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Criminal Law Case Update
Fall 2011 District Court Judges' Conference
(Includes cases decided between June 7, 2011 and September 20, 2011)

The summaries below are drawn from criminal case summaries prepared by Jessica Smith. Summaries of all reported appellate cases during this time frame are available at www.sog.unc.edu/node/488.

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Investigation Issues

Grounds for Stop

- (1) No reasonable suspicion supported stop;
- (2) Running away from consensual encounter with police in high crime area did not provide probable cause for resisting arrest

[*State v. White*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court erred by denying the defendant's motion to suppress. Officers responded to a complaint of loud music in a location they regarded as a high crime area. The officers did not see the defendant engaged in any suspicious activity and did not see any device capable of producing loud music. Rather, the defendant was merely standing outside at night with two or three other men. These facts do not provide reasonable suspicion to justify an investigatory stop of the defendant. That being the case, the officer's encounter with the defendant was entirely consensual, which the defendant was free to and did ignore by running away. Once the officer caught up with the defendant and handcuffed him for resisting arrest, a seizure occurred. However, because the defendant's flight from the consensual encounter did not constitute resisting, the arrest was improper.

Non-functioning right brake light did not provide basis for stop when left brake light operational

[*State v. Heien*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). An officer improperly stopped a vehicle on the basis of a non-functioning brake light. The evidence indicated that although the left brake light was operating, the right light was not. There was no violation under G.S. 20-129(g) because that statute only requires one brake light to be operational. Nor was a stop proper for a violation of G.S. 20-129(d) because that statute deals with rear lamps, not brake lights. For similar reasons, the court also concluded that there was no violation of G.S. 20-183.3 (violation of safety inspection requirements).

Case remanded for application of reasonable suspicion standard to determine constitutionality of vehicle stop

[*State v. Salinas*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). Because the trial court incorrectly applied a probable cause standard instead of a reasonable suspicion standard when determining whether a vehicle stop was unconstitutional, the court reversed the trial court's ruling suppressing evidence and remanded for a new determination under the correct standard. The State argued that the court also determine, based on the evidence presented at the suppression hearing, that a reasonable suspicion justifying the stop existed as a matter of law. The court declined to do so. Concurring with the court's ruling reversing the trial court's order, one judge dissented to the court's decision to remand, concluding that the court should make the relevant determination itself.

Uncertainties in and inconsistencies between the driver's and the defendant's stories justified extended detention of defendant after resolution of initial traffic stop

[*State v. Williams*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). Over a dissent, the court held that the totality of the circumstances gave rise to a reasonable articulable suspicion that criminal activity was afoot justifying an extended detention of the defendant after the officer dealt with the initial purpose of the traffic stop. The officer stopped the vehicle in which the defendant was a passenger for having

illegally tinted windows and issued a citation. The officer then asked for and was denied consent to search the vehicle. Thereafter he called for a canine trained in drug detection; when the dog arrived it alerted on the car and drugs were found. Based on uncertainties in and inconsistencies between the driver and the defendant's stories, the duration of the stop was justified. Specifically, the driver did not know the name of the city from which the pair travelled nor any details about their destination; the vehicle was travelling on I-77 purportedly from Louisville, KY to Myrtle Beach, SC which is an indirect route; the defendant initially stated that the driver was her cousin, but later stated she and the driver simply called each other cousins based on their close and long term relationship; and while the driver told the officer that the defendant owned the vehicle, the defendant stated that a friend of hers was the owner, but that she intended to purchase it.

Reasonable suspicion supported stop of defendant when he approached officers' car in front of house where officers previously had made drug arrests and appeared nervous when he realized people he was approaching were police officers

[*State v. Brown*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). Officers had reasonable suspicion to stop the defendant. When officers on a gang patrol noticed activity at a house, they parked their car to observe. The area was known for criminal activity. The defendant exited a house and approached the officers' car. One of the officers had previously made drug arrests in front of the house in question. As the defendant approached, one officer feared for his safety and got out of the car to have a better defensive position. When the defendant realized the individuals were police officers his "demeanor changed" and he appeared very nervous—he started to sweat, began stuttering, and would not speak loudly. Additionally, it was late and there was little light for the officers to see the defendant's actions.

Reasonable suspicion supported stop of defendant's vehicle based on activities consistent with tip from informant describing drug dealing activities

[*State v. Ellison*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). An officer had reasonable suspicion to stop the defendant's vehicle. An informant told the officer that after having his prescriptions for hydrocodone and Xanax filled, Mr. Shaw would immediately take the medication to defendant Treadway's residence, where he sold the medications to Treadway; Treadway then sold some or all of the medications to defendant Ellison. Subsequently, the officer learned that Shaw had a prescription for Lorcet and Xanax, observed Shaw fill the prescriptions, and followed Shaw from the pharmacy to Treadway's residence. The officer watched Shaw enter and exit Treadway's residence. Minutes later the officer observed Ellison arrive. The officer also considered activities derived from surveillance at Ellison's place of work, which were consistent with drug-related activities. Although the officer had not had contact with the informant prior to this incident, one of his co-workers had worked with the informant and found the informant to be reliable; specifically, information provided by the informant on previous occasions had resulted in arrests. The trial court did not err by denying the defendant's motion for disclosure of an informant's identity where the informant's existence was sufficiently corroborated under G.S. 15A-978(b).

Handcuffing defendant during a Terry stop was reasonable and did not transform stop into arrest

[*State v. Carrouthers*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). An officer's act of handcuffing the defendant during a Terry stop was reasonable and did not transform the stop into an arrest. The officer observed what he believed to be a hand-to-hand drug transaction between the defendant and another individual; the defendant was sitting in the back seat of a car, with two other people up front. Upon

frisking the defendant, the officer felt an item consistent with narcotics, corroborating his suspicion of drug activity. The officer then handcuffed the defendant and recovered crack cocaine from his pocket. The circumstances presented a possible threat of physical violence given the connection between drugs and violence and the fact that the officer was outnumbered by the people in the car. In dicta, the court noted that the trial judge was entitled to modify her ruling on a suppression motion because court was still in session.

“Low” numbers on vehicle’s 30-day temporary tag did not provide reasonable suspicion for stop

[*State v. Burke*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). Over a dissent, the court held that the trial judge erred by denying the defendant’s motion to suppress when no reasonable suspicion supported a stop of the defendant’s vehicle. The officer stopped the vehicle because the numbers on the 30-day tag looked low and that the "low" number led him to "wonder[] about the possibility of the tag being fictitious." The court noted that it had previously held that 30-day tags that were unreadable, concealed, obstructed, or illegible justified stops of the vehicles involved. Here, although the officer testified that the 30-day tag was dirty and worn, he was able to read the tag without difficulty; the tag was not faded; the information was clearly visible; and the information was accurate and proper.

- (1) Stop of unarmed juvenile in open field where an anonymous caller said individuals were walking with a shotgun or rifle not supported by reasonable suspicion**
- (2) Trial court erred by denying motion to dismiss charge of resisting a public officer**

[*In re A.J.M-B*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). The trial court erred by denying the juvenile’s motion to dismiss a charge of resisting a public officer when no reasonable suspicion supported a stop of the juvenile (the activity that the juvenile allegedly resisted). An anonymous caller reported to law enforcement “two juveniles in Charlie district . . . walking, supposedly with a shotgun or a rifle” in “an open field behind a residence.” A dispatcher relayed the information to Officer Price, who proceeded to an open field behind the residence. Price saw two juveniles “pop their heads out of the wood line” and look at him. Neither was carrying firearms. When Price called out for them to stop, they ran around the residence and down the road.

Grounds for Frisk

Officer’s search of juvenile for evidence of his identity in connection with a *Terry* stop unreasonable

[*In re D.B.*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court erred by admitting evidence obtained by an officer who exceeded the proper scope of a *Terry* frisk. After the officer stopped the juvenile, he did a weapons frisk and found nothing. When the officer asked the juvenile to identify himself, the juvenile did not respond. Because the officer thought he felt an identification card in the juvenile’s pocket during the frisk, he retrieved it. It turned out to be a stolen credit card, which was admitted into evidence. Although officers who lawfully stop a person may ask a moderate number of questions to determine his or her identity and to gain information confirming or dispelling the officers' suspicions that prompted the stop, no authority suggests that an officer may physically search a person for evidence of his identity in connection with a *Terry* stop.

Warrantless Searches

- (1) Officer executing search warrant at residence from which drugs were allegedly sold reasonably believed that for officer safety he should pat down defendant who was present in house;**
- (2) Evidence supported trial court's finding that officer identified drugs by feel during pat-down**

[*State v. Richmond*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). (1) An officer executing a search warrant at a home reasonably believed that for officer safety he should pat down the defendant, who was present at the house when officers arrived to execute the search warrant. The search warrant application stated that illegal narcotics were being sold from the residence and that officers had conducted two previous controlled buys there, one only 72 hours earlier. When officers entered, they found six individuals, including defendant, and saw drugs in plain view. Based on his experience as a narcotics officer, the officer testified to a connection between guns and drugs. (2) The evidence supported the trial court's finding that based on an officer's training and experience, he immediately formed the opinion that a bulge in the defendant's pants contained a controlled substance when conducting a pat down.

Defendant's consent to seizure not rendered involuntary by officers' statements that they would detain him until they obtained a search warrant

[*State v. McMillan*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). The fact that officers advised the defendant that if he did not consent to giving oral swabs and surrendering certain items of clothing they would detain him until they obtained a search warrant did not negate the defendant's voluntary consent to the seizure of those items.

Trial court did not err in denying motion to suppress when officer saw a bong in plain view

[*State v. Lupek*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). In a drug case, the trial court did not err by denying the defendant's motion to suppress when an officer saw the item in question—a bong—in plain view while standing on the defendant's front porch and looking through the open front door. The court rejected the defendant's argument that the officer had no right to be on the porch. The officer responded to a call regarding a dog shooting, the defendant confirmed that his dog was shot by a neighbor, and the officer went to the defendant's residence to investigate. Once there he encountered a witness from whom he sought to obtain identification as he followed her to the porch.

Bra-lift search of juvenile was constitutionally unreasonable

[*In re T.A.S.*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). In a split opinion, the court held that a search of a juvenile's bra was constitutionally unreasonable. The school's principal was told by students that pills that "would cause kids to be unsafe" were coming into the school; no detail was provided regarding the nature of the pills or of the students responsible. The only other information provided was that some students were hiding the pills in places not normally searched when they came through metal detectors at the school's entrance, like shoe tongues, socks, bras, and underwear. As a result of the tip and after passing through the metal detectors, all students were brought one-by-one to a classroom to be searched. They emptied their book bags, had their jackets thoroughly searched, removed their shoes, and emptied their pockets. A staff member of unspecified sex conducted the searches and patted down the students' socks. The girls were required to perform a "bra lift," where they "pull their shirts out,"

“shake them,” and “go underneath themselves with their thumb in the middle of their bra [to] pull it out.” Other administrators and a resource officer, whose sexes were unspecified, were in the room, along with a male law enforcement officer who observed. The juvenile unsuccessfully moved to suppress drugs and drug paraphernalia founds during her search. The court concluded that when the school required the juvenile to pull out her bra in searching for evidence of pills of an unknown nature and quantity, the content of the suspicion failed to match the degree of intrusion and the search was unreasonable. One judge concurred in the result; another dissented.

Probable Cause to Arrest

Court of appeals improperly conflated the sufficiency of the evidence standard with assessment of whether officers had probable cause to arrest; officers had probable cause to arrest based on illegal drug activity in motel room

[*State v. Biber*](#), __ N.C. __, __ S.E.2d __ (June 16, 2011). The court reversed a decision of the Court of Appeals and held that probable cause supported the defendant’s arrest for drug possession. In the decision below, the Court of Appeals held that there was insufficient evidence that the defendant had constructive possession of the substance at issue, found in a motel room’s bathroom light fixture while the defendant and two others were present. Although the case was before the Court of Appeals on an adverse ruling on a suppression motion, the court reached the issue of sufficiency of the evidence. The North Carolina Supreme Court concluded that the Court of Appeals applied the wrong analysis, conflating the sufficiency of the evidence standard with the standard that applies when assessing whether officers had probable cause to arrest. The court concluded that unchallenged facts supported the trial court’s conclusion that the officers had probable cause to arrest. Specifically, responding officers knew they were being dispatched to a motel to assist its manager in determining whether illegal drug use was occurring in Room 312, after a complaint had been made. The officers’ initial conversation with the manager confirmed the possibility of suspicious activities. When the door to the room was opened, they saw a woman with a crack pipe and drug paraphernalia next to her. The woman fled to the bathroom, ignoring instructions to open the door while she flushed the toilet. A search of the bathroom revealed a bag of what looked like narcotics in the light fixture. The defendant ignored instructions to remain still. When asked, the defendant claimed the room was his and that a bag containing clothing was his.

Miranda

Age of child subjected to police questioning is relevant to *Miranda* custody analysis

[*J.D.B. v. North Carolina*](#), 564 U.S. __ (June 16, 2011). In this North Carolina case, the Court held, in a five-to-four decision, that the age of a child subjected to police questioning is relevant to the *Miranda* custody analysis. J.D.B. was a 13-year-old, seventh-grade middle school student when he was removed from his classroom by a uniformed police officer, brought to a conference room, and questioned by police. This was the second time that police questioned J.D.B. in a week. Five days earlier, two home break-ins occurred, and items were stolen. Police stopped and questioned J.D.B. after he was seen behind a residence in the neighborhood where the crimes occurred. That same day, police spoke to J.D.B.’s grandmother—his legal guardian—and his aunt. Police later learned that a digital camera matching the description of one of the stolen items had been found at J.D.B.’s school and in his possession. Investigator DiCostanzo went to the school to question J.D.B. A uniformed school resource

officer removed J.D.B. from his classroom and escorted him to a conference room, where J.D.B. was met by DiCostanzo, the assistant principal, and an administrative intern. The door to the conference room was closed. With the two police officers and the two administrators present, J.D.B. was questioned for 30–45 minutes. Before the questioning began, J.D.B. was given neither *Miranda* warnings nor the opportunity to speak to his grandmother. Nor was he informed that he was free to leave. J.D.B. eventually confessed to the break-ins. Juvenile petitions were filed against J.D.B.; and at trial, J.D.B.'s lawyer moved to suppress his statements, arguing that J.D.B. had been subjected to a custodial police interrogation without *Miranda* warnings. The trial court denied the motion and J.D.B. was adjudicated delinquent. The N.C. Court of Appeals affirmed. The N.C. Supreme Court held that J.D.B. was not in custody, declining to extend the test for custody to include consideration of the age of the individual questioned. The U.S. Supreme Court reversed, holding that the *Miranda* custody analysis includes consideration of a juvenile suspect's age and concluding, in part: "[A] reasonable child subjected to police questioning will sometimes feel pressured to submit when a reasonable adult would feel free to go. We think it clear that courts can account for that reality without doing any damage to the objective nature of the custody analysis." Slip Op. at 8. The Court distinguished a child's age "from other personal characteristics that, even when known to police, have no objectively discernible relationship to a reasonable person's understanding of his freedom of action." Slip Op. at 11. It held: "[S]o long as the child's age was known to the officer at the time of police questioning, or would have been objectively apparent to a reasonable officer, its inclusion in the custody analysis is consistent with the objective nature of that test." Slip Op. at 14. However, the Court cautioned: "This is not to say that a child's age will be a determinative, or even a significant, factor in every case." *Id.* The Court remanded for the North Carolina courts to determine whether J.D.B. was in custody when the police interrogated him, "this time taking account of all of the relevant circumstances of the interrogation, including J.D.B.'s age." Slip Op. at 18. For further discussion of this case, see Jeff Welty, [J.D.B., the Supreme Court, and Miranda](#), posting to North Carolina Criminal Law: UNC School of Government Blog (June 20, 2011).

Defendant not in custody when he made statement to detectives during interview at police station

[State v. Carter](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). The defendant was not in custody when he made a statement to detectives. The defendant rode with the detectives to the police station voluntarily, without being frisked or handcuffed. He was told at least three times—once in the car, once while entering the police station, and once at the beginning of the interview—that he was not in custody and that he was free to leave at any time. He was not restrained during the interview and was left unattended in the unlocked interview room before the interview began. The defendant was not coerced or threatened. To the contrary, he was repeatedly asked if he wanted anything to eat or drink and was given food and a soda when he asked for it.

Exclusionary Rule

Exclusionary rule does not apply when the police conduct a search in compliance with binding precedent that is later overruled

[Davis v. United States](#), 564 U.S. __ (June 16, 2011). The exclusionary rule (a deterrent sanction barring the prosecution from introducing evidence obtained by way of a Fourth Amendment violation) does not apply when the police conduct a search in compliance with binding precedent that is later overruled. Alabama officers conducted a routine traffic stop that eventually resulted in the arrests of driver Stella Owens for driving while intoxicated and passenger Willie Davis for giving a false name to police. The police handcuffed both individuals and placed them in the back of separate patrol cars. The police then

searched the passenger compartment of Owens's vehicle and found a revolver inside Davis's jacket pocket. The search was done in reliance on precedent in the jurisdiction that had interpreted *New York v. Belton*, 453 U.S. 454 (1981), to authorize automobile searches incident to arrests of recent occupants, regardless of whether the arrestee was within reaching distance of the vehicle at the time of the search. Davis was indicted on a weapons charge and unsuccessfully moved to suppress the revolver. He was convicted. While Davis's case was on appeal, the Court decided *Arizona v. Gant*, 556 U.S. ___ (2009), adopting a new, two-part rule under which an automobile search incident to a recent occupant's arrest is constitutional (1) if the arrestee is within reaching distance of the vehicle during the search, or (2) if the police have reason to believe that the vehicle contains evidence relevant to the crime of arrest. Analyzing whether to apply the exclusionary rule to the search at issue, the Court determined that "[the] acknowledged absence of police culpability dooms Davis's claim." Slip Op. at 10. It stated: "Because suppression would do nothing to deter police misconduct in these circumstances, and because it would come at a high cost to both the truth and the public safety, we hold that searches conducted in objectively reasonable reliance on binding appellate precedent are not subject to the exclusionary rule." Slip Op. at 1. For further discussion of this case, see Jeff Welty, [Davis v. United States and the Future of the Exclusionary Rule](#), posting to posting to North Carolina Criminal Law: UNC School of Government Blog (June 21, 2011).

Pretrial and Trial Procedure

Bond Issues

School board's notice of appeal from order setting aside bond forfeiture divested court of jurisdiction to enter second forfeiture

[State v. Cortez](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 20, 2011). The county school board's notice of appeal from a judge's order affirming the Clerk's ruling setting aside bond forfeitures divested the Clerk and trial court of jurisdiction to enter a second forfeiture while the appeal was pending.

Bail agent may file motion to set aside forfeiture but may not represent corporate surety at motion hearing.

[State ex rel Guilford County Board of Educ. v. Herbin](#), ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 6, 2011). (1) A bail agent may file a motion to set aside a forfeiture. (2) Filing such a motion by a bail agent does not constitute unauthorized practice of law. (3) A bail agent may appear pro se at a hearing on a motion to set aside forfeiture if the agent has a financial liability to the surety as a result of the bond. However, a bail agent may not appear at the motion hearing in court to represent the corporate surety.

Conduct of the Judge

Trial judge did not commit prejudicial error by laughing in presence of jury

[State v. Herrin](#), ___ N.C. App. ___, ___ S.E.2d ___ (June 21, 2011). The trial court did not commit prejudicial error in violation of G.S. 15A-1222 (judge may not express an opinion) by laughing in the presence of the jury upon hearing a witness's testimony that defendant "ran like a bitch all the way, way down past his house." The court concluded that "[a]lthough the judge's outburst may have been ill-advised and did not

exemplify an undisturbed atmosphere of judicial calm” (citation omitted), any resulting error was harmless.

Discovery

Trial court erred by failing to require disclosure of material exculpatory information contained in privileged documents that were reviewed in camera by the trial court and pertained to the victim’s allegations

[*State v. Martinez*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). In a child sex case, the trial court erred by failing to require disclosure of material exculpatory information contained in privileged documents that were reviewed in camera by the trial court and pertained to the victim’s allegations. The documents contained “sufficient exculpatory material to impeach the State’s witnesses.” The court instructed the trial judge to “review the material de novo to determine, in his or her discretion, what material should be made available to Defendant.”

Trial court did not err by denying the defendant’s motion to disclose the identity of a confidential informant

[*State v. Mack*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). The trial court did not err by denying the defendant’s motion to disclose the identity of a confidential informant in a drug case where—for reasons discussed in the court’s opinion—the defendant failed to show that the circumstances of his case required disclosure.

Right to Counsel

Defendant not entitled to relief when he failed to show that trial counsel’s performance was adversely affected by conflict created by counsel’s former representation of defendant’s ex-girlfriend, who testified for the State at defendant’s first-degree murder trial

[*State v. Choudhry*](#), __ N.C. __, __ S.E.2d __ (Aug. 26, 2011). Although the trial court’s inquiry of the defendant was insufficient to assure that the defendant knowingly, intelligently, and voluntarily waived his right to conflict free counsel, because the defendant failed to show that counsel’s performance was adversely affected by the conflict, he is not entitled to relief. At the defendant’s noncapital first-degree murder trial, the prosecution informed the trial court that defense counsel had previously represented a State’s witness, Michelle Wahome, who was the defendant’s girlfriend at the time of the incident in question and with whom the defendant had a child. Specifically, defense counsel had represented Wahome with respect to charges arising out of an incident at a shopping mall. The charges were reduced to common law forgery and although the defendant had not been charged in the matter, both he and Wahome appeared in the video surveillance and the items in question were men’s clothing. Defense counsel indicated that the prior representation would not impair his ability to represent the defendant and that he did not plan to question Wahome about the earlier incident. The trial court then informed the defendant that defense counsel had previously represented Wahome, a witness for the State and asked the defendant if he had any concerns about counsel’s ability appropriately to represent him, if he was satisfied with counsel’s representation, and if he desired to have counsel continue his representation. The defendant said that he had no concerns about counsel’s representation and gave an affirmative answer to each remaining question. The defendant was convicted and appealed. In a split decision, the court of appeals found no error. *State v. Choudhry*, __ N.C. App. __, __, 697 S.E.2d 504

(2010). The dissenting judge contended that the trial court erred by failing to fully inform the defendant of the consequences of the potential conflict and that a remand was required. The supreme court determined that because the prosecutor brought a potential conflict to the trial judge's attention, the trial judge was obligated to make an inquiry. The court concluded that because the trial court did not specifically explain the limitations that the conflict imposed on defense counsel's ability to question Wahome regarding her earlier criminal charges or indicate that he had given the defendant such an explanation, the trial judge failed to establish that the defendant had sufficient understanding of the implications of counsel's prior representation of Wahome to ensure a knowing, intelligent, and voluntary waiver of the potential conflict of interest. However, it went on to conclude that in light of counsel's effective cross-examination of Wahome, the defendant failed to demonstrate an actual conflict of interest adversely affecting performance and thus was not entitled to relief.

Trial court erred by allowing defendant to waive counsel without complying with G.S. 15A-1242.

[*State v. Anderson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). Over a dissent, the court held that the trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Among other things, the trial court failed to clarify the specific charges or inform the defendant of the potential punishments or that he could request court-appointed counsel.

[*State v. Seymore*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011) (). The trial court erred by allowing the defendant to waive counsel after accepting a waiver of counsel form but without complying with G.S. 15A-1242. Significantly, on the waiver form the defendant checked the box waiving his right to assigned counsel, not the box waiving his right to all assistance of counsel. Citing *State v. Callahan*, 83 N.C. App. 323, 324 (1986), the court noted that "[t]he record must affirmatively show that the inquiry was made and that the defendant, by his answers, was literate, competent, understood the consequences of his waiver, and voluntarily exercised his own free will." It continued, quoting *Callahan* and stating: "In cases where 'the record is silent as to what questions were asked of defendant and what his responses were' this Court has held, '[we] cannot presume that [the] defendant knowingly and intelligently waived his right to counsel[.]' When there is no 'transcription of those proceedings,' the defendant 'is entitled to a new trial.'"

[*State v. Sorrow*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The trial court erred by permitting the defendant to waive counsel and proceed pro se at a probation revocation hearing without first satisfying the requirements of G.S. 15A-1242. The court concluded that even though the defendant executed two Waiver of Counsel forms (AOC-CR-227), one of which was certified by the trial court, "these waivers are not presumed to have been knowing, intelligent, and voluntary because the rest of the record indicates otherwise." Nothing in the record indicated that the defendant understood and appreciated the consequences of the decision to proceed pro se, the nature of the charges, the proceedings, or the range of possible punishments. Noting that the trial court is not required to follow a specific "checklist" of questions when conducting the waiver inquiry, the court referenced a checklist that appears in the judges' bench book. [The Bench Book cited in the opinion is out of print. However, the relevant section in the current version of the Superior Court Judges' Bench Book is available [here](#), and it includes the relevant checklist].

- (1) Investigators did not violate capital defendant’s constitutional right to counsel by continuing to question him after an attorney who had been appointed as provisional counsel arrived at the sheriff’s office and was denied access to the defendant;**
- (2) Trial court did not err by failing to inquire into defense counsel’s alleged conflict of interest;**
- (3) Trial court did not err by failing to obtain a waiver from the defendant of the right to conflict-free counsel**

[*State v. Phillips*](#), __ N.C. __, __ S.E.2d __ (June 16, 2011) (1) Investigators did not violate the capital defendant’s constitutional right to counsel by continuing to question him after an attorney who had been appointed as provisional counsel arrived at the sheriff’s office and was denied access to the defendant. The interrogation began before the attorney arrived, the defendant waived his *Miranda* rights, and he never stated that he wanted the questioning to stop or that he wanted to speak with an attorney. (2) Office of Indigent Defense Services statutes and rules regarding an indigent’s entitlement to counsel did not make the defendant’s statement inadmissible. Although the relevant statutes create an entitlement to counsel and authorize provisional counsel to seek access to a potential capital defendant, they do not override a defendant’s waiver of the right to counsel, which occurred in this case. (3) The trial court did not err by failing to inquire into defense counsel’s alleged conflict of interest and by failing to obtain a waiver from the defendant of the right to conflict-free counsel. According to the defendant, the conflict arose when it became apparent that counsel might have to testify as a witness. The court rejected the defendant’s argument that his claim should be assessed under the conflict of interest ineffective assistance of counsel standard rather than the standard two-prong *Strickland* analysis. It noted that the conflict of interest standard generally applies to conflicts that arise from multiple or successive representation, and it deferred to defense counsel’s conclusion that no conflict existed in the case at hand. Applying *Strickland*, the court rejected the defendant’s claim, concluding that even if counsel’s conduct fell below an objective standard of reasonableness, no prejudice occurred.

Pleadings

Juvenile petition alleging felony larceny fatally defective

[*In re D.B.*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). A juvenile petition alleging felony larceny was fatally defective because it contained no allegation that the alleged victim, the Crossings Golf Club, was a legal entity capable of owning property.

Fatal variance between indictment and evidence based on dates on which sexual assault occurred

[*State v. Khouri*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). In sexual assault case involving a child victim, there was a fatal variance between the indictment, which alleged an offense date of March 30, 2000 – December 31, 2000, and the evidence, which showed that the conduct occurred in the Spring of 2001. The State never moved to amend the indictment.

Indictment not defective where it described prior felony conviction as “Possess Stolen Motor Vehicle”

[*State v. Griffin*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). A habitual felon indictment was not defective where it described one of the prior felony convictions as “Possess Stolen Motor Vehicle” instead of Possession of Stolen Motor Vehicle. The defendant’s argument was “hypertechnical”; the

indictment sufficiently notified the defendant of the elements of the offense. Moreover, it referenced the case number, date, and county of the prior conviction.

Indictment charging felonious speeding to elude arrest and alleging aggravating factor of reckless driving not required to specify how defendant drove recklessly

[State v. Leonard](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). An indictment charging felonious speeding to elude arrest and alleging an aggravating factor of reckless driving was not required to specify the manner in which the defendant drove recklessly.

Conspiracy to commit armed robbery indictment was defective when it did not allege an agreement to commit an unlawful act

[State v. Billinger](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). A conspiracy to commit armed robbery indictment was defective when it did not allege an agreement to commit an unlawful act. The court rejected the State's argument that the indictment's caption, which identified the charge as "Conspiracy to Commit Robbery with a Dangerous Weapon," and the indictment's reference to the offense being committed in violation of G.S. 14-2.4 (governing punishment for conspiracy to commit a felony) saved the indictment.

Motions Practice

Trial court erred by failing to make the necessary findings of fact on material conflict as to whether defendant was in custody when he made statement

[State v. Williams](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). Although there was no material conflict in the evidence as to whether the defendant was impaired when he made a statement, the court held, over a dissent, that there was a material conflict as to whether he was in custody and that the trial court erred by failing to make the necessary findings of fact on that issue. Because the defendant's testimony did not meet the standard for rendering his statement involuntary, any conflict in the evidence on this issue was not material. As to custody, the officer's testimony suggested the defendant was not in custody. However the defendant's testimony if believed would support a contrary conclusion; therefore there was a material conflict on this issue.

State's notice of appeal from motion to suppress untimely when filed after judge orally granted the motion but before the judge filed his written order

[State v. Oates](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). The State failed to give proper notice of appeal from a ruling granting a motion to suppress. The State filed a written notice of appeal after the judge orally granted the motion but before the judge filed his written order. For further discussion of this case, see Jeff Welty, [A Trap for the Unwary Prosecutor](#), posting to North Carolina Criminal Law: UNC School of Government Blog (September 4, 2011).

[State v. Joe](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). The trial court did not err by dismissing felony drug possession and habitual felon indictments when, after the trial court granted the defendant's motion to suppress, the prosecutor entered an oral dismissal in open court. The dismissal on the State's motion also precluded review of the trial court's ruling on the suppression motion.

Guilty plea vacated when entered pursuant to plea agreement that purported to afford defendant a right of appeal not provided by law

[*State v. White*](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). The trial court erred by accepting a plea agreement that attempted to preserve the defendant's right to appeal the trial court's adverse ruling on his motion to dismiss a felon in possession of a firearm charge on grounds that the statute was unconstitutional as applied. Because a defendant has no right to appeal such a ruling, the court vacated the plea and remanded. A dissenting judge would have dismissed the appeal entirely because of the defendant's failure to include a copy of his written motion to dismiss and suppress in the record.

Verdicts

Guilty verdicts not mutually exclusive

[*State v. Johnson*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). Guilty verdicts of trafficking in opium and selling and possessing with intent to sell and deliver a schedule III preparation of an opium derivative are not mutually exclusive. There is no support for the defendant's argument that a schedule III preparation of an opium derivative does not qualify as a "derivative . . . or preparation of opium" for purposes of trafficking.

[*State v. Wade*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The trial court did not err by accepting a verdict of guilty of assault with a deadly weapon with intent to kill inflicting serious injury when the jury had acquitted the defendant of attempted first-degree murder. The verdicts were not mutually exclusive under *State v. Mumford*, 364 N.C. 394 (2010).

Other Procedural Issues

- (1) Trial court erred by dismissing charges on grounds of selective prosecution; trial court erroneously concluded that other similarly situated employees were not charged;**
- (2) Defendant failed to demonstrate that prosecution, as distinguished from initial investigation, was politically motivated**

[*State v. Pope*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The trial court erred by dismissing charges on grounds of selective prosecution. The defendant, a public works director, was charged with larceny by employee in connection with selling "white goods" and retaining the proceeds. To demonstrate selective prosecution, the defendant must: (1) make a prima facie showing that he or she has been singled out for prosecution while others similarly situated and committing the same acts have not; and (2) demonstrate that the discriminatory selection for prosecution was invidious and done in bad faith in that it rests upon such impermissible considerations as race, religion, or the desire to prevent the exercise of constitutional rights. The trial court erroneously concluded that other similarly situated employees were not charged. The defendant was the public works director while the others were his subordinates; none were in a position to oversee wholesale theft from the town; and the defendant alone received the money from the sales, divided up the money, failed to remit it to the town, and kept a portion for himself while distributing the remainder to other employees. The court also rejected the defendant's assertion that his prosecution resulted from support of certain town political candidates, concluding that he failed to demonstrate that the prosecution, as opposed to the initial investigation, was politically motivated. While the initial investigation may or may not have been politically motivated, local officials subsequently brought in the SBI to investigate and it was the SBI's investigation that

resulted in defendant being charged and prosecuted by the district attorney, who is not an agent of local government.

Controlling the Defendant in the Courtroom

[*State v. Stanley*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). (1) The trial court did not abuse its discretion by failing to remove the defendant's handcuff restraints during trial. The defendant was an incarcerated prisoner charged with possession of drugs at a penal institution. The trial court properly considered the defendant's past record and reasoned that incarceration for second-degree murder and kidnapping raised safety concerns. (2) Although the trial court erred by failing to give the limiting instruction required by G.S. 15A-1031 regarding the defendant's restraints, the error was not prejudicial.

Evidence

Confrontation Clause

[*Bullcoming v. New Mexico*](#), 564 U.S. ____ (June 23, 2011). Applying *Melendez-Diaz v. Massachusetts*, 557 U.S. __, 129 S. Ct. 2527 (June 25, 2009) (holding that forensic laboratory reports are testimonial and thus subject to *Crawford*), the Court held that substitute analyst testimony in an impaired driving case violated *Crawford*. The defendant was arrested on charges of driving while intoxicated (DWI). Evidence against him included a forensic laboratory report certifying that his blood-alcohol concentration was well above the threshold for aggravated DWI. At trial, the prosecution did not call the analyst who signed the certification. Instead, the State called another analyst who was familiar with the laboratory's testing procedures but had neither participated in nor observed the test on the defendant's blood sample. The New Mexico Supreme Court determined that, although the blood-alcohol analysis was "testimonial," the Confrontation Clause did not require the certifying analyst's in-court testimony. Instead, the New Mexico court held that live testimony of another analyst satisfied the constitutional requirements. The Court reversed, holding that "surrogate testimony of that order does not meet the constitutional requirement." For further discussion of this case, see Jessica Smith, [Bullcoming and Substitute Analysts](#), posting to North Carolina Criminal Law: UNC School of Government Blog (June 29, 2011).

Admission of nonhearsay statements from officer contained in transcript of defendant's interview with police did not implicate Confrontation Clause

[*State v. Castaneda*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court did not err by denying the defendant's request to redact certain statements from a transcript of the defendant's interview with the police. In the statements at issue, an officer said that witnesses saw the defendant pick up a knife and stab the victim. The statements were not hearsay because they were not admitted for the truth of the matter asserted but rather to provide context for the defendants' answers and to explain the detectives' interviewing techniques. The court also noted that the trial court gave an appropriate limiting instruction. Because the statements at issue were not admitted for the truth of the matter asserted and therefore were not hearsay, their admission did not implicate the Confrontation Clause.

No Confrontation Clause violation occurred when State's expert forensic pathologist testified about victim's autopsy and gave her own opinion concerning cause of death

[State v. McMillan](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). Assuming arguendo that the defendant properly preserved the issue for appeal, no Confrontation Clause violation occurred when the State's expert forensic pathologist, Dr. Deborah Radisch, testified about the victim's autopsy and gave her own opinion concerning cause of death. Distinguishing *State v. Locklear*, 363 N.C. 438 (2009), and *Bullcoming v. New Mexico*, __ U.S. __, 180 L. Ed. 2d. 610 (2011), and following *State v. Blue*, __ N.C. App. __, 699 S.E.2d 661 (2010), the court noted that Dr. Radisch was present for the autopsy and testified as to her own independent opinion as to cause of death.

Drug Identification

By eating crack cocaine in presence of officers, defendant forfeited right to challenge the officer's testimony identifying the substance based on sight and the results of a narcotics field test

[State v. James](#), __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011)). Under the circumstances, no error occurred when the trial court allowed an officer to testify that a substance was crack cocaine based on visual examination and on the results of a narcotics field test kit (NIK). After officers observed the substance, the defendant ate it in an attempt to conceal evidence. As to the visual identification, the court noted that "[u]nder normal circumstances" the testimony would be inadmissible under *State v. Ward*, 364 N.C. 133 (2010) (testimony identifying a controlled substance must be based on a scientifically valid chemical analysis and not mere visual inspection). It also noted that testimony regarding the NIK typically would be inadmissible because the State did not sufficiently establish the reliability of that test. However, the court concluded that "[u]nder the unique circumstances of this case . . . Defendant forfeited his right to challenge the admission of this otherwise inadmissible testimony." It reasoned that "[j]ust as a defendant can lose the benefit of a constitutional right established for his or her benefit, we hold a defendant can lose the benefit of a statutory or common law legal principle established for his or her benefit in the event that he or she engages in conduct of a sufficiently egregious nature to justify a forfeiture determination." It concluded: "[H]aving prevented the State from conducting additional chemical analysis by eating the crack cocaine, Defendant has little grounds to complain about the trial court's decision to admit the police officers' testimony identifying the substance as crack cocaine based on visual inspection and the NIK test results." For further discussion of this case, see Jessica Smith, [Eating the Evidence](#), posting to North Carolina Criminal Law: UNC School of Government Blog (September 21, 2011).

False Evidence Claims

Defendant's claim that prosecution elicited or failed to correct false testimony rejected

[State v. Phillips](#), __ N.C. __, __ S.E.2d __ (June 16, 2011). The court rejected the capital defendant's claim that the prosecution knowingly elicited or failed to correct false testimony. In victim Cooke's pretrial statements, she related that the defendant said that he had nothing to live for. When asked at trial whether the defendant made that statement, Cooke responded: "Not in those terms, no." The court concluded that it was not apparent that Cooke testified falsely or that her trial testimony materially conflicted with her pretrial statements. Moreover, it found that any inconsistency was addressed during cross-examination. Finally, the court concluded that even if Cooke perjured herself, there is no indication that the State knew her testimony was false.

Hearsay

Statements offered to explain officer's subsequent action not hearsay

[*State v. Stanley*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011) (). When statements were offered to explain an officer's subsequent action, they were not offered for the truth of the matter asserted and thus were not hearsay.

Defendant's statement properly admitted as statement against penal interest

[*State v. Speight*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). In the defendant's trial for sex offense, burglary, and other crimes, the trial court did not err by admitting the defendant's statement, made to an officer upon the defendant's arrest: "Man, I'm a B and E guy." Given the charges, the statement was a statement against penal interest pursuant to Rule 804(b)(3).

Court declines to decide whether statement by law enforcement officer was admission of party opponent

[*State v. Phillips*](#), __ N.C. __, __ S.E.2d __ (June 16, 2011). Noting that it has not had occasion to consider whether statements by law enforcement officers acting as agents of the government and concerning a matter within the scope of their agency or employment constitute admissions of a party opponent under Rule 801(d) for the purpose of a criminal proceeding, the court declined to address the issue because even if error occurred, it did not constitute plain error.

Opinion

Court did not commit plain error by admitting lay opinion testimony from officer that items were purchased with stolen credit card, blood was on clothing and in car, a wood panel piece matched a break at the entry site, and defendant was pictured on surveillance tape.

[*State v. Howard*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). (1) No plain error occurred when the trial court allowed a detective to give lay opinion testimony that items were purchased with a stolen credit card and it looked like someone had tried to hide them; subtotals on a store receipt indicated that the credit card was stolen; blood was present on clothing and in a car; and a broken wood panel piece matched a break at the entry site. Some testimony was proper on the ground that an officer may give lay opinion testimony based on investigative training. Other testimony was nothing more than an instantaneous conclusion reached by the detective. Finally, the Supreme Court of North Carolina has upheld lay opinion testimony identifying blood or bloodstains. (2) The trial court did not commit plain error by allowing a detective to identify the defendant as the person shown in a still photograph from a store's surveillance tapes. The detective observed the defendant in custody on the morning that the photo was taken, affording him the opportunity to see the defendant when his appearance most closely matched that in the video. The detective also located the defendant's clothes. The detective had more familiarity with the defendant's appearance at the time the photo was taken than the jury could have.

No plain error to allow expert testimony in child sexual abuse case that victim showed signs of abuse

[*State v. Khouri*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). In a child sexual abuse case, no plain error occurred when the trial court allowed the State's expert to testify that the victim exhibited some classic signs of a sexually abused child. The expert did not testify that the victim was in fact sexually abused.

- (1) No error in allowing lay witness to testify, based on personal observation, that the defendant was impaired;**
- (2) No error in qualifying the State's witness as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior;**
- (3) No error in admitting expert testimony regarding the amount of cocaine in defendant's system at the time of the collision and the effects of cocaine on an individual's ability to drive**

[*State v. Norman*](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). (1) The trial court did not err by allowing a lay witness to testify that the defendant was impaired. The witness formed the opinion that the defendant was impaired because of the strong smell of alcohol on him and because the defendant was unable to maintain balance and was incoherent, acting inebriated, and disoriented. The witness's opinion was based on personal observation immediately after the collision. (2) The trial court did not abuse its discretion by qualifying the State's witness as an expert in the fields of forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior. The witness was the head of the Forensic Test for Alcohol branch of the N.C. Department of Health and Human Services, oversaw the training of law enforcement officers on the operation of alcohol breath test instruments and of drug recognition experts. His specialty is in "scientific issues related to breath testing and blood testing for drugs and alcohol." He has a B.A. and master's in biology and is certified as a chemical analyst. He attended courses on the effects of alcohol on the human body and various methods for determining alcohol concentrations and the effects of drugs on human psychomotor performance. He has published several works and has previously been qualified as an expert in forensic blood alcohol physiology and pharmacology, breath and blood alcohol testing, and the effects of drugs on human performance and behavior over 230 times in North Carolina. Despite his lack of a formal degree or certification in physiology and pharmacology, his extensive practical experience qualifies him to testify as an expert. (3) The trial court did not abuse its discretion by admitting the State's expert's testimony regarding the relative amount of cocaine in the defendant's system at the time of the collision and the effects of cocaine on an individual's ability to drive. The defendant argued that the testimony was based on unreliable methods. Based on cocaine's half-life and a report showing unmetabolized cocaine in the defendant's system, the expert determined that the defendant had recently used cocaine and that the concentration of cocaine in his system would have been higher at the time of the crash. On cross-examination, he testified that there was no way to determine the quantity of cocaine in the defendant's system. He further testified as to the effects of cocaine on driving ability, noting a correlation between "high-risk driving, speeding, [and] sometimes fleeing . . . when cocaine is present." He based this testimony on a study which "looked at crashes and behaviors and found [an] association or correlation between the presence of cocaine and high-risk driving." He testified that it was possible for cocaine to be detected in a person's system even after the person was no longer impaired by the drug. The expert's testimony that the level of cocaine in the defendant's system would have been higher at the time of the collision and his testimony as to the general effects of cocaine on a person's ability to drive was supported by reliable methods. Notably, the defendant's expert corroborated this testimony both as to the half-life of cocaine and the existence of studies showing a correlation between the effects of cocaine and "high-risk" driving.

Trial court erred by admitting a social worker’s testimony that she “substantiated” victim’s claim of sexual abuse

[*State v. Martinez*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). In a child sex case, the trial court erred by admitting a DSS social worker’s testimony that she “substantiated” the victim’s claim of sexual abuse by the defendant. This testimony was an impermissible expression of opinion as to the victim’s credibility.

Trial judge did not commit plain error by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body

[*State v. Norton*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). The trial judge did not commit plain error by allowing a witness accepted as an expert forensic toxicologist to testify about the effects of cocaine on the body. The defendant had argued that this testimony was outside of the witness’s area of expertise. The court concluded that “[a]s a trained expert in forensic toxicology with degrees in biology and chemistry, the witness in this case was plainly in a better position to have an opinion on the physiological effects of cocaine than the jury.”

Trial court did not commit plain error by admitting lay opinion testimony by an eyewitness that defendant “knew what he was doing” and “had it planned out.”

[*State v. Phillips*](#), __ N.C. __, __ S.E.2d __ (June 16, 2011). In this capital case, the trial court did not commit plain error by admitting lay opinion testimony by an eyewitness. When the eyewitness was asked about the defendant’s demeanor, she stated: “He was fine. I mean it was -- he had -- he knew what he was doing. He had it planned out. It was a -- he -- he knew before he ever got there what was going to happen.” The defendant argued that the eyewitness had no personal knowledge of any plans the defendant might have had. The court noted that a lay witness may provide testimony based on inference or opinion if the testimony is rationally based on the witness’s perception and helpful to a clear understanding of his or her testimony or the determination of a fact in issue. It further noted that this rule permits a witness to express “instantaneous conclusions of the mind as to the appearance, condition, or mental or physical state of persons, animals, and things, derived from observation of a variety of facts presented to the senses at one and the same time. Such statements are usually referred to as shorthand statements of facts.” Immediately before the testimony at issue, the witness testified that the defendant had said that “[h]e was in debt with somebody who he needed money for and that’s why they came to [the] house,” that the debt was “with a drug dealer and they were going to kill him, if he did not come up with their money,” and that “his brother had been shot and he was dying and he had to get their money.” In context, the witness’s statements that the defendant “had it planned out” and “knew before he ever got there what was going to happen” were helpful to an understanding of her testimony and were rationally based on her perceptions upon seeing the defendant commit the multiple murders at issue.

Rule 404(b)

No plain error in a maiming case in which defendant was accused of attacking victim with pickaxe and almost cutting off his finger to admit 404(b) evidence that defendant had previously attacked victim with fork and stabbed his finger

[*State v. Flaugher*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). In a maiming case in which the defendant was accused of attacking the victim with a pickaxe and almost severing his finger, no plain error occurred when the trial judge admitted 404(b) evidence that the defendant had previously attacked the victim with a fork and stabbed his finger. The 404(b) evidence was admitted to show absence of accident or mistake. Although the defendant argued that she never intended to purposefully strike the victim's finger with the pickaxe, the defendant knew from the fork incident that she could end up stabbing the victim's hand or fingers if she swung at him with a weapon and he attempted to defend himself. The evidence was thus relevant to whether the defendant intended to disable the victim or whether she accidentally struck his finger and did not intend to maim it. The court also rejected the defendant's argument that the 404(b) evidence was inadmissible because the State had previously dismissed charges arising from the fork incident, distinguishing cases in which the defendants had been tried and acquitted of the 404(b) conduct.

No error in child sexual assault case to admit 404(b) evidence that defendant engaged in sexual conduct with another child

[*State v. Khouri*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). In a sexual assault case involving a child victim, no error occurred when the trial court admitted 404(b) evidence that the defendant engaged in sexual contact with another child to show common plan or scheme. The court rejected the defendant's argument that the acts were not sufficiently similar, concluding that both incidents occurred while the victims were in the care of the defendant, their grandfather; the victims were around the same age when the conduct began; for both victims, the conduct occurred more than once; and with both victim's, the defendant initiated the conduct by talking to them about whether they were old enough for him to touch their private parts. The court also determined that the acts met the temporal proximity requirement.

No error in drug case in admitting evidence regarding a co-defendant's earlier incident of drug possession

[*State v. Ellison*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The court rejected the defendant's argument that, in a drug trafficking case, the trial court erred by admitting evidence regarding a co-defendant's earlier incident of drug possession that did not involve the defendant. The evidence was relevant to the co-defendant's guilty knowledge and was sufficiently similar to the matter in question. The court also found that the evidence was not subject to exclusion under Rule 403.

Rape Shield

Evidence of victim's sexual relations with another person properly excluded under Rape Shield Statute

[*State v. Khouri*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court did not err by sustaining the State's objection under the Rape Shield Statute. After the victim had already testified that she was

unsure whether her aborted child was fathered by the defendant or her boyfriend, the defense questioned a witness in order to show that the victim had sexual relations with a third man. Introducing such evidence would not have shown that the alleged acts were not committed by defendant given evidence that already had been admitted. Additional evidence would have only unnecessarily humiliated and embarrassed the victim while having little probative value.

Trial judge did not err by limiting defendant’s cross-examination of prosecuting witness regarding inconsistent statements about her sexual history and by refusing to admit victim’s unredacted medical records

[*State v. Edmonds*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). (1) In a child sex case, the trial judge did not err by limiting the defendant’s cross-examination of the prosecuting witness regarding inconsistent statements about her sexual history, made to the police and medical personnel. The evidence did not fit within any exception to Rule 412. The court also held that any probative value of the evidence for impeachment purposes was outweighed by its prejudicial effect. (2) The trial court did not err by refusing to admit the victim’s unredacted medical records containing statements regarding her prior sexual history, given that the records had little if any probative value.

Other Evidence Issues

Evidence of break-in occurring hours after armed robbery for which defendant was on trial properly admitted under “course of conduct” exception

[*State v. Howard*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). In an armed robbery prosecution, evidence of a break-in occurring hours after the incident in question was properly admitted under the “‘course of conduct’” or ‘complete story’ exception.” The evidence was necessary for the jury to understand how the defendant was identified as the perpetrator and how items stolen from the robbery victim and purchased with her credit card were recovered. The break-in evidence “was necessary for the jury to understand the complete story and timeline of the events that took place on the night in question, and therefore was properly admitted under the ‘course of conduct’ exception.” A footnote to the court’s opinion suggests that this basis for admission was separate from and independent of admissibility under Rule 404(b).

No error to allow officer to testify about hair observed on wall at murder scene despite State’s failure to collect evidence

[*State v. McDowell*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). In a murder case, the trial court did not err by allowing law enforcement officers to testify that they had observed a small hair on the wall at the murder scene and that the hair appeared to have tissue attached. The hair was not collected as evidence. The court concluded that the State is not required to collect evidence as a pre-condition to offering testimony about a particular subject.

Officer’s statements that he believed the defendant to be lying were admissible because they provided context for the defendant’s inculpatory responses

[*State v. Castaneda*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court did not err by denying the defendant’s motion to redact an officer’s statements in a transcript of an interview of the defendant in which the officer accused the defendant of telling a “lie” and giving an account of the events that was

“bullshit” and like “the shit you see in the movies.” The defendant argued that these statements were inadmissible opinion evidence about the defendant’s credibility. The court noted that the issue of the admissibility of an interrogator’s statements during an interview that the suspect is being untruthful has not been decided by North Carolina’s appellate courts. It concluded that because the officer’s statements were part of an interrogation technique designed to show the defendant that the detectives were aware of the holes and discrepancies in his story and were not made for the purpose of expressing an opinion as to the defendant’s credibility or veracity at trial, the trial court properly admitted the evidence. The court noted that investigators’ comments reflecting on the suspect’s truthfulness are not always admissible. It explained that an interrogator’s comments that he or she believes the suspect is lying are admissible only to the extent that they provide context to a relevant answer by the suspect. Here, the officer’s statements that he believed the defendant to be lying were admissible because they provided context for the defendant’s inculpatory responses. For similar reasons the court rejected the defendant’s argument that admission of these statements violated Rule 403.

Trial court did not abuse its discretion by excluding the State’s expert testimony regarding repressed memory

[State v. King](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). Over a dissent, the court held that the trial court did not abuse its discretion by excluding the State’s expert testimony regarding repressed memory under Rule 403.

Trial court properly rejected defendant’s objection to the reading of a witness’s statement on the grounds that it was a prior inconsistent statement

[State v. Phillipott](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The court rejected the defendant’s argument that the trial court erred by overruling the defendant’s objection to the reading of a witness’s prior inconsistent statement, concluding that the statement was consistent with the witness’s testimony. A concurring judge concluded that the statement was inconsistent but properly admitted.

Crimes

Acting in Concert

Defendant did not have to share accomplice’s intent to use dangerous weapon to be convicted of armed robbery under acting in concert theory

[State v. Jackson](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). The evidence was sufficient to support a conviction of armed robbery under an acting in concert theory. Although the record did not reveal whether the defendant shared the intent or purpose to use a dangerous weapon during the robbery, this was not a necessary element under the theory of acting in concert.

Assaults

No error in instructing jury that pickaxe was a deadly weapon

[*State v. Flaughner*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court did not err by instructing the jury that a pickaxe was a deadly weapon. The pickaxe handle was about 3 feet long, and the pickaxe weighed 9–10 pounds. The defendant swung the pickaxe approximately 8 times, causing cuts to the victim’s head that required 53 staples. She also slashed his middle finger, leaving it hanging only by a piece of skin.

Convictions of attempted murder and assault as to each victim proper based on multiple shots fired from gun in single incident

[*State v. Wright*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). Citing *State v. Washington*, 141 N.C. App. 354 (2000), the court held that the defendant was properly charged and convicted of attempted murder and assault as to each victim, even though the offenses arose out of a single course of conduct involving multiple shots from a gun.

Drug offenses

- (1) Motion to dismiss trafficking charges based on lack of notice and unfairness properly denied;
- (2) Motion to dismiss trafficking in opium charges properly denied as there was substantial evidence that pills consisted of a mixture containing an opiate derivative;
- (3) No error in allowing witness to identify substance as opium derivate on rebuttal;
- (4) No error in joining charges;
- (5) Case remanded for correction of clerical error in judgment

[*State v. Ellison*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). (1) The trial court did not err by denying the defendant’s motion to dismiss trafficking charges on the grounds that a conviction would infringe upon his constitutional rights to due process and freedom from cruel and unusual punishment. The defendant argued that he lacked adequate notice that “possession of prescription Lorcet pills could result in being charged with trafficking in an opiate and being responsible for the entire weight of the pills” and because punishment would be grossly unfair given the relatively small amount of controlled substance at issue. The court rejected the defendant’s “lack of notice” argument concluding that in North Carolina, liability for trafficking cases involving prescription medications hinges upon the total weight of the pills or tablets in question, not the weight of the controlled substance in those medications. The court rejected his “substantive unfairness” argument, concluding that there is a rational basis for subjecting individuals involved with large-scale distribution of mixtures containing controlled substances to more severe punishment: deterrence of large scale drug distribution. (2) The trial court did not err by denying the defendants’ motions to dismiss trafficking in opium charges; the defendant had asserted that the medications at issue, which were Schedule III controlled substances, were not punishable under G.S. 90-95(h)(4). At trial the State’s witness testified that a portion of the pills contained a mixture of hydrocodone and acetaminophen; that hydrocodone is a derivative of opium; that a mixture consisting of hydrocodone combined with acetaminophen is called dihydrocodeinone; and that dihydrocodeinone is a derivative of opium. Thus, there was substantial evidence that the pills consisted of a mixture containing an opiate derivative. The court rejected the defendant’s argument that the General Assembly intended G.S. 90-95(d)(2) to govern criminal liability in connection with prescription drugs, reasoning, in

part, that G.S. 90-95(d)(2) clearly limits its application to situations not covered by G.S. 90-95(h)(4). The court further concluded: “the controlled substance schedule to which a particular opiate derivative is assigned has nothing to do with the extent to which activities involving that substance are subject to punishment under the trafficking statutes.” (3) The trial court did not abuse its discretion by allowing the State’s witness to identify the substance as an opium derivative on rebuttal. Under G.S. 15A-1226, a trial judge may, in his or her discretion, permit a party to introduce additional evidence prior to the verdict and offer new evidence which could have been offered in the party’s case in chief or during a previous rebuttal as long as the opposing party is permitted further rebuttal. (4) The trial court did not abuse its discretion by granting the State’s motion to join charges against two defendants. The defendant had argued that as a result of joinder, the jury was allowed to consider against him “other crimes” evidence introduced against a co-defendant. The court rejected this argument, concluding that the no prejudice occurred; the defendant was clearly not involved in the other crime and the trial court gave an appropriate limiting instruction. (5) The court remanded to the trial court for correction of a clerical error in the judgment so that the judgment would reflect the offense the defendant was convicted of committing (trafficking by transportation versus trafficking by delivery).

Failing to Cause Attendance

Evidence sufficient to establish violation of compulsory attendance law

[*State v. Jones*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). (1) The State’s evidence was sufficient to survive a motion to dismiss charges of violating N.C.’s compulsory attendance law. (2) The trial court did not err by failing to instruct the jury that it needed to determine whether the defendants had made a good faith effort to comply with the compulsory school attendance law.

Homicide

Sufficient evidence of premeditation and deliberation to support first-degree murder conviction

[*State v. Phillipott*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). There was sufficient evidence of premeditation and deliberation where the victim did not provoke the defendant; after shooting the victim, the defendant pointed the gun at the victim’s wife; and the victim had five gunshot wounds, four to the head.

Sufficient evidence of malice to support second-degree murder conviction

[*State v. Trogdon*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011). There was sufficient evidence of malice to support a second-degree murder conviction. Based on expert testimony the jury could reasonably conclude that the child victim did not die from preexisting medical conditions or from a fall. The jury could find that while the victim was in the defendant’s sole custody, he suffered non-accidental injuries to the head with acute brain injury due to blunt force trauma of the head. The evidence would permit a finding that the victim suffered a minimum of four impacts to the head, most likely due to his head being slammed into some type of soft object. Combined with evidence that the defendant bit the victim, was upset about the victim’s mother’s relationship with the victim’s father, and that the defendant resented the victim, the jury could find that the defendant intentionally attacked the month-old child, resulting in his death.

[State v. McMillan](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). (1) There was sufficient evidence of malice to sustain a second-degree murder conviction. Because there was evidence that the defendant killed the victim with a deadly weapon, the jury could infer that the killing was done with malice. The court rejected the defendant's argument that his statements that he and the victim "had words or something" provided evidence of provocation sufficient to negate the malice presumed from the use of a deadly weapon or require a voluntary manslaughter instruction. (2) The evidence was sufficient to support a first-degree felony-murder conviction when the underlying felony was armed robbery and where the defendant used the stolen item—a .357 Glock handgun—to commit the murder and the two crimes occurred during a continuous transaction.

[State v. Norman](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). (1) There was sufficient evidence of malice in a case arising from a vehicle accident involving impairment. The defendant admitted that he drank 4 beers prior to driving. The State's expert calculated his blood alcohol level to be 0.08 at the time of the collision and other witnesses testified that the defendant was impaired. Evidence showed that he ingested cocaine and that the effects of cocaine are correlated with high-risk driving. The defendant admitted that he was speeding, and experts calculated his speed to be approximately 15 mph over the posted speed limit. The State also introduced evidence that the defendant had 4 prior driving while impaired convictions. (2) There was sufficient evidence that the defendant's actions were the proximate cause of death. The defendant argued that two unforeseeable events proximately caused the victims' deaths: a third-party's turn onto the road and the victims' failure to yield the right-of-way. The court found that the first event was foreseeable. As to the second, it noted that the defendant's speeding and driving while impaired were concurrent proximate causes.

No error in denial of motion to dismiss second degree murder charge where defendant intentionally used deadly weapon, killing officer

[State v. Carter](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree murder. The defendant, after being kicked in the face in a fight inside a nightclub, became angry about his injury, retrieved a 9mm semi-automatic pistol and loaded magazine from his car, and loaded the gun, exclaiming "Fuck it. Who wants some?" He then began firing toward the crowd, killing an officer. Evidence of the intentional use of a deadly weapon—here, a semi-automatic handgun—that proximately causes death triggers a presumption that the killing was done with malice. This presumption is sufficient to withstand a motion to dismiss a second-degree murder charge. The issue of whether the evidence is sufficient to rebut the presumption of malice in a homicide with a deadly weapon is then a jury question.

Impaired Driving

0.08 sufficient evidence to support conviction for impaired driving

[State v. Arrington](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The evidence was sufficient to sustain the defendant's conviction for impaired driving when there was evidence of two .08 readings. The court rejected the defendant's argument that since the blood alcohol reading was the lowest for which he could be convicted under the statute, the margin of error of the Intoxilyzer should be taken into account to undermine the State's case against him. For further discussion of this case, see Shea Denning, [Per se impairment, reasonable doubt, margins of error, and all that lies between](#), posting to North Carolina Criminal Law: UNC School of Government Blog (September 27, 2011).

Faulty driving, along with evidence of consumption of alcohol and cocaine, sufficient to establish impaired driving

[*State v. Norton*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). The evidence was sufficient to survive a motion to dismiss. Evidence of faulty driving, along with evidence of consumption of alcohol and cocaine, is sufficient to show a violation of G.S. 20-138.1. Witnesses observed the defendant's behavior as he was driving, not sometime after. Multiple witnesses testified as to his faulty driving and other conduct, including that he "had a very wild look on his face" and appeared to be in a state of rage; drove recklessly without regard for human life; drove in circles on a busy street and on a golf course; twice collided with other motorists; drove on the highway at speeds varying between 45 and 100 mph; drove with the car door open and with his left leg and both hands hanging out; struck a patrol vehicle; and exhibited "superhuman" strength when officers attempted to apprehend him. Blood tests established the defendant's alcohol and cocaine use, and one witness testified that she smelled alcohol on the defendant.

Kidnapping

Trial court erred by submitting the theory of removal to the jury

[*State v. Boyd*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). In a kidnapping case, the trial court erred by submitting the theory of removal to the jury. Although evidence supported confinement and restraint, no evidence suggested that the defendant removed the victim in a case where the crime occurred entirely in the victim's living room. The court stated: "where the victim was moved a short distance of several feet, and was not transported from one room to another, the victim was not 'removed' within the meaning of our kidnapping statute."

Sufficient circumstantial evidence that minor's parents did not consent to her kidnapping

[*State v. Phillips*](#), __ N.C. __, __ S.E.2d __ (June 16, 2011). In a multiple homicide case in which the defendant also was charged with kidnapping a victim who was a minor, there was sufficient circumstantial evidence that the minor's parents did not consent to her kidnapping. Because the victim's parents did not testify, there was no direct evidence of lack of parental consent. However, the State presented evidence that, having shot and repeatedly stabbed the victim while she was at the murder scene, the defendant and his accomplices found her after she crawled outside and removed her from the yard for the stated purpose of killing her while she was incapable of escaping. They loaded her into the bed of the defendant's truck and drove to a trash pile, only to abandon her there when they heard sirens.

Larceny and Obtaining Property by False Pretenses

Sufficient evidence to sustain conviction for receiving goods explicitly represented as stolen by a law enforcement officer

[*State v. Louali*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The evidence was sufficient to sustain a conviction for receiving goods explicitly represented as stolen by a law enforcement officer. No specific words are required to be spoken to fulfill the "explicitly represented" element of the offense. Rather the statute "merely requires that a person knowingly receives or possesses property that was clearly expressed, either by words or conduct, as constituting stolen property." Here, the officer said that he

was told that the business bought “stolen property, stolen laptops” and twice reminded the defendant that “this stupid guy kept leaving the door open, [and] I kept running in the back of it and taking laptops.” After the exchange of money for the laptops, the officer told the defendant that he could get more laptops.

No error in failing to define the term “larceny” for the jury

[*State v. Whitley*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The trial court did not err by failing to define the term “larceny” for the jury. The court noted that it has previously determined that “larceny” is a word of “common usage and meaning to the general public[,]” and thus it is not error to not define it in the jury instructions. It further noted: “While we disagree that the legal term “larceny” is commonly understood by the general public, we are bound by precedent . . . and thus this issue is overruled.”

Evidence was sufficient to establish that the defendant perpetrated the offense of obtaining property by false pretenses

[*State v. Griffin*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The evidence was sufficient to establish that the defendant perpetrated the offense of obtaining property by false pretenses. A surveillance video showed that he took a purse containing the victim’s credit card at 9:06 a.m. The credit card was used at 9:30 a.m. to purchase a laptop computer only 3.4 miles from the scene of the theft. Also, there was evidence that the defendant was involved in a similar crime.

Maiming

Evidence was sufficient to show that the defendant intended to strike the victim’s finger with the intent to disable him

[*State v. Flaughner*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). In a maiming without malice case, the evidence was sufficient to show that the defendant intended to strike the victim’s finger with the intent to disable him. The intent to maim or disfigure may be inferred from an act that does in fact disfigure the victim, unless the presumption is rebutted by evidence to the contrary. Here, the near severing of the victim’s finger triggered that presumption, which was not rebutted.

Motor Vehicle Offenses

(1) No requirement that jury be unanimous as to findings of specific aggravating factors in felony speeding to elude

(2) No plain error in failing to define for jury aggravating factor of reckless driving

[*State v. Banks*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). (1) In a felony speeding to elude case, the trial court did not err by giving a disjunctive jury instruction that allowed the jury to convict the defendant if it found at least two of three aggravating factors submitted. The defendant had argued that the trial court should have required the jury to be unanimous as to which aggravating factors it found. (2) The trial judge did not commit plain error by failing to define the aggravating factor of reckless driving in felony speeding to elude jury instructions. The defendant had argued that the trial court was obligated to include the statutory definition of reckless driving in G.S. 20-140.

Sufficient evidence of felonious serious injury by motor vehicle

[State v. Leonard](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). There was sufficient evidence of felonious serious injury by motor vehicle. The defendant had argued that his willful action in attempting to elude arrest was the proximate cause of the victim's injuries, not his impaired driving. The court rejected this argument, concluding that even if his willful attempt to elude arrest was a cause of the injuries, his driving under the influence could also be a proximate cause.

Resist, Delay & Obstruct

Insufficient evidence of resisting an officer when defendant fled from a consensual encounter

[State v. Joe](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). There was insufficient evidence of resisting an officer when the defendant fled from a consensual encounter. When the officer approached an apartment complex on a rainy, chilly day, the defendant was standing outside, dressed appropriately in a jacket with the hood on his head. Although the officer described the complex as a known drug area, he had no specific information about drug activity on that day. When the defendant saw the officer's van approach, "his eyes got big" and he walked behind the building. The officer followed to engage in a consensual conversation with him. When the officer rounded the corner, he saw the defendant run. The officer chased, yelling several times that he was a police officer. The officer eventually found the defendant squatting beside an air conditioning unit and arrested him for resisting.

Robbery

Sufficient evidence of armed robbery where defendant's attack on victim and taking of his wallets were a single, continuous transaction

[State v. Flaughner](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). Where the evidence showed that the defendant's attack on the victim and the taking of his wallets constituted a single, continuous transaction, the evidence was sufficient to support an armed robbery charge. The court rejected the defendant's argument that she took the victim's wallets only as an afterthought. The court also rejected the defendant's argument that the evidence was insufficient because it was not positive that she possessed the weapon when she demanded the victim's money. The court noted that the defendant held the pickaxe when she assaulted the victim and had already overcome and injured him when she demanded his wallets and took his money; the pickaxe had already served its purpose in subduing the victim.

Sufficient evidence of armed robbery where stolen gun used to threaten victim

[State v. McMillan](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). The evidence was sufficient to sustain an armed robbery conviction when the item stolen—a handgun—was also the item used to threaten or endanger the victim's life. For further discussion of this case, see Jeff Welty, [Armed Robbery by an Unarmed Defendant](#), posting to North Carolina Criminal Law: UNC School of Government Blog (August 18, 2011).

Trial judge properly instructed the jury on doctrine of recent possession

[*State v. Lee*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). In a robbery case, the court held that the trial judge properly instructed the jury on the doctrine of recent possession as to non-unique goods (cigarettes).

Sufficient evidence that defendant took victim's personal property by use or threatened use of knife

[*State v. Speight*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). In an armed robbery case, there was sufficient evidence that the defendant took the victim's personal property by the use or threatened use of a knife. The victim awoke to find the defendant on top of her holding a knife to her throat. After struggling with him, she pleaded and negotiated with him for almost 90 minutes. The defendant acknowledged that he had already taken money from the victim's purse. However, when the defendant fled, he took a knife from her kitchen and the victim's sports bra and the victim never saw her purse again.

Sexual Offenses

Evidence sufficient to support conviction of multiple sex offenses even though victim did not describe each and every act

[*State v. Davis*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). In a case in which the defendant was indicted on 24 counts of indecent liberties, 6 counts of first-degree statutory sex offense, and 6 counts of second-degree sex offense, the evidence was sufficient even though the victim did not describe in detail each and every act. The victim testified that the defendant demanded he perform sexual acts at least once a week when the victim was in the sixth and seventh grades, with only three or four weeks in which the defendant did not commit sexual acts on or in the presence of the victim. He testified that during sixth grade, the defendant required that the victim masturbate him once a week. In addition, the defendant would make the victim watch him masturbate, and make the victim masturbate himself as well. The victim testified that during seventh grade, the defendant made the victim watch him masturbate and perform fellatio on him once a week. The victim's testimony described discrete instances of different types of sexual acts perpetrated upon him by the defendant over a long period of time.

Weapons Offenses

Sufficient evidence that defendant had constructive possession of gun found in van he was driving

[*State v. Best*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). There was sufficient evidence that the defendant constructively possessed a gun found in a van to support charges of carrying a concealed weapon and possession of a firearm by a felon. The fact that the defendant was the driver of the van gave rise to an inference of possession. Additionally, other evidence showed possession: the firearm was found on the floor next to the driver's seat, in close proximity to the defendant; the defendant admitted that he owned the gun; and this admission was corroborated by a passenger in the van, who had seen the defendant in possession of the weapon that afternoon, and remembered that the defendant had been carrying the gun in his pants pocket and later placed it on the van floor.

Insufficient evidence to support adjudication of delinquency based on assault by pointing a gun where weapon was an airsoft gun

[*In re N.T.*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). The evidence was insufficient to support an adjudication of delinquency based on assault by pointing a gun where the weapon was an airsoft gun from which plastic pellets were fired using a “pump action” mechanism. For purposes of the assault by pointing a gun statute, the term “gun” “encompasses devices ordinarily understood to be ‘firearms’ and not other devices that fall outside that category.” Slip op. at 12. Thus, imitation firearms are not covered. The court noted that its conclusion had no bearing on whether the juvenile might be found delinquent for assault with a deadly weapon inflicting serious injury, assault with a deadly weapon, assault inflicting serious injury, or assault on a child under twelve.

Sufficient evidence to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon where defendant used a single weapon during multiple robberies

[*State v. Lee*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The evidence was sufficient to support multiple counts of possession of a weapon of mass death and destruction and possession of a firearm by a felon. The defendant had argued that the evidence was insufficient to support multiple charges because it showed that a single weapon was used, and did not show that the possession on each subsequent date of offense was a new and separate possession. The court distinguished *State v. Wiggins*, __ N.C. App. __, 707 S.E.2d 664 (2011), on grounds that in that case, the offenses were committed in close geographic and temporal proximity. Here, the court determined, the offenses occurred in nine different locations on ten different days over the course of a month. It concluded: “While the evidence tended to show that defendant used the same weapon during each armed robbery, the robberies all occurred on different days and in different locations. Because each possession of the weapon was separate in time and location, . . . the trial court did not err in denying defendant’s motion to dismiss the multiple weapons possession charges.”

Defendant’s ownership of sawed-off shotgun established constructive possession of weapon of mass death and destruction

[*State v. Billinger*](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). There was sufficient evidence to establish that the defendant constructively possessed a weapon of mass death and destruction. Following law from other jurisdictions, the court held that “constructive possession may be established by evidence showing the defendant’s ownership of the contraband.” Because the evidence showed that the defendant owned the sawed-off shotgun at issue, it was sufficient to show possession of a weapon of mass death and destruction.

Defenses

No error in denial of request to instruct on diminished capacity where no evidence cast doubt on defendant’s ability to form requisite intent for first-degree murder

[*State v. McDowell*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 6, 2011). In a murder case, the trial court did not err by denying the defendant’s request for a jury instruction on diminished capacity. The defendant had argued that he was entitled to the instruction based on evidence that he suffered from post-traumatic

stress syndrome, alcohol dependence, and cognitive impairment resulting from a head injury, causing him to possibly overreact to stress or conclude that deadly force was necessary to deal with a threatening situation. The court found no evidence casting doubt on the defendant's ability to premeditate, deliberate, or form the specific intent to kill necessary for guilt of first-degree murder on the basis of malice, premeditation, and deliberation.

No error to refuse to instruct on voluntary intoxication when defendant did not produce sufficient evidence that her intoxication rendered her incapable of forming the necessary intent

[*State v. Flaugher*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The trial court did not err by refusing to instruct on voluntary intoxication. Some evidence showed that the defendant had drunk two beers and "could feel it," had taken Xanax, and may have smoked crack cocaine. However, the defendant herself said she was not drunk and had not smoked crack. The defendant did not produce sufficient evidence to show that her mind was so completely intoxicated that she was utterly incapable of forming the necessary intent.

No plain error for trial judge to instruct jury on insanity using pattern jury instruction

[*State v. Castillo*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). No plain error occurred when the trial judge instructed the jury on insanity using N.C.P.I.—Crim. 304.10. The defendant had argued that the trial court erred by failing to instruct the jury that the insanity defense applies if a defendant believed, due to mental illness, that his conduct was morally right.

Error to dismiss larceny by employee charges based on the theory of entrapment by estoppel

[*State v. Pope*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The trial court erred by dismissing larceny by employee charges based on the theory of entrapment by estoppel. The defendant, a public works supervisor, was accused of selling "white goods" and retaining the proceeds. The court concluded that while officials testified that they were aware that some "white goods" were sold and that the money was deposited to a common pool, no evidence was offered to show that government officials expressly condoned the defendant pocketing money from that fund. Thus, the explicit permission requirement for entrapment by estoppel was not met.

Court erred in giving self-defense instruction for assaults not involving deadly force

[*State v. Whetstone*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). The trial court committed plain error by charging the jury with a self-defense instruction that related to assaults not involving deadly force (N.C.P.I.—Crim. 308.40) when the defendant was charged with assault with a deadly weapon with intent to kill inflicting serious injury. The court explained: "in those cases where the weapon is not a deadly weapon per se, but . . . the trial judge concludes on the evidence . . . that the weapon used was a deadly weapon as a matter of law, the jury should be instructed that the assault would be excused as being in self-defense only if the circumstances at the time the defendant acted were such as would create in the mind of a person of ordinary firmness a reasonable belief that such action was necessary to protect himself from death or great bodily harm." The instruction given lessened the State's burden of proving that the defendant did not act in self-defense.

Sex Offender Registration and Satellite-Based Monitoring

Second-degree kidnapping and crime against nature not sexually violent offenses requiring registration as a sex offender

[*State v. Burgess*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011). The trial court erred by ordering that the defendant register as a sex offender. Although the trial court determined that that the defendant was convicted of a sexually violent offense, neither of the offenses for which the defendant was convicted—second-degree kidnapping and crime against nature—is a sexually violent offense.

- (1) Trial court erred by requiring the defendant to enroll in SBM for ten years;**
- (2) Trial court had subject matter jurisdiction to order SBM;**
- (3) No violation of due process rights in ordering SBM without notice of ground;**
- (4) No error in determining that indecent liberties involved physical, mental, or sexual abuse of minor**

[*State v. Jarvis*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). (1) The trial court erred by requiring the defendant to enroll in satellite-based monitoring (SBM) for ten years after finding that he required the highest level of supervision and monitoring. The DOC risk assessment classified the defendant as a low risk and only two of the trial court's four additional findings of fact were supported by competent evidence. One finding of fact involved the defendant's *Alford* plea and lack of remorse. Remanding, the court instructed that the trial court may consider whether the defendant's actions showed lack of remorse but indicated that no authority suggests that the fact of an *Alford* plea itself shows lack of remorse. (2) The court rejected the defendant's argument that the trial court lacked subject matter jurisdiction to order SBM enrollment because the State failed to file a written pleading providing notice regarding the basis for SBM. (3) The court rejected the defendant's argument that the trial court violated his due process rights by ordering him to enroll in SBM without providing any notice of the ground triggering SBM. Because the defendant was placed on probation and as a condition of his probation was incarcerated for 120 days, his eligibility for SBM was determined by the trial court pursuant to G.S. 14-208.40A; neither the DOC nor the trial court was responsible for any type of notice regarding defendant's eligibility. (4) Citing *State v. Cowan*, __ N.C. App. __, __, 700 S.E.2d 239, 247 (2010), the court rejected the defendant's argument that the trial court erred by determining that indecent liberties involved the physical, mental, or sexual abuse of a minor.

Trial court erred by (1) considering risk assessment before deciding whether defendant committed an aggravated offense and (2) finding that sex offense in a parental role is an aggravated offense

[*State v. Mann*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). (1) The trial court failed to follow the procedures set out in G.S. 14-208.40A when ordering the defendant to register as a sex offender and enroll in lifetime SBM. Specifically, the trial court erred by considering the risk assessment before deciding whether the defendant committed an aggravated offense. (2) The trial court erred by finding that sex offense in a parental role (G.S. 14-27.7(a)) is an aggravated offense.

Sentencing and Probation

Prior Record Level

Error to enhance defendant's prior record level based on out-of-state convictions when State failed to present sufficient evidence that out-of-state offenses were substantially similar to NC offenses

[*State v. Burgess*](#), __ N.C. App. __, __ S.E.2d __ (Sept. 20, 2011). The trial court erred by sentencing the defendant as a level IV offender when the State failed to present sufficient evidence establishing that out-of-state offenses were substantially similar to North Carolina offenses. The State presented printed copies of out-of-state statutes purportedly serving as the basis for the out-of-state convictions. However, the State's worksheet did not identify the out-of-state crimes by statute number and instead used brief and non-specific descriptions that could arguably describe more than one crime, making it unclear whether the statutes presented were the basis for the defendant's convictions. Also, the State presented 2008 versions of statutes when the defendant's convictions were from 1993 and 1994, and there was no evidence that the statutes were unchanged. Finally, the trial court erred by accepting the classification of the defendant's out-of-state offenses without comparing the elements of those offenses to the elements of the North Carolina offenses the State contended were substantially similar.

Trial court did not err by using felonious breaking or entering conviction to support possession of a firearm by a felon charge and also for calculating defendant's prior record level

[*State v. Best*](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). Distinguishing *State v. Gentry*, 135 N.C. App. 107 (1999), the court held that the trial court did not err by using a felonious breaking or entering conviction for the purpose of both supporting a possession of a firearm by a felon charge and calculating the defendant's prior record level.

Defendant's stipulation to classification of prior convictions sufficient to prove prior record level

[*State v. Wingate*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). Where the defendant stipulated that he was previously convicted of one count of conspiracy to sell or deliver cocaine and two counts of selling or delivering cocaine and that these convictions were Class G felonies, there was sufficient proof to establish his prior conviction level. The class of felony for which defendant was previously convicted was a question of fact, to which defendant could stipulate, and was not a question of law requiring resolution by the trial court.

Probation

Trial court erred by failing to make findings of fact showing that it considered and evaluated defendant's evidence before concluding that defendant violated probation

[*State v. Floyd*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The trial court erred by failing to make findings of fact that clearly show it considered and evaluated the defendant's evidence before concluding that the defendant violated his probation by failing to pay the cost of his sexual abuse treatment program. The defendant presented ample evidence of an inability to pay after efforts to secure employment; the probation officer corroborated this evidence and testified that he believed that the defendant would complete the treatment program if he could pay for it. For further discussion of

this case, see Jamie Markham, [Willfulness of Probation Violations](#), posting to North Carolina Criminal Law: UNC School of Government Blog (September 15, 2011).

Addiction not lawful excuse for probation violation

[State v. Stephenson](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The defendant's explanation that she was addicted to drugs was not a lawful excuse for violating probation by failing to complete a drug treatment program. For further discussion of this case, see Jamie Markham, [Willfulness of Probation Violations](#), posting to North Carolina Criminal Law: UNC School of Government Blog (September 15, 2011).

G.S. 15A-1023(b) does not apply in probation revocation proceeding

[State v. Cleary](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). G.S. 15A-1023(b), which grants a defendant the right to a continuance when a trial court refuses to accept a plea, does not apply when the trial court refuses to accept a plea in the context of a probation revocation proceeding.

Restitution

Error to order restitution that lacked connection to conviction

[State v. Billinger](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). The trial court erred by ordering the defendant to pay restitution in connection with a conviction for possessing a weapon of mass death and destruction where the State conceded that the restitution had no connection to that conviction.

Generally

Defendant's right to be present at sentencing not violated when judgment included court costs and fees for community service, a condition imposed in open court

[State v. Arrington](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). The defendant's right to be present when sentence is pronounced was not violated when the trial judge included in the judgment court costs and fees for community service that had not been mentioned in open court. The change in the judgment was not substantive. "[E]ach of the conditions imposed . . . was a non-discretionary byproduct of the sentence that was imposed in open court." Further, the court noted that payment of costs does not constitute punishment and, therefore, the imposition of costs on the defendant outside of his presence did not infringe on his right to be present when sentence is pronounced.

No violation of G.S. 15A-1335 occurred when, after one of several convictions consolidated for judgment was vacated, defendant was re-sentenced to same term of imprisonment

[State v. Skipper](#), __ N.C. App. __, __ S.E.2d __ (Aug. 16, 2011). No violation of G.S. 15A-1335 occurred on resentencing. A jury found the defendant guilty of felonious breaking and entering, felonious larceny, felonious possession of stolen goods, and for being a habitual felon. The trial court consolidated the offenses for judgment and sentenced the defendant to 125–159 months of imprisonment. The appellate court subsequently vacated the felony larceny conviction and remanded for resentencing. At resentencing the trial court consolidated the offenses and again sentenced the defendant to 125–159

months. The defendant argued that because he received the same sentence even though one of the convictions had been vacated, the new sentence violated G.S. 15A-1335. The court disagreed, concluding that the pursuant to G.S. 15A-1340.15(b), having consolidated the sentences, the trial court was required to sentence the defendant for the most serious offense, which it did at the initial sentencing and the resentencing.

Defendant not entitled to credit for time spent in private drug treatment program

[*State v. Stephenson*](#), __ N.C. App. __, __ S.E.2d __ (July 19, 2011). The defendant was not entitled to credit under G.S. 15-196.1 for time spent in a drug treatment program as a condition of probation because the program was not an institution operated by a State or local government.

No evidence that trial court improperly considered defendant's not guilty plea

[*State v. Norman*](#), __ N.C. App. __, __ S.E.2d __ (July 5, 2011). There was no evidence that the trial court improperly considered during sentencing the defendant's decision to plead not guilty.

Trial court lacked authority to order that any later sentence imposed on defendant run consecutive to the sentence imposed in current case

[*State v. Herrin*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011)). The trial court exceeded its statutory authority by mandating that any later sentence imposed on the defendant must run consecutive to the sentence imposed in the case at hand. The court, however, declined to vacate the relevant portion of the judgment, concluding that because the defendant had not yet been ordered to serve a consecutive sentence, such an opinion would be advisory.

Sufficient evidence supported submission of aggravating factor to the jury

[*State v. Carter*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). There was sufficient evidence supporting the trial judge's submission of the G.S. 15A-1340.16(d)(6) aggravating factor (offense against a law enforcement officer, etc. while engaged in the performance of or because of the exercise of official duties.) to the jury. Subsection (d)(6)'s "engaged in" prong does not require the State to prove that the defendant knew or reasonably should have known that the victim was a member of the protected class engaged in the exercise of his or her official duties; rather, submission simply requires evidence sufficient to establish the "objective fact" that the victim was a member of the protected class—here, a law enforcement officer—engaged in the performance of his or her official duties. On the facts presented, the evidence was sufficient.

(1) Defendant's exclusion from in-chambers conference harmless error;

(2) Evidence of awards from Crime Victim's Compensation Commission supported restitution award

[*State v. Wright*](#), __ N.C. App. __, __ S.E.2d __ (June 21, 2011). (1) Excluding the defendant from an in-chambers conference held prior to the sentencing hearing was harmless beyond a reasonable doubt. The in-chambers conference was recorded, the defendant was represented by counsel and given an opportunity to be heard and to make objections at the sentencing hearing, and the trial court reported the class level for each offense and any aggravating or mitigating factors on the record in open court. (2) Evidence of two awards from the Crime Victim's Compensation Commission properly supported the trial

court's restitution award. However, because restitution exceeded the amounts stated in these awards, the court remanded for the trial court to amend the order accordingly.

License Revocation

DMV may not revoke driving privileges for a willful refusal to submit to chemical analysis absent receipt of an affidavit swearing that the refusal was indeed willful

[Lee v. Gore](#), __ N.C. App. __, __ S.E.2d __ (Aug. 26, 2011). Affirming a divided decision below, [Lee v. Gore](#), __ N.C. App. __, 698 S.E.2d 179 (Aug. 17, 2010), the court held that the Division of Motor Vehicles (DMV) may not revoke driving privileges for a willful refusal to submit to chemical analysis absent receipt of an affidavit swearing that the refusal was indeed willful. The court reasoned that because G.S. 20-16.2(d) requires that the DMV first receive a "properly executed affidavit" from law enforcement swearing to a willful refusal to submit to chemical analysis before revoking driving privileges, DMV lacked the authority to revoke the petitioner's driving privileges. In this case, the officer swore out the DHHS 3907 affidavit and attached to that affidavit the DHHS 3908 chemical analysis result form indicating the test was "refused." However, neither document indicated that the petitioner's refusal to participate in chemical analysis was willful. For further discussion of this case, see Shea Denning, [Lee v. Gore: Averment of Willful Refusal Necessary before DMV Can Revoke](#), posting to North Carolina Criminal Law: UNC School of Government Blog (August 31, 2011).

Clerical error on affidavit alleging willful refusal does not deprive DMV of authority to suspend license

[Hoots v. Robertson](#), __ N.C. App. __, __ S.E.2d __ (Aug. 2, 2011). The trial court erred by determining that a clerical error on a law enforcement officer's affidavit under G.S. 20-16.2(d) divests the DMV of its authority to suspend the driving privileges of a person who has willfully refused to submit to a chemical analysis when charged with an implied consent offense where the error does not involve an element of the offense of willful refusal. The clerical error involved listing the time of refusal as 3:45 am instead of 3:47 am.