sped from a gas station. The court rejected the defendant's argument that because he was a passenger in the car—and not the driver—there was no evidence supporting a flight instruction. The court noted that the bar for an instruction on flight "is low." Here, the defendant fired his gun while the vehicle in which he was a passenger was speeding away from the gas station; the defendant later told the driver to stop at a specified location and then abandoned the vehicle and left the area on foot; and the defendant intentionally disposed of his weapon shortly thereafter. This evidence "plainly supports an instruction on flight in spite of the fact that Defendant was not actually driving the [vehicle] when it fled the . . . station."

Prospective Juror's remark that her uncle, a criminal defense attorney, had told her that his job was to "get the bad guys off" did not amount to an improper comment on the defendant's guilt or the case at issue.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the court rejected the defendant's argument that a statement made by a prospective juror violated his constitutional right to an impartial jury and constituted plain error. Specifically, the defendant argued that the prospective juror's statement that her uncle was a local defense attorney who had told her his job was to "get the bad guys off" amounted to a comment on the defendant's guilt from a reliable source. The court found that the statement in question was generic and did not imply any particular knowledge of the defendant's case or the possibility that the defendant might be guilty.

No prejudicial error where the court instructed the jury on a sexual act not supported by the evidence, where the instruction did not have a probable impact on the verdict.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sex case, no prejudicial error occurred when the trial court instructed the jury on a sexual act that was not supported by the evidence. The defendant was convicted of four felonies under G.S. 14-27.4(a)(1) (first degree sexual offense with a child) and two felonies under G.S. 14-27.7(a) (sex offense in a parental role). Both statutes require that the defendant engage in a "sexual act" with the victim. The term sexual act is defined as cunnilingus, fellatio, analingus, or anal intercourse. The evidence at trial showed that the defendant engaged in fellatio and anal intercourse with victim. There was however no evidence that the defendant engaged in analingus with the victim. However, the trial court instructed the jury that it could find the defendant guilty of the six felonies if it found that he committed fellatio, anal intercourse, or

analingus with the victim. The court noted that it cannot be discerned from the verdict sheets which theory the jury relied upon to find the defendant guilty. In its first opinion in the case, the court held that the trial court's inclusion of analingus, where no evidence of that act was offered at trial, constituted plain error per se. The Supreme Court however remanded, instructing the court to revisit its holding in light of *State v. Boyd*, 366 N.C. 548 (2013). In *Boyd,* the trial court instructed the jury that it could convict the defendant of kidnapping based on three alternative theories: confinement, restraint, or removal. On appeal to the court of appeals, two members of the panel held that the instruction constituted plain error because there was no evidence that the defendant had removed the victim. A dissenting judge agreed with the majority that the trial court erred by instructing on the theory of removal but disagreed that the error rose to the level of plain error. The dissenting judge did not assume that the jury relied on the theory of removal to support the kidnapping conviction; rather, she cited the overwhelming evidence supporting the other kidnapping theories, confinement and restraint, to conclude that the defendant failed to show that absent the error the jury would have returned a different verdict. The Supreme Court reversed the court of appeals in *Boyd*, adopting the dissenting opinion from the intermediate appellate court. In this second appeal, the court noted that the Supreme Court's approach in *Boyd* represented a shift away from the per se rule that had been previously applied in cases involving disjunctive instructions where one of the theories was not supported by the evidence. Turning to the case at hand, the court concluded that the defendant failed to meet his burden of showing that the trial court's inclusion of analingus in the jury instruction had any probable impact on the verdict. It noted that the victim was clear in her testimony regarding the occasions where fellatio and anal intercourse had occurred.

Continuances

(1) Trial court's oral indication that the case would be continued from a future trial setting was not an order of the court and could be overruled by another judge, absent an actual order. (2) The defendant failed to show the denial of his continuance motion violated his rights where counsel did not file a motion, did not specify with particularity why more time was needed, and offered no explanation for failure to prepare other than the earlier trial judge's oral indication.

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this case involving charges of fleeing to elude arrest, resisting an officer, driving without a license and other charges, the trial court did not err by denying the defendant's motion for a continuance. Following the defendant's arrest on May 22, 2015 attorney Doyle was appointed to represent the defendant. The defendant was later charged with first-degree murder in an unrelated case and attorney Mannette was appointed to represent him on that charge. On March 9, 2016, the defendant's homicide case was continued until September 2016. Attorney Doyle was present at the hearing and moved the trial court to allow him to withdraw as counsel on the charges at issue in this case and appoint Ms. Mannette. The prosecutor informed the court that the charges were scheduled for trial on April 18, 2016. Mannette said that she believed the charges were headed towards resolution but that she would not be prepared to try the case in a month. The trial court indicated that the "bottom line" was that the case was "going to get continued" if the State was prepared to proceed to trial on April 18th. When the case was called for trial on April 18,

2006, Mannette orally moved for a continuance, explaining that when she took the case she indicated that if the parties could not reach a non-trial disposition she would not be prepared to try the case. Defense counsel acknowledged that she had received discovery a month earlier. Counsel stated that she had not interviewed a witness or conducted legal research to support her pretrial motions. The trial court denied the continuance motion. On appeal the defendant argued that the denial of his motion to continue deprived him of his constitutional right to effective assistance of counsel because counsel had insufficient time to prepare a defense. The court rejected this argument. First, it rejected the defendant's argument that the trial court's remark made at the March 9th hearing constituted a judgment or order that could not be overruled by another judge. The court noted that an order rendered in open court is not enforceable until it is entered, that is, reduced to writing, signed by the judge, and filed with the clerk of court. Thus, the oral statement by the judge, which was not reduced to writing or entered as an order or judgment, was not a judgment or order that may not be overruled by another judge. Second, the court rejected the defendant's argument regarding his need for additional time to prepare a defense. At the pretrial hearing, defense counsel stated that there was a lay witness she had not interviewed, a suppression motion for which she had not conducted the necessary research, and other unspecified motions in limine that needed to be filed and argued. Defense counsel did not identify the witness or articulate any material factual issue upon which the witness might testify. Nor did counsel offer an explanation, other than her reliance on the prior judge's comment at the earlier hearing, for failure to interview the witness, conduct the necessary research, or file a properly supported written motion to continue. Additionally, the trial was not unusual or complex. The court thus concluded that the defendant had failed to establish that the denial of his continuance motion violated his constitutional rights.

Evidence

Photographs

Photographs used for illustrative evidence were properly authenticated and admitted for non-substantive purposes.

State v. Little, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this armed robbery case, the trial court did not err by admitting photographs for illustrative purposes. The photographs were admitted solely to illustrate the testimony of witnesses and the trial court appropriately instructed the jury. The court rejected the defendant's argument that photographs admitted for illustrative purposes must be authenticated in the same manner as photographs admitted as substantive evidence.

Rape Shield

No error for trial court to exclude cross-examination of State's expert on the child victim's sexual activity with others where expert testified to PTSD diagnosis of the victim and the victim's consensual sexual activity with others did not inform the expert's diagnosis.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, the trial court did not err by precluding the defendant from cross-examining the State's expert witness about information in the treatment records regarding the child's sexual activity with partners other than the defendant. The defendant unsuccessfully sought to cross-examine an expert who testified that the victim suffered from PTSD about information she learned regarding the victim's sexual activity with other individuals. During *voir dire* the expert testified that any information about the victim's consensual sexual activity with others did not play a role and was not relevant to her PTSD diagnosis. The trial court found the evidence to be irrelevant. The court noted that having so found, the trial court was not required to proceed under a Rule 403 balancing test.

Evidence of victim's STDs not admissible under Rule 412 where defendant's evidence raised only a speculation that the victim was sexually active with someone else.

State v. Jacobs, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this child sexual assault case, the trial court did not err by concluding that evidence regarding the victim's sexually-transmitted diseases was inadmissible under Rule 412. The defendant had wanted to call an expert witness to testify that the victim—his daughter--had STDs but that the defendant tested negative for those diseases. The defendant argued that the evidence would make a sexual relationship between himself and the victim less likely and would show that someone else had sexual relations with the victim. The court began by holding that the presence of an STD is indicative of prior sexual behavior and thus implicates Rule 412. The court went on to reject the defendant's argument that evidence of the STDs was admissible under the exception to the Rule that allows evidence of "specific instances of sexual behavior offered for the purposes of showing that the act or acts charge were not committed by the defendant." The defendant offered no alternative explanation or specific act to prove that any sexual act committed was done by someone other than him. Rather, he offered evidence of the victim's STDs and his own negative testing to raise speculation and insinuate that the victim must have been sexually active with someone else. The court found that the presence of an STD was not relevant and was properly excluded. One judge wrote separately, concurring in result only to emphasize that evidence regarding STDs "is not a class of evidence unto itself that should be included wholesale" under the Rule. [Phil Dixon blogged about the preservation aspect of the case here.]

Failure to make an offer of proof concerning the victim's responses to questions about her past sexual history bars consideration of Rule 412 issue on appeal.

State v. Parlier, ___ N.C. App. ___, 797 S.E.2d 340 (Mar. 7, 2017). In this child sexual assault case, because the defendant did not make an offer of proof to show what the victim's responses to questions about her past sexual behavior would have been, he failed to preserve for appellate review whether he

should have been allowed to question the victim regarding her general sexual history (a Rape Shield issue).

Rule 404(b)

Evidence of prior arson committed four years ago by the defendant under circumstances similar to the current arson offense properly admitted under Rule 404(b) as evidence of defendant's intent.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). In this arson case, the trial court properly admitted 404(b) evidence to show the defendant's intent. The evidence in question pertained to another arson, which was sufficiently similar to the incident in question. Both arsons occurred in the same town during nighttime hours and involved the same building location. In both instances the defendant was intoxicated, knew the buildings were occupied, and was angry about a perceived harm perpetrated against her by an occupant of the residence. Although the other incident occurred approximately four years earlier, there was a sufficient temporal proximity to the conduct at issue.

Bare evidence of the defendant's prior incarceration, while not necessarily Rule 404(b) evidence under existing precedent, was nonetheless improper character evidence under Rule 404(a).

State v. Rios, ___ N.C. App. ___, 795 S.E.2d 234 (Dec. 20, 2016). In this drug case, a new trial was required where character evidence was improperly admitted. When cross-examining the defendant's witness, the prosecutor elicited testimony that the defendant had been incarcerated for a period of time. The court viewed this testimony as being equivalent to testimony regarding evidence of a prior conviction. Because the defendant did not testify at trial, the State could not attack his credibility with evidence of a prior conviction. The court rejected the State's argument that the defendant opened the door to this testimony, finding that the defendant did not put his good character at issue. [Phil Dixon blogged about the case here.]

Evidence of 4 year-old embezzlement by defendant admissible under Rule 404(b) to show intent, motive, plan, and absence of mistake.

State v. Fink, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this larceny by employee case, the trial court did not err by admitting 404(b) evidence. The charges arose out of a 2014 incident in which the defendant, a manager of an auto shop, kept for himself cash paid by a customer for auto repairs. At trial, an officer testified that in 2010 he investigated the defendant for embezzlement. The defendant, who was working as a restaurant manager, admitted stealing from the restaurant by voiding out cash transactions and keeping the cash for himself. The court found that evidence showing that the defendant embezzled from a previous employer four years prior was clearly relevant to show intent, plan, or absence of mistake or accident. In both cases, the defendant worked for the business, held a managerial position, took cash paid and intended for the business, kept the cash for himself, and manipulated accounting procedures to cover his tracks. The prior incident was sufficiently similar to the

current one and was not too remote in time. Additionally, the trial court gave a proper limiting instruction.

Recording of conversations between defendant and testifying jailhouse informant proper to show the nature and context of the relationship between the two men under Rules 404(b) and 403.

State v. Carvalho, ___ N.C. ___, 794 S.E.2d 497 (Dec. 21, 2016). The court *per curiam* affirmed the Court of Appeals in *State v. Carvalho* ___, N.C. App. ___, 777 S.E.2d 78 (Oct. 6, 2015). In this murder case, the Court of Appeals held, over a dissent, that the trial court did not err by admitting under Rule 404(b) portions of an audiotape and a corresponding transcript, which included a conversation between the defendant and an individual, Anderson, with whom the defendant was incarcerated. Anderson was a key witness for the State and his credibility was crucial. The recorded conversation included discussions of plans to commit future robbery and murder, when a murderer becomes a serial killer, how to become a hitman, and similar topics. The 404(b) evidence was not admitted for propensity but rather to show: that the defendant trusted and confided in Anderson; the nature of their relationship, in that the defendant was willing to discuss commission of the crimes at issue with Anderson; and relevant factual information to the murder charge for which the defendant was on trial. These were proper purposes. Additionally, the trial court did not abuse its discretion in admitting this evidence under the Rule403 balancing test.

Prejudicial error to admit 404(b) evidence of prior gun possession by defendant.

State v. Williams, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this possession of a firearm by a felon case, the court held, over a dissent, that the trial court erred by admitting 404(b) evidence. The current charges were filed after officers found an AK-47 rifle in the back seat of a vehicle and a Highpoint .380 pistol underneath the vehicle, next to the rear tire on the passenger side. At trial, the State offered, and the trial court admitted, evidence of a prior incident in which officers found a Glock 22 pistol in a different vehicle occupied by the defendant. The evidence was admitted to show the defendant's knowledge and opportunity to commit the crime charged. The defendant offered evidence tending to show that he had no knowledge of the rifle or pistol recovered from the vehicle. The trial court erred by admitting the evidence as circumstantial proof of the defendant's knowledge. The court reasoned, in part, that "[a]bsent an immediate character inference, the fact that defendant, one year prior, was found to be in possession of a different firearm, in a different car, at a different location, during a different type of investigation, does not tend to establish that he was aware of the rifle and pistol in this case." The court found that the relevance of this evidence was based on an improper character inference. The court further held that the trial court abused its discretion by admitting the evidence as circumstantial proof of the defendant's opportunity to commit the crime charged. The court noted, in part, that the State offered no explanation at trial or on appeal of the connection between the prior incident, opportunity, and possession. The court went on to hold that the trial court's error in admitting the evidence for no proper purpose was prejudicial and warranted a new trial. The dissenting judge believed that the defendant did not properly preserve his objection, that the issue should be reviewed under the plain error standard, and that no plain error occurred.

Confrontation

Statement offered to show course of investigation not offered for the truth of the matter asserted and therefore non-testimonial for purposes of the Confrontation Clause.

State v. Garner, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this case involving a larceny from a country club, the Confrontation Clause was not violated when the trial court admitted evidence that the owners of the country club received an anonymous phone call providing information about the perpetrator. The trial court admitted the statement with a limiting instruction that it was not to be considered for its truth but only to show the course of the officers' investigation based on the information provided by the caller. Because the statement was admitted for a purpose other than the truth of the matter asserted, it falls outside of the protections afforded by the Confrontation Clause.

Hearsay

Where statement by non-testifying declarant offered to establish why the defendant was under police surveillance, it was not offered for the truth of the matter asserted and did not violate the hearsay prohibition.

State v. Rogers, ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (2017). In this drug case, the trial court did not err by allowing an officer to testify about information collected from a non-testifying witness during an investigation. The statement was not offered for its truth but rather to explain the officer's subsequent conduct and how the investigation of the defendant unfolded. The court explained, "hearsay testimony given by an informant to the witness concerning a defendant's conduct was admissible to 'explain how the investigation of the defendants unfolded, why defendants were under surveillance, and why the witnesses followed the defendant's vehicle.'"

Where the witness testified that a jailer told her the defendant was in jail at the same time as her and that statement was offered to explain why the witness was afraid to testify, the statement was not offered for the truth of the matter asserted and did not violate the hearsay ban.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). The trial court did not err by allowing a witness to testify that after the incident in question and while she was incarcerated, a jailer told her that the defendant was in an adjacent cell. The defendant argued that because the jailer did not testify at trial, this was inadmissible hearsay. The court disagreed, finding that the statement was not offered to prove its truth but rather to explain why the witness was afraid to testify. Because the defendant did not object, even if the statement was hearsay, its admission did not rise to the level of plain error.

When witness did not recall her statement to law enforcement, the video of the interview was properly admitted as a "past recollection recorded" hearsay exception under Rule 803(5); playing the video a second time to corroborate the officer's testimony about the interview was permissible and not error.

State v. Harris, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court did not err by allowing the introduction of a video recording of the State's witness being interviewed by law enforcement as substantive evidence. It was admissible as a past recollection recorded once the witness failed to recall the details of the interview. The court rejected the notion that the video had been introduced to refresh the witnesses recollection under Rule 612. A second playing of the video to corroborate the officer's testimony about the interview was also permissible.

Impeachment

No prejudice where trial court limited cross-examination of State's expert, prohibiting questions on letters to the editor regarding child abuse and other topics written by the expert 10 years earlier.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016). In this child sexual assault case, even if the trial court erred by denying the defendant's request to admit into evidence three letters to the editor written by the State's expert witness and published in a newspaper 10 years before the expert's interview with the child in question, the error was not prejudicial. The defendant contended that the letter showed possible bias or prejudice in child advocacy matters and that he should have been permitted to cross-examine the expert about their content. The court determined, however, that the defendant had failed to demonstrate a reasonable possibility that a different result at trial would have occurred if the letters had been admitted.

(1) Where the victim's husband testified to biographical information about the victim and the injuries sustained by their child (also a victim), no error to limit the scope of cross-examination and exclude questions about the pending civil complaint or possible financial bias. (2) No error for the trial court to exclude evidence that the child was not properly restrained in a child set. Per G.S. 20-137.1, such evidence is typically not admissible in criminal proceedings.

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) In this impaired driving second-degree murder case, the trial court did not err by preventing the defendant from cross-examining witness Cooke regarding the contents of a verified complaint that Cooke had filed against the defendant and the estate of the deceased victim on behalf of himself and Cooke's son, who was injured in the crash. The State filed a motion *in limine* to prevent the defendant from cross-examining Cooke regarding the contents of the verified civil complaint. The trial court granted the State's motion and prohibited the defendant from cross-examining Cooke regarding the allegations in the complaint or about any bias that might result from Cooke's financial interest in the defendant's prosecution. Cooke was called by the State to testify about his family and the child's injuries. The State did not elicit any testimony from him regarding cause of the crash and he did not offer any testimony that would tend to sway the jury in deciding the defendant's guilt. The defendant failed to show that the trial court's decision to limit the

scope of cross-examination influenced the jury's verdict. (2) The trial court did not err by excluding evidence that a child victim was not properly restrained in a child seat. Although G.S. 20-127.1 provides that passengers less than 16 years old must be properly secured in a vehicle, the statute also provides that evidence of failure to wear a seatbelt is not admissible in any criminal action, subject to exceptions that do not apply in this case.

Error to exclude impeachment evidence of mother's previous accusations against the defendant, but no prejudice in light of other evidence of guilt.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the trial court erred by excluding evidence which tended to show the victim's mother's bias against the defendant. After concluding that the defendant failed to preserve his challenges with respect to three pieces of impeachment evidence, the court concluded that exclusion of impeachment evidence that the mother had previously accused the defendant of domestic abuse constituted error. The evidence at issue showed that the mother had accused the defendant of domestic violence, the police declined to prosecute, that she subsequently took out a private warrant, and that she failed to prosecute those charges. The court agreed that exclusion of this evidence was error, explaining: "Evidence that Mother had accused Defendant of domestic violence could have indicated Mother's bias against Defendant and may have influenced the jury's assessment of her credibility as a witness." However, considering the entire record, the court went on to conclude that there was no reasonable possibility that had the jury heard the evidence a different result would have been reached at trial.

Vouching

Improper vouching for law enforcement officer to testify that the victim seemed truthful, but error did not rise to level of plain error given the lack of objection at trial and the corroborating testimony of other witnesses.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by allowing an officer to testify that when the victim provided a statement he "seemed truthful." The error, however, did not rise to the level of plain error. At trial, the prosecutor asked the officer to describe the victim's demeanor. The officer responded that he was agitated and seemed to be in pain but that "he was—to me, he seemed truthful." This constituted improper vouching for the witness.

Where defense counsel failed to object to improper vouching for child victim by the State's expert, argument not preserved for appellate review.

State v. Mendoza, ___ N.C. App. ___, 794 S.E.2d 828 (Dec. 6, 2016).). In this child sexual assault case, the defendant failed to preserve the argument that the trial court committed prejudicial error by allowing the State's expert witness to testify that she diagnosed the child with PTSD, thus improperly vouching for the witness. At trial, the defendant did not object to the expert's testimony on the basis that it impermissibly vouched for the child's credibility or the veracity of the sexual abuse allegations;

rather, his objection was grounded on the fact that a licensed clinical social worker is not sufficiently qualified to give an opinion or diagnosis regarding PTSD.

Experts

Defense expert is not required to examine or interview prosecuting witness to testify about issues relating to witness, but trial court did not abuse discretion in excluding expert's testimony about the suggestibility of memory in this case.

State v. Walston, ___ N.C. ___, ___ S.E.2d ___ (May 5, 2017). Reversing the Court of Appeals in a case in which the amended version of Rule 702 applied, the Supreme Court held that the trial court did not abuse its discretion in excluding defense expert testimony regarding repressed memory and the suggestibility of memory. The case involved a number of child sex offense charges. Before trial, the State successfully moved to suppress testimony from a defense expert, Moina Artigues, M.D., regarding repressed memory and the suggestibility of children. The Court of Appeals had reversed the trial court and remanded for a new trial, finding that the trial court improperly excluded the expert's testimony based on the erroneous belief it was inadmissible as a matter of law because the expert had not interviewed the victims. The State petitioned the Supreme Court for discretionary review. Holding that the trial court did not abuse its discretion in excluding Dr. Artigues's testimony, the Court found that "the Court of Appeals was correct to clarify that a defendant's expert witness is not required to examine or interview the prosecuting witness as a prerequisite to testifying about issues relating to the prosecuting witness at trial." The Court noted: "Such a requirement would create a troubling predicament given that defendants do not have the ability to compel the State's witnesses to be evaluated by defense experts." The Court disagreed however with the Court of Appeals' determination that the trial court based its decision to exclude defendant's proffered expert testimony solely on an incorrect understanding of the law. It found that the Court of Appeals presumed that the testimony was excluded based on an erroneous belief that there was a per se rule of exclusion when an expert has not interviewed the victim. However, the trial court never stated that such a rule existed or that it based its decision to exclude the testimony solely on that rule. The Court went on to note that Rule 702 does not mandate any particular procedural requirements for evaluating expert testimony. Here, the trial court ordered arguments from both parties, conducted voir dire, considered the proffered testimony, and considered the parties' arguments regarding whether the evidence could be excluded under Rule 403 even if it was admissible under Rule 702. With respect to the latter issue, the Court noted that Rule 403 allows for the exclusion of evidence that is otherwise admissible under Rule 702. The Court concluded that there is evidence to support the trial court's decision to exclude the testimony and that it properly acted as a gatekeeper in determining the admissibility of expert testimony.

Expert's comment that "in fact she did experience abuse", in context, referred to a hypothetical victim and did not constitute improper vouching for the victim.

State v. Martinez, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this child sexual assault case, the State's medical expert did not impermissibly testify that the victim had been abused. Case law holds that in the absence of physical evidence to support a diagnosis of sexual abuse, expert testimony that sexual

abuse has in fact occurred is not admissible because it is an impermissible opinion regarding the victim's credibility. Here however the expert's statement, considered in context, does not amount to an assertion that the child was in fact abused. Rather, the expert was speaking of a hypothetical victim when she made the statement in question. In fact, she testified that the victim's medical exam was normal and that she could not determine from the exam whether or not the child had been sexually abused.

Videos

Error to admit video surveillance tape without proper foundation, but not prejudicial in light of other evidence of guilt.

State v. Moore, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The State failed to lay a proper foundation for the introduction of a video as either illustrative or substantive evidence. An officer testified that the day after the incident in question, he asked the manager of a Kangaroo convenience store for a copy of the surveillance video made by cameras at the store. The manager allowed the officer to review the video. The officer used the video camera function on his cell phone to make a copy of the surveillance footage. At trial he testified that the cell phone video accurately showed the contents of the video he had seen at the store. The store clerk also reviewed the video but was not asked any questions about the creation of the original video or whether it accurately depicted the events that he observed on the day in question. No testimony was elicited at trial concerning the type of recording equipment used to make the video, its condition on the day in question or its general reliability. No witness was asked whether the video accurately depicted events that he had observed, and no testimony was offered on the subject. However, the court went on to hold that the error was not prejudicial.

Crimes

Acting in Concert

Plain error for the trial court to instruct on acting in concert where State's evidence showed mere presence of the defendant at the residence of another where drugs found; motion to dismiss for insufficiency should have been allowed.

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 526 (Dec. 20, 2016). In this drug case, the trial court committed plain error by instructing the jury on the theory of acting in concert. The State presented no evidence that the defendant had a common plan or purpose to possess the contraband with his alleged accomplice, McEntire. At most, the evidence showed that the two were acquainted and the defendant was present when the drugs were found at McEntire's home. Mere presence at the scene of a crime, however, is insufficient where the State presented no evidence that the two shared any criminal intent.

Evidence of acting in concert was sufficient where the defendant drove the shooter to the scene of the crime, assisted the shooter in attempting to restrain the victim, and drove the shooter away from the scene.

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). The evidence was sufficient to sustain a charge of assault with a deadly weapon inflicting serious injury based on a theory of acting in concert. It was undisputed that the victim sustained serious injury; the only real issue was whether the evidence was sufficient to allow a reasonable inference that the defendant was a perpetrator of the crime. Another individual, Mr. Robinson, shot the victim. The evidence showed that the defendant and the victim's wife drove to the victim's residence, where the victim and his wife engaged in a dispute over custody of their children until the police arrived and required the defendant and the victim's wife to leave without the children. The next evening the defendant drove his vehicle, with Robinson and the victim's wife, back to the victim's residence, carrying with them firearms, bulletproof vests, and walkie-talkie radios that were turned on and set to the same channel. The vehicle was waiting in the victim's apartment parking lot when he arrived home. Robinson, who did not know the victim, shot the victim and asked him if he wanted to die. The defendant assisted Robinson in restraining the victim, placed a handcuff on one of the victim's wrists, tried to cuff both of the victim's wrists, searched the victim's pockets, and escorted the victim's children from his apartment to the vehicle where the victim's wife was waiting. After neighbors found the victim bleeding from gunshot wounds, the defendant sped away from the scene with the victim's wife, Robinson, and the children. This evidence was sufficient to sustain and acting in concert charge.

Assault

Attempted assault with deadly weapon inflicting serious injury is a cognizable offense in North Carolina and may serve as a predicate offense in a habitual felon prosecution.

State v. Floyd, ___ N.C. ___, 794 S.E.2d 460 (Dec. 21, 2016). The Court of Appeals improperly found that attempted assault is not a recognized criminal offense in North Carolina. The court rejected the notion that attempted assault is an "attempt of an attempt." Thus, a prior conviction for attempted assault with a deadly weapon inflicting serious injury can support a later charge of possession of a firearm by a felon and serve as a prior conviction for purposes of habitual felon status. [Jessica Smith blogged about the case here.]

Spitting at people walking behind officer supported conviction of assault on officer when spit hit officer.

State v. Mylett, __ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). The evidence was sufficient to support a conviction for assault on a government officer under G.S. 14-33(c)(4). While attempting to separate the defendant from other individuals, the defendant spit at people walking behind the officer, hitting the officer with his spit. The defendant argued that because he intended to assault individuals standing behind the officer, the State failed to establish that he intended to assault the officer. The court rejected this argument, holding that the offense was a general intent crime. Here, the defendant conceded that

he knew the victim was a law enforcement officer and that he intended to commit an assault. The court concluded that "we are satisfied that when Defendant spat at members of the crowd and [the] Officer . . . was struck by Defendant's spit, the requirements of [the statute] were satisfied." It continued: "the knowledge element of assault on a government officer in violation of [G.S. 14-33(c)(4)] is satisfied whenever a defendant while in the course of assaulting another individual instead assaults an individual he knows, or reasonably should know, is a government officer."

Sexual Assault

Evidence was insufficient support sexual battery.

In re S.A.A., ___ N.C. App. ___, 795 S.E.2d 602 (Dec. 20, 2016). The State failed to introduce sufficient evidence of sexual battery. The 13-year-old juvenile was adjudicated delinquent in part based on two counts of sexual battery against two 11-year-old female schoolmates. It was alleged that he draped his arms around the girls' shoulders in order to smear a glowing liquid on them during an evening of Halloween trick-or-treating. The State failed to introduce sufficient evidence that the juvenile touch the tops of the girls' breasts for a sexual purpose. One girl testified that the juvenile rubbed "this green glow stick stuff" on her leaving glowing liquid on her shirt above her collarbone. The other girl testified that the juvenile reached his arm around her shoulder and "put this weird green glowing stuff" on her arm and back, also touching her "boobs" over her sweatshirt. In criminal cases involving adult defendants the element of acting for the purpose of sexual arousal, sexual gratification, or sexual abuse may be inferred from the very act itself. However, an intent to arouse or gratify sexual desires may not be inferred in children under the same standard. Rather, a sexual purpose does not exist without some evidence of the child's maturity, intent, experience, or other factor indicating his purpose in acting. Here, the juvenile denied touching either girl's breasts, saying that he only put his hand around their shoulders; this account was supported by witnesses. Neither the location nor the alleged manner of the touching was secretive in nature; rather, the incident occurred on a busy public street on Halloween. The evidence was undisputed that the juvenile have been wiping green glowing liquid on trees, signs, and other young people during the evening. Nothing about his attitude suggested a sexual motivation; neither girl said that he made any sexual remarks. And when the girls ran away, he did not try to pursue them. [Jessica Smith blogged about the case here.]

Breaking and Entering

Breaking and entering of a building on church grounds not regularly used for worship but instead used for storage cannot sustain conviction for breaking and entering of a place of worship.

State v. McNair, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). (1) The evidence was insufficient to convict the defendant of breaking or entering into a place of religious worship. The defendant was alleged to have broken into a place of religious worship used by Vision Phase III International Outreach Center ("Vision"), a church engaged in international missions and renting a building called the "Chapel" for the purpose of conducting its church services. Several other structures were situated behind the Chapel, including a small barn, located approximately 50 feet away. The property owner allowed Vision

to use the barn to store equipment that could not be kept in the Chapel. The only building that the defendant was alleged to have broken into was the barn, which the State conceded was not used for religious worship. However, the State argued that the barn was within the curtilage of the Chapel, and for this reason should be deemed an extension of the Chapel for purposes of the statute. The court rejected this argument reasoning, in part, that based on the statute's wording "it is clear" that to be convicted of breaking or entering into a place of religious worship, the specific building broken into must be a "building that is regularly used, and clearly identifiable, as a place for religious worship." (2) The evidence was sufficient to convict the defendant of felony breaking or entering a building. The court rejected the defendant's argument that the evidence showed only his presence at the scene, noting, among other things, that responding to a possible break-in, officers found the defendant scaling a 10-foot brick wall near the barn. The court also found that the evidence was sufficient to support an inference that the defendant intended to commit a larceny when he entered the barn, noting, among other things, that items had been removed from the barn and placed in the fenced in area around it.

Robbery

Evidence was sufficient to support the element of unlawful taking from the person where the defendant, along with three masked men, entered a building, ordered the occupants to the ground and property was taken from the victim.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this armed robbery case, there was sufficient evidence that the defendant committed a taking from the victim's person or presence. The evidence showed that the defendant and three other men entered a building in the early morning. The armed intruders ordered the occupants to lie face-down on the ground and take off their clothing. The defendant ordered, "Give me all your money," and the victim's cell phone was taken at this time.

Threating or endangering element of armed robbery is viewed objectively; actual fear of the victim is irrelevant. Display of a weapon satisfies this element, whether or not the gun is pointed at a victim and regardless of whether an explicit threat is made.

State v. Wright, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). In this armed robbery case, the trial court did not err by failing to instruct the jury on the lesser-included offense of common law robbery. The defendant entered three convenience stores with his face covered and a gun in his hand and stole money in the presence of the store clerks. The defendant argued that the State failed to present evidence that the victims' lives were endangered or threatened. With respect to two of the robberies, the defendant argued that there was no evidence that he actually pointed his gun at the clerks. With respect to the third, he noted that the clerk testified that she was "never scared." The court distinguished cases holding that mere possession of a weapon during a robbery is insufficient to support a finding that the victim's life was endangered or threatened on the basis that in those cases, neither the victim nor the bystanders actually saw the weapon. It went on to note that where the evidence establishes that a defendant held a dangerous weapon that was seen by the victim or a witness during the robbery, cases hold that this element is satisfied. Thus, with respect to the robberies where the clerks saw the defendant holding the gun, the evidence was sufficient. With respect to the third

robbery, the court held, citing prior case law, that the State is not required to prove that the victim was in fact afraid. [Jeff Welty blogged about the case here.]

Child Abuse

Error to leave 'moderate punishment' undefined in jury instructions in child abuse prosecution. Where a defense of parental discipline is raised, the State must prove lasting injury, a malicious purpose, or cruel and grossly inappropriate corrective procedures.

State v. Varner, ___ N.C. App. ___, 796 S.E.2d 834 (Mar. 7, 2017), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 10, 2017). In this misdemeanor child abuse case, where the defendant hit his son with a paddle, the trial court committed reversible error with respect to the jury instructions. After the defendant paddled his 10-year-old son for refusing to eat at the family dinner table, the child experienced bruising and pain for several days. The defendant was charged with felony child abuse. At the charge conference, the trial judge told the parties that he would instruct the jury that it could not convict the defendant if it found that the child's injuries were inflicted as a result of the defendant's "moderate punishment to correct" his child. Neither party objected to this instruction. The trial judge further indicated that he would give an instruction defining "moderate punishment" as "punishment that does not cause lasting injury." The State objected to this definition, arguing that moderate punishment should not be limited to that which produced lasting injuries. The trial judge agreed and, over the defendant's objection, struck this definition. Thus, the trial judge left the term moderate punishment undefined. The jury found the defendant guilty of misdemeanor child abuse. On appeal the defendant argued that the trial court erred when it struck the proposed instruction defining moderate punishment as punishment which caused lasting injury to the child. The court agreed that the instructions impermissibly allowed the jury to convict the defendant simply because they thought his degree of punishment was excessive, even if they thought he was acting in good faith and did not inflict a lasting injury on the child. The court reversed and remanded for a new trial, noting that based on the case law discussed in the court's opinion, "it would have been proper for the State to request an instruction advising the jury that it could nonetheless convict if it determined that Defendant acted out of 'wickedness of purpose,' irrespective of the extent of the physical injuries." [Shea Denning blogged about this case here.]

Conspiracy

Evidence was sufficient to support a conviction for conspiracy to possess stolen property where the defendant called his accomplice from jail, the accomplice arrived at the defendant's home where the stolen property was located, and the accomplice admitted to working with the defendant.

State v. Greene, ___ N.C. App. ___, 795 S.E.2d. 815 (Jan. 17, 2017). The evidence was sufficient to support a charge of conspiracy to possess stolen goods, a pistol. After the defendant took the pistol and other items from the victims' purses, the pistol was found in the field near a residence. The defendant's alleged accomplice was present at the residence and admitted to officers that he was working with the

defendant. This occurred after the defendant called the alleged accomplice from jail. From this evidence a jury could reasonably infer that the accomplice conspired with the defendant to possess the pistol.

(1) Husband's involvement in defendant's drug sales to undercover agent went beyond mere presence and was sufficient to support conspiracy charge. (2) While multiple conspiracies require proof of separate agreements, the evidence here was sufficient to support conspiracy charges for each transaction.

State v. Glisson, ___ N.C. App. ___, 796 S.E.2d 124 (Feb. 7, 2017). (1) The evidence was sufficient to support a conviction for conspiracy to traffic in opium by sale and delivery. The defendant was indicted on multiple drug offenses arising from three separate controlled buys. On appeal the defendant argued that the State failed to present evidence, aside from an accomplice's mere presence at the second control buy, that the defendant conspired with the accomplice to traffic in opium. The court rejected this argument, noting, among other things that the defendant brought the accomplice to the drug transaction location for all three controlled buys. The location of the second exchange was one the defendant did not like and the sale took place at or near dark. The drugs were maintained in the same vehicle as the accomplice and the defendant exchanged the drugs and counted the money in front of him. From this evidence, it would be reasonable for the jury to infer that the accomplice was present at the defendant's behest to provide safety and comfort to the defendant during the transaction. (2) The evidence supported multiple conspiracy charges. The court rejected the defendant's argument that the evidence showed only one agreement to engage in three separate transactions. It noted that the first two transactions were separated by one month and that approximately three months passed between the second and third buys. There was no evidence suggesting that the defendant planned the transactions as a series. Rather, the informant or the detective initiated each.

Drugs

Convictions vacated for insufficient evidence of constructive possession by guest present at a residence where drugs found.

State v. Holloway, ___ N.C. App. ___, 793 S.E.2d 766 (Dec. 6, 2016), *temporary stay allowed*, ___ N.C. ___, 794 S.E.2d 526 (Dec. 20, 2016). (1) In this drug case, there was insufficient evidence of constructive possession. Officers responded to a report of a breaking and entering at a residence. They heard a commotion inside and noticed smoke coming from the house. Two men, the homeowner and the defendant, left through the front door. Because the officers had responded to a breaking and entering in progress, they placed the men in custody. The source of the smoke turned out to be a quantity of marijuana burning in the oven. A subsequent search of the premises found over 19 pounds of marijuana and other items including drug paraphernalia. A photograph of the defendant was found in a container in a bedroom. The defendant was indicted on multiple drug charges including trafficking, possession with intent, maintaining a dwelling and possession of drug paraphernalia. At trial, the defendant's mother explained why the homeowner had a photograph of the defendant. The homeowner testified that the defendant was merely visiting on the day in question, that the contraband was his, and that the defendant did not know about its presence. The trial court denied the defendant's motion to dismiss,

which asserted insufficiency of the evidence. The defendant was convicted. The court found that the State failed to present substantial evidence demonstrating the defendant's constructive possession of the contraband. The only evidence tying the defendant to the residence or the contraband was his presence on the afternoon in question and a single photograph of him found face down in a plastic storage bin located in a bedroom. There was no evidence that the defendant had any possessory interest in the house, that he had a key to the residence, that his fingerprints were found on any of the seized items, that any items belonging to him were found in the residence (on this issue it noted that the photograph belong to the homeowner), or that any incriminating evidence was found on his person. (2) The evidence was insufficient with respect to the maintaining a dwelling charge. There was no evidence that the defendant was the owner or lessee of the residence, there was no evidence that he paid for its utilities or upkeep, there was no evidence that he had been seen in or around the dwelling and there was no evidence that he lived there.

Habitual felon conviction based on enhanced felony sentence for repeat possession of marijuana under G.S. 90-95(e)(3) rejected.

State v. Howell, ___ N.C. App. ___, 792 S.E.2d 898 (Dec. 6, 2016), *review allowed*, ___ N.C. ___, 796 S.E.2d 789 (Mar. 16, 2017). G.S. 90-95(e)(3) operates as a sentence enhancement not a separate offense. The defendant was charged with possession of marijuana of over ½ ounce but less than 1½ ounces, a Class I misdemeanor, of having previously been convicted of any offense in violation of the Controlled Substances Act, and with attaining the status of habitual felon. The defendant pled guilty to the possession charge, acknowledged his prior conviction subjecting him to enhanced punishment and acknowledged attaining habitual felon status. The trial court treated the marijuana misdemeanor as a Class I felony because of the prior conviction and then elevated that conviction to a Class E felony because of habitual felon status. On appeal the defendant argued that under G.S. 90-95(e)(3), the prior conviction was merely a sentence enhancement, and could not serve to elevate the misdemeanor offense to a felony offense. The court agreed, concluding: "it appears that our General Assembly intended that section (e)(3) to act as a sentence enhancement rather than a separate offense." It continued: "Thus, while defendant's Class 1 misdemeanor is punishable as a felony under the circumstances present here, the substantive offense remains a Class 1 misdemeanor." The court went on to conclude that as a result, the defendant's habitual felon status had no impact on his sentence as a misdemeanant. [John Rubin blogged about the case here.]

Where the evidence showed only that drugs were possessed in the defendant's vehicle for only a short amount of time on one occasion, defendant's motion to dismiss the charge of maintaining a vehicle for keeping controlled substances should have been granted.

State v. Rogers, ___ N.C. App. ___, 796 S.E.2d 91 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 21 (2017). Over a dissent, the court held that "[b]ecause the evidence did not establish continuous possession of a vehicle for the purpose of keeping or selling a controlled substance, the trial court erred in denying defendant's motion to dismiss the charge of maintaining a vehicle for the keeping and/or selling of a controlled substance." The State failed to demonstrate continuous maintenance or possession of the vehicle by the defendant beyond the brief period of time when he was observed by

the police on the afternoon of his arrest or that the defendant had used the vehicle on a prior occasion to keep or sell drugs. The evidence showed only that the defendant possessed drugs in the vehicle on one occasion.

Where multiple Schedule I controlled substances were found in one mixture, the defendant may be prosecuted for each substance.

State v. Williams, ___ N.C. App. ___, 796 S.E.2d 823 (Mar. 7, 2017). Where the defendant was in possession of a bag containing two separate Schedule I controlled substances, Methylone and 4-Methylethcathinone, two convictions were proper. Noting that it had already rejected the argument advanced by the defendant in another case, the court held that the defendant could be punished for two offenses where two different drugs are found in the same mixture.

Where the evidence showed two separate methamphetamine labs, defendant was properly convicted of and sentenced for two separate manufacturing methamphetamine offenses.

State v. Maloney, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). The court rejected the defendant's argument that the trial court erred by entering judgment for two separate counts of manufacturing methamphetamine. The defendant had argued that the crime was a single continuing offense and that therefore one of the conviction should be vacated. However two separate methamphetamine labs were discovered, in the trunk of a vehicle and in a storage unit. It was clear that the separate and distinct locations contained two separate methamphetamine manufacturing processes. Thus, the trial court did not err by entering judgment for two separate counts of manufacturing methamphetamine.

Homicide

Discharging a weapon into occupied property is not an assault crime for purposes of felony murder merger doctrine.

State v. Spruiell, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). Rejecting the defendant's ineffective assistance of counsel claim with respect to his first-degree felony murder conviction, the court also rejected the proposition that a felony murder conviction cannot be predicated on a felony of shooting into occupied property where that felony also was the cause of the victim's death. Reviewing the relevant case law, the court concluded:

> [I]t is clear that neither the Supreme Court nor this Court has ever expressly recognized an exception to the felony murder rule for the offense of discharging a weapon into occupied property. At most, North Carolina courts have recognized a very limited "merger doctrine" that precludes use of the felony murder rule in situations where the defendant has committed one assault crime against one victim and the State seeks to use that assault as the predicate felony for a felony murder conviction.

While a single assault on a single victim cannot serve as the underlying felony for felony murder, the

offense of discharging a weapon into an occupied vehicle can serve as a predicate offense for felony murder, regardless of the number of victims. . [Shea Denning blogged about the case here.]

(1) Verdict for second-degree murder that failed to specify which theory of malice supported conviction not ambiguous where the evidence only supported deadly-weapon implied malice (the B1 variety). (2) Depraved-heart malice (the B2 variety), although inapplicable here, is not limited to DWI homicide cases.

State v. Lail, ___ N.C. App. ___, 795 S.E.2d 401 (Dec. 30, 2016). (1) In this second-degree murder case, the trial court did not err by sentencing the defendant as a Class B1 felon. The defendant argued that the trial court erred because the jury returned a general verdict that failed to specify whether he had been found guilty of a Class B1 or B2 felony. The State proceeded under a deadly weapon implied malice theory rising from the defendant's alleged use of a butcher knife to slash the victim's throat. The trial judge instructed the jury on the definitions of express malice and deadly weapon implied malice (B1 second-degree murder) but not on depraved heart malice (B2 second-degree murder). The jury returned a general verdict of second-degree murder. The court held that since the jury was not presented with evidence supporting a finding of depraved heart malice, its general verdict was unambiguous and the B1 sentence was proper. It noted, however, that where the jury is presented with both B2 depraved heart malice and a B1 malice theory a general verdict would be ambiguous. It stated: "in this situation, trial judges . . . should frame a special verdict requiring the jury to specify which malice theory supported it second-degree murder verdict." (2) In the course of its ruling the court also noted that depraved heart malice is not limited to driving while intoxicated homicide cases. The evidence here showed that the defendant engaged in a deliberate attempt to take the life of the victim by repeatedly cutting his throat, which is not the type of reckless and indifferent malice that would qualify for the B2 classification.

Impaired Driving

G.S. 20-16.2(a), requiring law enforcement to read an impaired-driving suspect the implied consent rights, is satisfied by the officer reading the rights and making a written copy available, regardless of the ability of the suspect to understand the rights in their native language.

State v. Mung, ___ N.C. App. ___, 795 S.E.2d 284 (Dec. 20, 2016). The trial court did not err by denying the defendant's motion to suppress in this DWI case. The defendant had argued that the arresting officer failed to comply with the requirements of G.S. 20-16.2. Specifically, the defendant asserted that he was not adequately informed of his rights under the statute due to the fact that English is not his first language and that the officer's failure to ensure that these rights were communicated to him in his native language of Burmese resulted in violation of the statute. The court held that *State v. Martinez*, __ N.C. App. __, 781 S.E.2d 346 (2016) (holding that the admissibility of the results of a chemical analysis test are not conditioned on a defendant's subjective understanding of the information disclosed to him pursuant to the requirements of G.S. 20-16.2(a)), was controlling. It held: "as long as the rights delineated under N.C. Gen. Stat. § 20-16.2(a) are disclosed to a defendant — which occurred in the

present case — the requirements of the statute are satisfied and it is immaterial whether the defendant comprehends them."

State has no right of appeal from district court's final order of suppression.

State v. Parisi, ___ N.C. App. ___, 796 S.E.2d 524 (Feb. 7, 2017), *temporary stay allowed*, ___ N.C. ___, 796 S.E.2d 20 (Feb. 24, 2017). For reasons discussed in the court's opinion, the court held that it lacked jurisdiction to hear the State's appeal of the defendant's motion to suppress and that the superior court erred when it remanded the case to the district court with instructions to dismiss. [Shea Denning blogged about this case here.]

Where retrograde extrapolation expert's BAC opinion relied on unsubstantiated assumption that the defendant's BAC was declining, the expert opinion should have been excluded under Rule 702.

State v. Babich, ___ N.C. App. ___, 797 S.E.2d 359 (Mar. 7, 2017). In this DWI case, the trial court erred by admitting retrograde extrapolation testimony by the State's expert witness. That expert used the defendant's 0.07 blood alcohol concentration 1 hour and 45 minutes after the traffic stop to extrapolate that the defendant had a blood alcohol concentration of 0.08 to 0.10 at the time of the stop. To reach this conclusion, the expert assumed that the defendant was in a post-absorptive state at the time of the stop, meaning that alcohol was no longer entering the defendant's bloodstream and thus her blood alcohol level was declining. The expert conceded that there were no facts to support this assumption. The expert made this assumption not because it was based on any facts in the case, but because her retrograde extrapolation calculations could not be done unless the defendant was in a post-absorptive state. The expert's testimony was inadmissible under the *Daubert* standard that applies to Evidence Rule 702. The court added: "Although retrograde extrapolation testimony often will satisfy the *Daubert* test, in this case the testimony failed *Daubert*'s 'fit' test because the expert's otherwise reliable analysis was not properly tied to the facts of this particular case." It explained:

> [W]hen an expert witness offers a retrograde extrapolation opinion based on an assumption that the defendant is in a post-absorptive or post-peak state, that assumption must be based on at least some underlying facts to support that assumption. This might come from the defendant's own statements during the initial stop, from the arresting officer's observations, from other witnesses, or from circumstantial evidence that offers a plausible timeline for the defendant's consumption of alcohol.
>
> When there are at least some facts that can support the expert's assumption that the defendant is post-peak or post-absorptive, the issue then becomes one of weight and credibility, which is the proper subject for cross-examination or competing expert witness testimony. But where, as here, the expert concedes that her opinion is based entirely on a speculative assumption about the defendant—one not based on any actual facts—that testimony does not satisfy the *Daubert* "fit" test because the expert's otherwise reliable analysis is not properly tied to the facts of the case.

The court went on to find that in light of the strength of the State's evidence that the defendant was appreciably impaired, the error was not prejudicial. [Shea Denning blogged about the case here.]

No prejudice for seven-hour delay between arrest and appearance before magistrate when the defendant had several opportunities to contact a witness or attorney; defendant's motion to dismiss for alleged G.S. 15A-501 and *Knoll* violations properly denied.

State v. Cox, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). In this impaired driving second-degree murder case, the trial court did not err by denying the defendant's motion to dismiss which had asserted that violation of G.S. 15A-501 required dismissal of the charges. Under G.S. 15A-501, a law enforcement must bring a person arrested before a judicial official without unnecessary delay and must without unnecessary delay advise the person of his right to communicate with counsel and friends and must allow him a reasonable time and opportunity to do so. The vehicle crash occurred at 2:37 AM. An officer arrived at the scene between 3:15 and 3:20 AM and conducted field sobriety testing on the defendant. The defendant was arrested without a warrant for impaired driving and violation of his .04 BAC drivers license restriction. The defendant was taken to a hospital to have blood drawn. He arrived at the hospital around 4:33 AM. The officer advised the defendant of his rights and the defendant signed a rights form; he did not ask to have a witness or attorney present. A telephone was available to the defendant in the hospital room. The defendant's blood was drawn at 4:55 AM and he was examined by a physician and cleared. The defendant was then taken to a law enforcement center where the lead detective arrived to interview the defendant at about 5:52 AM. The interview began at about 6:15 AM, at which time the defendant was read his *Miranda* rights and waived his rights. The interview concluded after an hour. The defendant was then charged with second-degree murder and felony serious injury by vehicle. After the detective checked the defendant's criminal and driving history, an officer transported the defendant to the county jail for processing at 9:35 AM. He was brought before magistrate at approximately 11:11 AM. Prior to seeing the magistrate, the defendant made a phone call to a friend but did not ask the friend come to the jail until after he knew the conditions of his release. Reviewing these facts, the court noted that there was a seven hour delay between the defendant's arrest and his appearance before a magistrate. The court noted that the defendant was afforded multiple opportunities to have witnesses or an attorney present and chose not to take advantage of those opportunities. It concluded: "Defendant cannot now assert that he was prejudiced to gain relief, either by the absence of a witness or attorney or by the time period between his arrest and appearance before a magistrate."

Error for trial court to instruct on .08 BAC prong of driving while impaired where no evidence supported that theory.

State v. Fowler, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case, the trial court committed reversible error by instructing the jury that it could find the defendant guilty if he was driving under the influence of an impairing substance or had a blood alcohol concentration of .08 or more, where no evidence supported a conviction under the .08 prong of the impaired driving statute. Although disjunctive jury instructions generally are permissible for impaired driving, in this case the State presented no evidence supporting the .08 prong. The trial court improperly instructed the jury on

alternative theories, one of which is not supported by the evidence. Because it is impossible to conclude, based on the record and the general verdict form, upon which theory the jury based its verdict, the court found that it must assume that the jury based its verdict on the theory for which it received an improper instruction. The court went on to reject the State's argument that the error was harmless or non-prejudicial and noted that this is not a case where there is overwhelming evidence of impaired driving.

Exigent circumstances for warrantless blood draw established where the officer testified that he believed the defendant was close to a .08 BAC, the officer was the only one on the scene, and obtaining a search warrant for the blood test would have taken an additional 1-1.5 hours.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the trial court properly denied the defendant's motion to suppress where exigent circumstances supported a warrantless blood draw. The defendant tested at .10 on a roadside test, was arrested at 2:48 AM and then was transported to the police department, where he arrived 18 minutes later. When the defendant refused to comply with further testing within 2 to 3 minutes after arriving at the police department, the detective decided to compel a blood test. The closest hospital was approximately 4 miles away from the police department and 8 miles from the magistrate's office. The detective read the defendant his rights regarding the blood draw at the hospital at 3:24 AM and waited for the defendant to finish making a phone call before starting the blood draw at 3:55 AM. The detective testified that based on the information he had at the time, he thought the defendant was close to a blood alcohol level of .08. The detective further indicated that he thought it would have taken an additional hour to an hour and half to get a search warrant. The detective was the only officer on the scene and would have had to wait for another officer to arrive before he could travel to the magistrate to get the search warrant. The trial court's finding regarding the detective's reasonable belief that the delay would result in the dissipation of alcohol in the defendant's blood was supported by competent evidence. Thus, the trial court did not err in denying the defendant's motion to suppress the blood draw.

Sufficient evidence of defendant's operation of the motor vehicle existed where the vehicle was found underneath the overhang of the front of a hotel, the defendant was sitting in the driver's seat, the vehicle was registered to the defendant and he admitted driving.

State v. Burris, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). In this impaired driving case the court rejected the defendant's argument that the trial court erred by denying his motion to dismiss at the close of the State's evidence. The defendant had argued that there was no independent evidence, other than his admission, to establish that he was operating a motor vehicle at any relevant time period. Here, the defendant admitted to the detective that he had been driving the vehicle and described in detail the route he took to get to the scene. When the detective approached the vehicle, the engine was not running but it was parked under an overhang area by the front door of a hotel, where guests typically stop to check in. The detective observed the defendant sitting in the drivers seat and the vehicle was registered to the defendant. The circumstantial evidence, along with the defendant's admissions to driving the vehicle and the route he took, was sufficient evidence for the jury to determine that the defendant drove the vehicle

Larceny

Evidence that showed the defendant stole items from sleeping patients in the hospital without their awareness was insufficient to support larceny from the person. That the thefts were captured on video was not a substitute for the victims' awareness at the time of the taking.

State v. Greene, ___ N.C. App. ___, 795 S.E.2d. 815 (Jan. 17, 2017). (1) The evidence was insufficient to support convictions of felony larceny from the person. Items were stolen from the victims' purses while they were sleeping in a hospital waiting room. At the time the items were stolen, the purses were not attached to or touching the victims. The court rejected the State's argument that the purses were under their owners' protection because hospital surveillance cameras operated in the waiting room. The court noted: "Video surveillance systems may make a photographic record of the taking, but they are no substitute for 'the awareness of the victim of the theft at the time of the taking.'" The court noted that the State's theory would convert any larceny committed in areas monitored by video to larceny from the person. (2) The court rejected the defendant's argument that one of the larceny convictions had to be arrested because both occurred as part of a single continuous transaction. The court reasoned that where the takings were from two separate victims, the evidence supported two convictions

Money paid by customer to store manager as a deposit on repairs subsequently stolen by the manager was the store's property for purposes of larceny by employee.

State v. Fink, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). There was sufficient evidence to convict the defendant of larceny by employee. The victim brought her vehicle in for repairs at an auto shop. The defendant, who was the shop manager, provided an estimate for the work, which the victim accepted. When she was told her vehicle was ready, the victim paid the defendant in cash and took her vehicle, later learning that the work had not been done. The defendant deposited a portion of the cash paid by the victim to the shop's account and kept the remaining amount. As soon as the victim tendered payment to the defendant as the shop's manager and agent, the funds became the property of the shop for purposes of larceny by employee.

Possession of Stolen Goods

Sufficient evidence of other incriminating circumstances existed to prove constructive possession of firearm where defendant jointly possessed vehicle with another, admitted ownership of another item of property in the vehicle, and exhibited nervous and irrational behavior.

State v. Rice, ___ N.C. App. ___, ___ S.E.2d ___ (April 4, 2017). The evidence was sufficient to establish that the defendant constructively possessed two stolen firearms found in a van he had rented. The defendant was convicted of two counts of possession of stolen goods in violation of G.S. 14-71.1. The weapons in question were stolen during two separate home invasions. Officers learned that a van spotted on the premises of the second home was rented to Shirelanda Clark. Clark informed officers that she had re-rented the vehicle to the defendant and an individual named Dezmon Bullock. At the request of the police, Clark arranged a meeting with the defendant and Bullock. The two arrived in the

van and consent was given to search the vehicle. As the search began, officers found a new basketball goal still in its box. After claiming ownership of the basketball goal, the defendant abruptly left the scene, leaving the item behind. The search continued, and the two stolen weapons were discovered. On appeal the court rejected the defendant's contention that the evidence was insufficient to establish constructive possession of the weapons, reasoning that although the defendant did not have exclusive possession of the van, other incriminating circumstances existed to establish constructive possession. Those circumstances included: the defendant's "nervous disposition;" the fact that the defendant "admitted ownership of the basketball goal in proximity to the stolen firearms;" the fact that the defendant had rented the van from Clark; and that the defendant "exhibited irrational conduct tending to indicate he was fearful that the firearms would be discovered during the course of the search — specifically his sudden and abrupt departure from the area when [officers] began the search of the van . . . leaving behind his personal property for which he did not return."

Obtaining Property by False Pretenses

Actual deceit of the victim at the time of the offense, while necessary for the completed offense of obtaining property by false pretenses, is not necessary to support a conviction for an attempt.

State v. Phillips, ___ N.C. App. ___, ___ S.E.2d ____ (Mar. 7, 2017). The trial court did not err by denying the defendant's motion to dismiss a charge of attempting to obtain property by false pretenses. After an officer learned about larcenies of Michael Kors items from a local store, he found an online posting for similar items in an online flea market. Using a fake name and address, the officer created a social media account and started a conversation with the seller, later determined to be the defendant, to discuss purchase of the items. The two agreed to meet. Unbeknown to the defendant, the officer decided to set up an undercover purchase for one of the items to determine if it in fact was stolen from the local store or whether it was counterfeit merchandise. The undercover purchase occurred and the item in question was determined to be counterfeit. Noting that actual deceit is not an element of attempting to obtain property by false pretenses, the court held that the evidence was sufficient to sustain the conviction. The court rejected the defendant's argument that because he did not actually represent the item as an authentic Michael Kors item, there was no evidence of a false pretense or intent to deceive. The court noted that the defendant advertised the items as Michael Kors bags and described them as such to the undercover officer. Additionally, the defendant purchased the bags from a warehouse in Atlanta that sold them for only a fraction of their worth, suggesting that the defendant knew the merchandise was counterfeit. The court also rejected the defendant's argument that because the offense was completed, a conviction for attempt was improper. The offense only occurs if the property actually is obtained in consequence of the victim's reliance on the false pretense. Here, because of the undercover operation, the officer was never deceived by the defendant's misrepresentation. As such, a conviction for attempt was appropriate.

Kidnapping

Where evidence showed that the victim was restrained to no more degree than was required to effectuate the concurrent assault and sex offense, it was error to deny motion to dismiss the kidnapping offense.

State v. China, ___ N.C. App. ___, 797 S.E.2d 324 (Feb. 21, 2017), *temporary stay allowed*, ___ N.C. ___, 797 S.E.2d 303 (Mar. 27, 2017). Over a dissent, the court held that because there was no evidence that the defendant restrained the victim beyond the degree of restraint that is inherent in the commission of a sexual or physical assault, the evidence was insufficient on the restraint element of kidnapping. The case involved a sudden attack, in which the defendant broke down the door of an apartment, ran into the bedroom where the victim was dressing, and assaulted him. After the defendant entered the bedroom, he immediately punched the victim hard enough to throw the victim onto the bed. The defendant continued punching the victim while he committed a brief, brutal sexual attack. After the sexual offense, the defendant dragged the victim off the bed and the defendant and his companion kicked the victim in the head and body. The entire incident took no more than a few minutes. The court agreed with the defendant that there was no evidence that the victim was subjected to any restraint beyond that inherent in the defendant's commission of the sex offense and assault.

The robbery of two victims downstairs that were subsequently moved upstairs to facilitate the robbery of more victims there was not a mere technical asportation or integral part of the robberies; thus, motion to dismiss the kidnapping offenses was properly denied.

State v. Curtis, ___ N.C. ___, 794 S.E.2d 501 (Dec. 21, 2016).The court *per curiam* affirmed the Court of Appeals, ___ N.C. App. ___, 782 S.E.2d 522 (2016). The Court of Appeals had held, over a dissent, that where the restraint and removal of the victims was separate and apart from an armed robbery that occurred at the premises, the trial court did not err by denying the defendant's motion to dismiss kidnapping charges. The defendant and his accomplices broke into a home where two people were sleeping upstairs and two others--Cowles and Pina--were downstairs. The accomplices first robbed or attempted to rob Cowles and Pina and then moved them upstairs, where they restrained them while assaulting a third resident and searching the premises for items that were later stolen. The robberies or attempted robberies of Cowles and Pina occurred entirely downstairs; there was no evidence that any other items were demanded from these two at any other time. Thus, the court could not accept the defendant's argument that the movement of Cowles and Pina was integral to the robberies of them. Because the removal of Cowles and Pina from the downstairs to the upstairs was significant, the case was distinguishable from others where the removal was slight. The only reason to remove Cowles and Pina to the upstairs was to prevent them from hindering the subsequent robberies of the upstairs residents and no evidence showed that it was necessary to move them upstairs to complete those robberies. Finally, the court noted that the removal of Cowles and Pina to the upstairs subjected them to greater danger.

Weapons Offenses

Where evidence raised merely a conjecture of guilt, motion to dismiss was improperly denied.

State v. Battle, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this felon in possession case, there was insufficient evidence that the defendant possessed the rifle in question. While attempting to locate the defendant, deputies established a perimeter around a large section of woods and deployed a canine, Max, to track human sent in the area. Following a scent, Max brought the officers to a loaded assault rifle. While Max continued to track the scent, another man emerged from the woods. After losing the scent and taking a rest break outside of the woods, Max resumed tracking, picking up a scent, and leading the officers to the defendant, who was discovered lying on the ground. The distance between where the rifle was recovered and where the defendant was found was between 75 and 100 yards. No evidence was presented regarding ownership of the rifle. DNA swabs taken from the rifle and compared to the defendant's DNA were inconclusive. No other evidence connected the defendant to the rifle. Notwithstanding the fact that Max was trained not to veer off of one human scent and on to another, the rifle was not found in the defendant's physical possession or in the immediate area over which he had the ability to control. Additionally, another man was present in the woods. The court noted that it had upheld convictions where defendants were identified as the perpetrator by tracking canines but found those cases distinguishable. Here, testimony of the canine's tracking behavior constituted the *only* evidence offered to establish constructive possession of the rifle. In one of those prior cases, hair and shoe print evidence also was presented to identify the defendant as the perpetrator. In the other, the canines were offered a scent source of the defendant and the codefendant and were tracking a known scent, as compared to the case at hand where Max was tracking an unknown scent. Also, in neither of the prior cases did the canine lose the track, take a break, and then resume. Additionally, here the defendant was not alone in the area and no other evidence linked him to the rifle or the site where it was recovered. The court concluded:

> The officers' testimony is insufficient to establish any link between Defendant and the firearm. The canine tracking evidence on an unknown scent fails to raise, as a matter of law, a reasonable inference of either actual or constructive possession of a firearm by Defendant as a convicted felon. Viewed in the light most favorable to the State, the evidence raises only a "suspicion [or] conjecture" that Defendant possessed the rifle. The trial court erred in denying Defendant's motion to dismiss.

Error to instruct on constructive possession of firearm where evidence did not support that theory.

State v. Malachi, ___ N.C. App. ___, ___ S.E.2d ___ (April 18, 2017). In this felon in possession of a firearm case, the trial court erred by instructing the jury, over the defendant's objection, that it could find the defendant guilty based on actual or constructive possession of the firearm where no evidence supported a theory of constructive possession. After an officer's frisk of the defendant revealed a revolver in his waistband, the defendant was arrested and brought to trial. After the trial court instructed the jury, the jury sought clarification of the "legal definition" of "possession of a firearm." The trial court, again over defense counsel's objection, responded with definitions of both actual and

constructive possession. The jury found the defendant guilty. Finding that the trial court erred, the court noted that "[a]n instruction related to a theory not supported by the evidence confuses the issues, introduces an extraneous matter, and does not declare the law applicable to the evidence." Additionally, cases "have consistently held that a trial court's inclusion of a jury instruction unsupported by the evidence presented at trial is reversible error. The court noted that when the trial court has instructed on alternative theories of guilt, one of which is supported by the evidence and the other is unsupported, it has presumed that the defendant was found guilty based on the theory that was not supported by the evidence. This presumption has been applied regardless of whether a defendant properly objected to the instruction at trial. The court noted however that recently, in *State v. Boyd*, 366 N.C. 548, the Supreme Court declared that such an instructional error not objected to a trial is not plain error per se. The court, however, interpreted *Boyd* as applying only to plain error review and not as eliminating the long-established presumption that the jury relied on an erroneous disjunctive instruction not supported by the evidence when given over an objection. Here, the evidence supported only a theory of actual possession and the constructive possession instruction was given over defense counsel's objection.

Defenses

Defendant not entitled to unrequested jury instruction on accident where he carried a loaded gun to the scene, initiated a physical confrontation with the victim and testified that, while his finger was on the trigger, the gun discharged by accident.

State v. Robinson, ___ N.C. App. ___, 795 S.E.2d 136 (Dec. 20, 2016). In a case involving attempted murder and other charges, the defendant was not entitled to a jury instruction on the defense of accident. The defendant testified that his gun discharged accidentally during the fight with the victim. The evidence, however, even considered in the light most favorable to the defendant, shows the defendant was engaged in wrongdoing when he shot the victim. The defendant admitted that he physically assaulted the victim and had his hand on the trigger of his gun when it discharged. By his own admission, he was engaged in wrongful conduct when he shot the victim. He thus was not entitled to a jury instruction on the defense of accident had one been requested by trial counsel, and it was not plain error for the court to fail to give the instruction on its own motion.

(1) Imperfect self-defense is not available in felony murder prosecutions. Although perfect self-defense is a defense, the defendant here was not entitled to an instruction on it or on the lesser-included offenses. (2) On plain error review, no prejudice from court's inclusion of aggressor doctrine as a part of self-defense instruction. Even if it was error, defendant failed to demonstrate likelihood of a different result without it.

State v. Juarez, ___ N.C. ___, 794 S.E.2d 293 (Dec. 21, 2016).(1) Reversing the Court of Appeals in this first-degree felony murder case, the court held that the trial court did not commit reversible error by failing to instruct the jury on the lesser included offenses of second-degree murder and voluntary

manslaughter. The underlying felony for first-degree felony murder was discharging a firearm into an occupied vehicle in operation. The trial court denied the defendant's request for instructions on second-degree murder and voluntary manslaughter. The Court of Appeals held that it was error not to instruct on the lesser because the evidence was conflicting as to whether the defendant acted in self-defense. The court found this reasoning incorrect, noting that self-defense is not a defense to felony murder. Perfect self-defense may be a defense to the underlying felony, which would defeat the felony murder charge. Imperfect self-defense, however, is not available as a defense to the underlying felony used to support a felony murder charge because allowing such a defense when the defendant is in some manner at fault "would defeat the purpose of the felony murder rule." In order to be entitled to instructions on the lesser-included offenses, "the conflicting evidence must relate to whether defendant committed the crime charged, not whether defendant was legally justified in committing the crime." Here, there is no conflict regarding whether the defendant committed the underlying felony. The defendant does not dispute that he committed this crime; rather he claims only that his conduct was justified because he was acting in self-defense. (2) Reversing the Court of Appeals, the court held that the trial court did not commit plain error when it instructed the jury on the aggressor doctrine of self-defense. The trial court instructed the jury on perfect self-defense including the aggressor doctrine (that a defendant is not entitled to the benefit of self-defense if he was the aggressor); the defendant did not object. When there is no evidence that a defendant was the initial aggressor, it is reversible error for the trial court to instruct on the aggressor doctrine. The Court of Appeals determined that there was no evidence that the defendant was the aggressor. It failed, however, to analyze whether such error had the type of prejudicial impact that seriously affected the fairness, integrity or public reputation of the judicial proceeding. Therefore, that court's analysis was insufficient to conclude that the alleged error constituted plain error. The court found it unnecessary to decide whether an instruction on the aggressor doctrine was improper because the defendant failed to show that the alleged error was so fundamentally prejudicial as to constitute plain error.

No error or ineffective assistance of counsel where counsel failed to request an instruction on voluntary intoxication when no substantial evidence supported the defense.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). In this arson case, the evidence was not sufficient to entitle the defendant to a voluntary intoxication instruction. While the evidence showed that the defendant was intoxicated at the time in question, there was no evidence about how much alcohol she had consumed or about the length of time over which she had consumed it. The State's evidence showed only that the defendant had consumed some amount of some type of alcohol over some unknown period; the defendant did not present evidence. The court also noted that the defendant's conduct in committing the crime and behavior with law enforcement afterwards indicated some level of awareness of her situation.

Prosecutor's emphasis in closing argument on the likelihood of release from civil commitment within 50 days in the event the jury found the defendant not guilty by reason of insanity held improper and prejudicial, requiring a new trial.

State v. Dalton, ___ N.C. ___, 794 S.E.2d 485 (Dec. 21, 2016). Affirming the Court of Appeals in this murder case, the court held that the prosecutor's closing argument exaggerating the defendant's likelihood of being released from civil commitment upon a finding of not guilty by reason of insanity and constituted prejudicial error requiring a new trial. At trial the defendant asserted the insanity defense. At the charge conference, the prosecutor asked the trial court if he could comment on the civil commitment procedures that would apply if the defendant was found not guilty by reason of insanity. The trial court agreed to permit the comment, but cautioned the prosecutor not to exaggerate the defendant's chance of being released after 50 days. During closing arguments the prosecutor stated that it was "very possible that in 50 days, if she shows by a preponderance of the evidence that she is not a threat to anyone else or herself, she will be back home." The defendant unsuccessfully objected to this comment and the prosecutor continued, arguing "She very well could be back home in less than two months." The court began by rejecting the State's argument that because the defendant failed to object to the prosecutor's second statement, that statement should be reviewed under a stricter standard of review. The court concluded that the second statement was not separate and distinct from the first. Turning to the propriety of the prosecutor's argument, it noted that if the jury finds a defendant not guilty by reason of insanity, the trial court must order the defendant civilly committed. Within 50 days of commitment, the trial court must provide the defendant with a hearing. If at that time the defendant shows by a preponderance of the evidence that she no longer has a mental illness or is dangerous to others the court will release the defendant. Clear, cogent and convincing evidence that an individual has committed homicide in the relevant past is prima facie evidence of dangerousness to others. Here, the evidence did not support the prosecutor's assertion that if the defendant was found not guilty by reason of insanity it is "very possible" that she would be released in 50 days. Instead, it demonstrated that the defendant will suffer from mental illness and addiction "for the rest of her life" and that her "risk of recidivism would significantly increase if she were untreated and resumed her highly unstable lifestyle." Additionally, the homicide for which she was convicted is prima facie evidence of dangerousness to others. Therefore the only reasonable inference from the evidence is that it is highly unlikely that the defendant would be able to demonstrate by a preponderance of the evidence within 50 days that she no longer is dangerous to others.

Preservation

Where specific elements were challenged in motion to dismiss for sufficiency of the evidence, appellate review of the sufficiency of other, unchallenged elements of the offenses was waived.

State v. Walker, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 21, 2017). In this multi-count assault and attempted murder case, because the defendant failed to challenge the sufficiency of the evidence as to the intent elements of the challenged convictions in the trial court, the issue was not preserved for

appellate review. The court concluded: "Because defense counsel argued before the trial court the sufficiency of the evidence only as to specific elements of the charges and did not refer to a general challenge regarding the sufficiency of the evidence to support each element of each charge, we hold Defendant failed to preserve the issues of the sufficiency of the evidence as to the other elements of the charged offenses on appeal." [Phil Dixon blogged about the case here.]

Sentencing

Fine of $1,000 as part of sentence for assault by strangulation was permissible.

State v. Zubiena, ___ N.C. App. ___, 796 S.E.2d 40 (Dec. 30, 2016). The trial court did not err by ordering the defendant to pay a $1000 fine as part of her sentence upon a conviction for assault by strangulation. North Carolina statutes provide that a person who has been convicted of a crime may be ordered to pay a fine as provided by law and that unless otherwise provided the amount of the fine is in the discretion of the court. The court noted that there is no statutory provision specifically addressing the fine amount that may be imposed for the offense at issue. Accordingly, the amount is left to the trial court's discretion. Here, the court found itself unable to identify any basis for determining that the fine was an abuse of discretion or otherwise unlawful. The court specifically rejected the defendant's argument that the fine violated the prohibition on excessive fines under the Eighth Amendment.

Evidence was sufficient for bulletproof vest sentencing enhancement.

State v. Johnson, ___ N.C. App. ___, 795 S.E.2d 126 (Dec. 20, 2016). In this assault inflicting serious injury case, the evidence was sufficient for a bulletproof vest sentencing enhancement. The victim testified that when he punched the defendant's chest, it felt padded; the victim told two police officers that both attackers wore bulletproof vests; and when the defendant's vehicle was stopped after the shooting, a bulletproof vest was found on the floor where the defendant was sitting.

Instruction on bulletproof vest enhancement was not improper.

State v. Robinson, ___ N.C. App. ___, 795 S.E.2d 136 (Dec. 20, 2016). The trial court's jury instruction regarding the bulletproof vest enhancement was not improper. The defendant argued that the trial court erred by instructing the jury that it could find this enhancement if it found that he wore or had in his immediate possession a bulletproof vest. The defendant argued that this instruction improperly presented the jury with two alternative theories, only one of which was supported by the evidence. The court rejected the defendant's argument that there was no evidence that he had such a vest in his immediate possession. Among other things, the police found a bulletproof vest in the back of the vehicle where the defendant had been sitting when fleeing the crime scene.

Notice of intent to seek prior record level point for the defendant being on probation, parole, or post-release supervision at the time of the offense was insufficient under 15A-1340.16(a6) where the notice was a prior record level worksheet with a handwritten notation given in discovery.

State v. Wilson-Angeles, ___ N.C. App. ___, 795 S.E.2d 657 (Feb. 7, 2017). The trial court erred by assessing one prior record level point because the offense was committed while the offender was on probation, parole, or post-release supervision where the State did not give notice of its intent to seek this point. Including a prior record level worksheet in discovery materials is insufficient to meet the notice requirement. The statute requires written notice at least 30 days before trial or plea and existing precedent requires that notice be provided in a manner other than a prior record level worksheet in discovery. Ideally, such notice would utilize the AOC form created for this purpose.

No 8th Amendment violation where juvenile sentenced to life with the possibility of parole for felony murder.

State v. Jefferson, ___ N.C. App. ___, ___ S.E.2d ____ (Mar. 7, 2017). The defendant's sentence of life imprisonment with the possibility of parole after a term of 25 years does not violate the Eighth Amendment under *Miller v. Alabama*, 132 S. Ct. 2455 (2012). As a 15-year-old, the defendant was charged with first-degree murder. He was found guilty under the felony murder rule and under then-applicable law, was sentenced to a mandatory term of life without the possibility of parole. While the defendant's appeal was pending, the United States Supreme Court decided *Miller,* holding that mandatory life without parole for those under the age of 18 at the time of their crimes violates the Eighth Amendment. The General Assembly then amended the statute to provide that the sentence for a defendant found guilty of first-degree murder solely under the felony murder rule shall be life in prison with the possibility of parole; a defendant sentenced under this provision must serve a minimum of 25 years before becoming eligible for parole. The defendant's sentence was vacated on appeal and remanded to the trial court for resentencing pursuant to the new statute. The trial court held a resentencing hearing and imposed a life sentence with the possibility of parole after 25 years. The court declined the defendant's invitation to extend *Miller* to sentences that include the possibility of parole. It added, however:

> Nevertheless, we note there may indeed be a case in which a mandatory sentence of life with parole for a juvenile is disproportionate in light of a particular defendant's age and immaturity. That case is not now before us. Defendant chooses only to assert that [the statute] fails to provide a trial judge with discretion to consider the mitigating factors of youth and immaturity. He does not show the existence of circumstances indicating the sentence is particularly cruel or unusual as-applied to him.

The court affirmed the sentence, noting that the defendant had failed to meet the burden of the facial constitutional challenge and did not bring an as-applied challenge.

***Miller* U.S. Supreme Court opinion holding 8th Amendment prohibits mandatory life sentences without the possibility of parole for juveniles is retroactive.**

State v. Perry, ___ N.C. ___, 794 S.E.2d 280 (Dec. 21, 2016). The State conceded and the court agreed that pursuant to *Montgomery v. Louisiana*, 136 S. Ct. 718 (2016), *Miller v. Alabama*, 132 S. Ct. 2455 (2012) (holding that imposition of a mandatory sentence of life in prison without the possibility of parole upon a juvenile violates the Eighth Amendment), applies retroactively to cases that became final before *Miller* was decided. This is one of several cases from the court recognizing the retroactivity of *Miller v. Alabama*.

Use of intellectual standards under existing Texas state law that failed to account for current medical standards in determining death-eligibility for purposes of Atkins inquiry violated 8th Amendment.

Moore v. Texas, 581 U.S. ___, 137 S. Ct. 1039 (Mar. 28, 2017). Vacating and remanding in this capital case, the Court held that a Texas court was wrong to fault a lower court for using a current definition of intellectual disability and by focusing on superseded standards and non-clinical factors for determining intellectual disability. Consulting current medical diagnostic standards, a state habeas court found in 2014 that the defendant was intellectually disabled and recommended relief. The Texas Court of Criminal Appeals (CCA) rejected this recommendation and denied the defendant relief. It reasoned that the habeas court erred by using the most current standards regarding the diagnosis of intellectual disability rather than the test set out in *Ex parte Briseno*, 135 S. W. 3d 1 (Tex. Crim. App. 2004) which incorporated older medical standards and set forth "seven evidentiary factors," later described by the Supreme Court as being unsupported by any authority, medical or judicial. The CCA determined that the *Briseno* standards "remai[n] adequately 'informed by the medical community's diagnostic framework.'" Applying them, that court found that relief was not warranted. One judge dissented, arguing that *Atkins* and *Hall* require courts to consult current medical standards to determine intellectual disability and criticizing the majority for relying on manuals superseded in the medical community. The dissenting judge also questioned the legitimacy of the seven *Briseno* factors, noting that they deviate from the current medical consensus. Before the Supreme Court the issue was whether the Texas court's "adherence to superseded medical standards and its reliance on *Briseno* comply with the Eighth Amendment and this Court's precedents." The Court held that it did not. It noted that although its decisions in *Atkins* and *Hall* left to the States the task of developing appropriate ways to enforce the restriction on executing intellectually disabled individuals, that determination must be informed by the medical community's diagnostic framework. Here, the habeas court applied current medical standards in concluding that the defendant is intellectually disabled and therefore not eligible for the death penalty. The CCA, however, faulted the habeas court for disregarding the CCA's case law and using a current definition of intellectual disability. The CCA instead "fastened its intellectual-disability determination" on a 1992 American Association on Mental Retardation manual definition adopted in *Briseno.* "By rejecting the habeas court's application of medical guidance and clinging to the standard it laid out in *Briseno,* including the wholly nonclinical *Briseno* factors, the CCA failed adequately to inform itself of the medical community's diagnostic framework." (quotation omitted). [Jeff Welty blogged about the case here.]

Probation and Post-Release Supervision

Notice of probation violation alleging pending charges without specifying which conditions were violated by the defendant incurring new charges was sufficient notice of revocation-eligible violation.

State v. Moore, ___ N.C. App. ___, 795 S.E.2d 598 (Dec. 20, 2016). The defendant was served with notice of probation violations alleging that the probationer had new pending charges, but the notice failed to specify which particular conditions of probation were violated, or to explicitly state that the alleged probation violations were revocation-eligible. In other words, the probation violation report did not specifically allege that the defendant had violated probation by committing a new criminal offense. Noting that no "magic" words are required, the court held: "Where the notice fails to allege specifically which condition was violated but where the allegations in the notice could only point to a revocation-eligible offense, the notice is adequate." The court notes that the better practice is to specify which condition of probation has been violated.

(1) The trial court where the probationer resides and where the violations occurred has jurisdiction to revoke probation, regardless of where the probation originated. (2) Failure of the trial court to make findings of good cause to revoke probation after its expiration was not error.

State v. Regan, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court had jurisdiction to revoke the defendant's probation. The court rejected the defendant's argument that the trial court in Harnett County lacked jurisdiction to commence a probation revocation hearing because the probation originated in Sampson County. It held: "A trial court located in a county where a defendant resides and violates the terms of her probation is vested with jurisdiction to revoke the defendant's probation." The court added however:

> In order to avoid disputes, uncertainty, and costly litigation, the better practice for probation officers is to specify on probation violation reports any address relevant to alleged probation violations, such as the last known address of a probationer who has left the jurisdiction without permission or the address of the probation office where a defendant failed to attend a scheduled meeting. Additionally, in a probation violation hearing, the better practice for the State is to introduce direct evidence of any address relevant to an alleged probation violation. In this case, the indirect evidence—sufficient to allow the reasonable inference that Defendant resided in Harnett County when she fled the jurisdiction and violated her probation in Harnett County by failing to meet with her probation officer there—supports the trial court's presumed findings necessary to support its judgment.

The court also rejected the defendant's argument that the trial court lacked jurisdiction to revoke her probation because there was no record showing that her probation had been transferred from Sampson County to Harnett County. The court noted that the defendant had offered no authority to support this assertion. (2) The court rejected the defendant's argument that the trial court erred by revoking her probation after its expiration because it did not make adequate findings of fact. Specifically, the

defendant argued that the trial court erred by failing to make any written or oral findings of good cause to revoke her probation. The court noted that the statute at issue, G.S. 15A-1344(f), does not require that the trial court make any specific findings and that, here, the record indicates that the trial court found good cause to revoke.

Error for the court to order restitution award in the absence of supporting evidence.

State v. Whitehurst, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). The trial court erred by ordering the defendant to pay $200 in restitution where no evidence was offered to support the amount of restitution ordered.

Error for court to order defendant to pay State's expert witness fee as a condition of post-release supervision in the absence of any statutory authorization.

State v. McLean, ___ N.C. App. ___, 796 S.E.2d 804 (Feb. 7, 2017). In this case involving armed robbery and other charges, the trial court erred by assessing a fee against the defendant for the State's expert witness. The expert medical witness testified regarding treatment he administered to the victim. The trial court ordered that the defendant, as a condition of any early release or post-release supervision, reimburse the State $780 for the expert's testimony. The court concluded that there was no statutory authority for the trial court to require this payment as a condition of early release or post-release supervision.

Plain error to admit evidence seized pursuant to warrantless probation search where search was not related to the purpose of probation supervision. Here, the search was a part of a task force targeting violent offenders (which the defendant was not), and the defendant's probation officer was not present and apparently not notified of the search.

State v. Powell, ___ N.C. App. ___, ___ S.E.2d ___ (May 16, 2017). Because the State failed to meet its burden of demonstrating that a warrantless search was authorized by G.S. 15A-1343(b)(13), the trial court erred by denying the defendant's motion to suppress. The defendant was subjected to the regular condition of probation under G.S. 15A-1343(b)(13). This provision requires that the probationer "Submit at reasonable times to warrantless searches by a probation officer of the probationer's person and of the probationer's vehicle and premises while the probationer is present, for purposes directly related to the probation supervision . . . ." Here, the search of the defendant's home occurred as part of an ongoing operation of a US Marshal's Service task force. The court noted that while prior case law makes clear that the presence or participation of law enforcement officers does not, by itself, render a warrantless search under the statute unlawful, the State must meet its burden of satisfying the "purpose" element of the statute. The State failed to meet its burden here. To conclude otherwise would require the court to read the phrase "for purposes directly related to the probation supervision" out of the statute. The court emphasized however that its opinion should not be read as diminishing the authority of probation officers to conduct warrantless searches of probationers' homes or to utilize the assistance of law enforcement officers in conducting such searches. Rather, it held that on the specific facts of this case the State failed to meet its burden of demonstrating that the search was authorized under the statute.

Sex Offender Registration and Monitoring

Failure to consider reasonableness of SBM monitoring was error requiring new hearing, but SBM statutes are not facially unconstitutional.

State v. Stroessenreuther, ___ N.C. App. ___, 793 S.E.2d 734 (Dec. 6, 2016). In this appeal from the trial court's order imposing SBM, the court rejected the defendant's argument that the state's SBM laws are facially unconstitutional but remanded for a determination of the reasonableness of the imposition of SBM. Before the trial court, the defendant argued that imposition of SBM violated his fourth amendment rights under *Grady v. North Carolina*, 135 S. Ct. 1368 (2015). The trial court accepted the State's argument that there was no need to address reasonableness under the fourth amendment because SBM was required by the applicable statute. On appeal, the State conceded that the trial court erred by imposing SBM without first considering whether it was reasonable, once the defendant raised the fourth amendment issue. The court thus vacated the SBM order and remanded.

In a petition to terminate sex offender registration, for purposes of making the finding that the relief requested complies with relevant federal law, the trial court should apply a categorical, elements-based approach in determining which Tier the offense would be under federal law, unless the statute is divisible. Where the statute at issue is divisible, a modified categorical approach is appropriate, whereby limited official court documentation may supplement the elements-based approach.

State v. Moir, ___ N.C. ___, 794 S.E.2d 685 (Dec. 21, 2016). The defendant was convicted of two counts of indecent liberties and registered as a sex offender. After 10 years, he petitioned the court to be removed from the registry. The trial court denied relief, finding that indecent liberties was a Tier II offense under federal law (which requires a minimum 25 years registration), and therefore that the relief requested did not comply with federal law. The trial court arrived at this conclusion that the offense was a Tier II by looking at the actual conduct for which the defendant was convicted, going beyond the pleadings and bare conviction (here, the young age of the victim was the determining factor). The court of appeals vacated the trial court. It held that the trial court erred in looking beyond the elements of the offense to the specific facts of the case, and found that indecent liberties was a Tier I offense under federal law. On discretionary review, the supreme court reversed the court of appeals. It held that the typical approach to determining the federal tier is to apply a categorical, elements-based approach. In other words, the court would look at the elements of the crime, only. If, however, a statute is divisible, or capable of being committed in more than one way, a modified-categorical approach would be appropriate. Under the modified-categorical approach, in addition to considering the elements, the court may consider certain official court documentation, such as the indictment or transcript of plea. Even under this approach, however, it is not appropriate for the court to broadly consider the facts underlying the conduct; the purpose of the modified-categorical approach is to determine which prong of the statute was violated, and therefore what crime was actually committed by the defendant. The trial court should decide whether indecent liberties is a divisible statute, and apply the appropriate approach to determine the applicable federal tier on remand. [Jamie Markham blogged about the case here.]

Permanent no-contact orders under 15A-1340.50 can authorize protection of the victim from indirect contact by the defendant through the victim's friends or family when appropriate findings of fact are made.

State v. Barnett, ___ N.C. ___, 794 S.E.2d 306 (Dec. 21, 2016). If supported by appropriate findings as required by the statute, the trial court has authority to enter a "Convicted Sex Offender Permanent No Contact Order" under G.S. 15A-1340.50 prohibiting the defendant from any interaction with a rape victim's minor children. The defendant was convicted of a number of offenses including attempted second-degree rape. At sentencing the trial court entered a no contact order under the statute, stating that the order included the victim's minor children. The Court of Appeals vacated the no contact order and remanded for the trial court to remove mention of individuals other than the victim, concluding that the trial court lacked authority to enter a no contact order including persons who were not victims of the sex offense. On the State's petition for discretionary review, the court agreed that the statute protects victims of sex offense and not third parties and that its catchall provision cannot be read to expand the statute's reach. However, it held that the statute can authorize protection for the victim from indirect contact by the defendant to the victim's family or friends when appropriate findings are made. It specified: "By 'appropriate findings,' we mean findings indicating that the defendant's contact with specific individuals would constitute indirect engagement of any of the actions prohibited in subsections (f)(1) through (f)(7) [of the statute]." The court remanded for further proceedings.

(1) Error to order lifetime sex-offender registration for defendant convicted of sexual offense with a child or sexual activity by a substitute parent, as neither offense is an aggravated offense under the registration statute. (2) Error to order lifetime SBM without evidence of reasonableness of the search, following *Grady v. North Carolina*.

State v. Johnson, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) The trial court erred by ordering lifetime registration for the defendant. Although the defendant was convicted of reportable convictions and is therefore required to register as a sex offender, neither sexual offense with a child under G.S. 14-27.4A(a) nor sexual activity by a substitute parent under G.S. 14-27.7(a) constitute aggravated offenses requiring lifetime registration. (2) The trial court erred by ordering lifetime SBM without a determination that the program was a reasonable search as mandated under *Grady v. North Carolina*, __ U.S. __, 191 L. Ed. 2d 459 (2015). The parties agreed that no evidence was presented to demonstrate the reasonableness of lifetime SBM. The court thus reversed the SBM order and remanded for the reasonableness determination mandated by *Grady.*

(1) Double Jeopardy bars convictions for both failure to notify the sheriff of change of address and failure to report in person to the sheriff's office for the same conduct. (2) The evidence here was sufficient to support a conviction for failure to report change of address when the defendant failed to register his address after being released from a period of incarceration.

State v. Reynolds, ___ N.C. App. ___, ___ S.E.2d ___ (May 2, 2017). (1) In this sex offender registration case, double jeopardy barred convictions under both G.S. 14-208.11(a)(2) and (a)(7). The defendant was convicted of two separate crimes: one pursuant to G.S. 14-208.11(a)(2) (failure to notify the last

registering sheriff of a change in address) and one pursuant to 14-208.11(a)(7) (failure to report in person to the sheriff's office as required by, here, G.S. 14-208.9(a) (in turn requiring that a person report in person and provide written notice of an address change)). The court noted that it has previously held that the elements of an offense under G.S. 14-208.11(a)(2) and under G.S. 14-208.9(a) are the same: that the defendant is required to register; that the defendant changed his or her address; and that the defendant failed to notify the last registering sheriff of the change. It concluded: "Because in this case North Carolina General Statute § 14-208.11(a)(2) and (a)(7) have the same elements, one of defendant's convictions must be vacated for violation of double jeopardy." The court went on to reject the State's argument that the legislature intended to allow separate punishment under both subsection (a)(2) and (a)(7). (2) There was sufficient evidence that the defendant changed his address. After the defendant registered in 2011, he was incarcerated and then released in 2013. The Supreme Court has clarified that while incarcerated, a registrant's address is that of the facility or institution in which he is confined and that when he is released from incarceration, his address necessarily changes. The court rejected the defendant's argument that his incarceration for only a month was not long enough to establish a new address at his place of confinement.