Shea Denning
John Rubin
UNC School of Government
Denning: 919.843.5120, denning@sog.unc.edu
Rubin: 919.962.2498, rubin@sog.unc.edu

Criminal Case Update

2015 Summer Conference
(Includes selected cases decided between October 7, 2014 and June 2, 2015)

The summaries are drawn from criminal case summaries prepared by Jessica Smith. To view all of the summaries, go to www.sog.unc.edu/programs/crimlaw/index.html. To obtain the summaries automatically by email, go to the above site and click on Criminal Law Listserv.

Contents

Investigation Issues 2
Seizures 2
Searches 8
Interrogation 12
Pretrial and Trial Procedure 13
Right to Counsel 13
Pleadings 14
Jury Instructions 15
Other Procedural Issues 18
Evidence 19
Confrontation Clause 19
Expert Opinion Testimony 20
Other Evidence Issues 23
Crimes 27
Generally 27
Impaired Driving 30
Robbery 32
Sexual Offenses 33
Defenses 35
Sex Offender Registration and Satellite-Based Monitoring 37
Sentencing and Probation 41

Post Conviction 44

Investigation Issues

Seizures

Officer may not prolong lawful traffic stop to conduct dog sniff or other unrelated checks without reasonable suspicion

Rodriguez v. United States, 575 U.S. __ (April 21, 2015). A dog sniff that prolongs the time reasonably required for a traffic stop violates the Fourth Amendment. After an officer completed a traffic stop, including issuing the driver a warning ticket and returning all documents, the officer asked for permission to walk his police dog around the vehicle. The driver said no. Nevertheless, the officer instructed the driver to turn off his car, exit the vehicle and wait for a second officer. When the second officer arrived, the first officer retrieved his dog and led it around the car, during which time the dog alerted to the presence of drugs. A search of the vehicle revealed a large bag of methamphetamine. All told, 7-8 minutes elapsed from the time the officer issued the written warning until the dog's alert. The defendant was charged with a drug crime and unsuccessfully moved to suppress the evidence seized from his car, arguing that the officer prolonged the traffic stop without reasonable suspicion to conduct the dog sniff. The defendant was convicted and appealed. The Eighth Circuit held that the de minimus extension of the stop was permissible. The Supreme Court granted certiorari "to resolve a division among lower courts on the question whether police routinely may extend an otherwise-completed traffic stop, absent reasonable suspicion, in order to conduct a dog sniff."

The Court reasoned that an officer may conduct certain unrelated checks during an otherwise lawful traffic stop, but "he may not do so in a way that prolongs the stop, absent the reasonable suspicion ordinarily demanded to justify detaining an individual." The Court noted that during a traffic stop, beyond determining whether to issue a traffic ticket, an officer's mission includes "ordinary inquiries incident to [the traffic] stop" such as checking the driver's license, determining whether the driver has outstanding warrants, and inspecting the automobile's registration and proof of insurance. It explained: "These checks serve the same objective as enforcement of the traffic code: ensuring that vehicles on the road are operated safely and responsibly." A dog sniff by contrast "is a measure aimed at detect[ing] evidence of ordinary criminal wrongdoing." (quotation omitted). It continued: "Lacking the same close connection to roadway safety as the ordinary inquiries, a dog sniff is not fairly characterized as part of the officer's traffic mission."

Noting that the Eighth Circuit's de minimus rule relied heavily on *Pennsylvania v. Mimms*, 434 U.S. 106 (1977) (per curiam) (reasoning that the government's "legitimate and weighty" interest in officer safety outweighs the "de minimis" additional intrusion of requiring a driver, already lawfully stopped, to exit the vehicle), the Court distinguished *Mimms*:

> Unlike a general interest in criminal enforcement, however, the government's officer safety interest stems from the mission of the stop itself. Traffic stops are

> “especially fraught with danger to police officers,” so an officer may need to take certain negligibly burdensome precautions in order to complete his mission safely. On-scene investigation into other crimes, however, detours from that mission. So too do safety precautions taken in order to facilitate such detours. Thus, even assuming that the imposition here was no more intrusive than the exit order in *Mimms*, the dog sniff could not be justified on the same basis. Highway and officer safety are interests different in kind from the Government’s endeavor to detect crime in general or drug trafficking in particular.

(citations omitted).

The Court went on to reject the Government’s argument that an officer may “incremental[ly]” prolong a stop to conduct a dog sniff so long as the officer is reasonably diligent in pursuing the traffic-related purpose of the stop, and the overall duration of the stop remains reasonable in relation to the duration of other traffic stops involving similar circumstances. The Court dismissed the notion that “by completing all traffic-related tasks expeditiously, an officer can earn bonus time to pursue an unrelated criminal investigation.” It continued:

> If an officer can complete traffic-based inquiries expeditiously, then that is the amount of “time reasonably required to complete [the stop’s] mission.” As we said in *Caballes* and reiterate today, a traffic stop “prolonged beyond” that point is “unlawful.” The critical question, then, is not whether the dog sniff occurs before or after the officer issues a ticket . . . but whether conducting the sniff “prolongs”—i.e., adds time to—“the stop”.

(citations omitted).

In this case, the trial court ruled that the defendant’s detention for the dog sniff was not independently supported by individualized suspicion. Because the Court of Appeals did not review that determination the Court remanded for a determination by that court as to whether reasonable suspicion of criminal activity justified detaining the defendant beyond completion of the traffic infraction investigation.

Defendant’s Fourth Amendment rights violated when officer took defendant’s license to his patrol vehicle without reasonable suspicion

State v. Leak, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). In a case in which there was a dissenting opinion, the court held that the defendant’s Fourth Amendment rights were violated when an officer, who had approached the defendant’s legally parked car without reasonable suspicion, took the defendant’s driver’s license to his patrol vehicle. Until the officer took the license, the encounter was consensual and no reasonable suspicion was required: “[the officer] required no particular justification to approach defendant and ask whether he required assistance, or to ask defendant to voluntarily consent to allowing [the officer] to examine his driver’s license and registration.” However, the officer’s conduct of taking the defendant’s license to his patrol car to investigate its status constituted a seizure that was not justified by reasonable suspicion. Citing the recent U.S. Supreme Court case *Rodriguez v. United States*, 135 S. Ct. 1609 (2015) (police may not extend a completed vehicle stop for a dog sniff, absent reasonable suspicion), the court rejected the suggestion that no violation occurred because any seizure was “de minimus” in nature.

Stop supported by reasonable suspicion where officer observed vehicle swerve right and almost strike curb in addition to other factors

State v. Wainwright, ___ N.C. App. ___, 770 S.E.2d 99 (Mar. 17, 2015). In this DWI case, the officer had reasonable suspicion to conduct a stop of the defendant's vehicle. The officer observed the defendant's vehicle swerve right, cross the line marking the outside of his lane of travel and almost strike the curb. The court found that this evidence, along with "the pedestrian traffic along the sidewalks and in the roadway, the unusual hour defendant was driving, and his proximity to bars and nightclubs, supports the trial court's conclusion that [the] Officer . . . had reasonable suspicion to believe defendant was driving while impaired."

Trial court failed to adequately determine reasonableness of checkpoint

State v. McDonald, ___ N.C. App. ___, 768 S.E.2d 913 (Mar. 3, 2015). Although the trial court properly found that the checkpoint had a legitimate proper purpose of checking for driver's license and vehicle registration violations, the trial court failed to adequately determine the checkpoint's reasonableness. The court held that the trial court's "bare conclusion" on reasonableness was insufficient and vacated and remanded for appropriate findings as to reasonableness.

Reversing Court of Appeals, court finds warrantless seizure of marijuana plants was justified under plain view doctrine where officers had right to be in place from which they saw plants; additionally, exigent circumstances justified seizure

State v. Grice, 367 N.C. 753 (Jan. 23, 2015). Reversing the court of appeals, the court held that officers did not violate the Fourth Amendment by seizing marijuana plants seen in plain view. After receiving a tip that the defendant was growing marijuana at a specified residence, officers went to the residence to conduct a knock and talk. Finding the front door inaccessible, covered with plastic, and obscured by furniture, the officers noticed that the driveway led to a side door, which appeared to be the main entrance. One of the officers knocked on the side door. No one answered. From the door, the officer noticed plants growing in several buckets about 15 yards away. Both officers recognized the plants as marijuana. The officers seized the plants, returned to the sheriff's office and got a search warrant to search the home. The defendant was charged with manufacturing a controlled substance and moved to suppress evidence of the marijuana plants. The trial court denied the motion and the court of appeals reversed. The supreme court began by finding that the officers observed the plants in plain view. It went on to explain that a warrantless seizure may be justified as reasonable under the plain view doctrine if the officer did not violate the Fourth Amendment in arriving at the place from where the evidence could be plainly viewed; the evidence's incriminating character was immediately apparent; and the officer had a lawful right of access to the object itself. Additionally, it noted, "[t]he North Carolina General Assembly has . . . required that the discovery of evidence in plain view be inadvertent." The court noted that the sole point of contention in this case was whether the officers had a lawful right of access from the driveway 15 yards across the defendant's property to the plants' location. Finding against the defendant on this issue, the court stated: "Here, the knock and talk investigation constituted the initial entry onto defendant's property which brought the officers within plain view of the marijuana plants. The presence of the clearly identifiable contraband justified walking further into the curtilage." The court rejected the defendant's argument that the seizure was improper because the plants were on the curtilage of his property, stating:

> [W]e conclude that the unfenced portion of the property fifteen yards from the home and bordering a wood line is closer in kind to an open field than it is to the paradigmatic curtilage which protects "the privacies of life" inside the home. However, even if the property at issue can be considered the curtilage of the home for Fourth Amendment purposes, we disagree with defendant's claim that a justified presence in one portion of the curtilage (the driveway and front porch) does not extend to justify recovery of contraband in plain view located in another portion of the curtilage (the side yard). By analogy, it is difficult to imagine what formulation of the Fourth Amendment would prohibit the officers from seizing the contraband if the plants had been growing on the porch—the paradigmatic curtilage—rather than at a distance, particularly when the officers' initial presence on the curtilage was justified. The plants in question were situated on the periphery of the curtilage, and the protections cannot be greater than if the plants were growing on the porch itself. The officers in this case were, by the custom and tradition of our society, implicitly invited into the curtilage to approach the home. Traveling within the curtilage to seize contraband in plain view within the curtilage did not violate the Fourth Amendment.

(citation omitted).

The court went on to hold that the seizure also was justified by exigent circumstances, concluding: "Reviewing the record, it is objectively reasonable to conclude that someone may have been home, that the individual would have been aware of the officers' presence, and that the individual could easily have moved or destroyed the plants if they were left on the property."

Defendant's allegedly evasive actions while being followed by police did not provide reasonable suspicion for stop, but other evidence, including that defendant accepted two boxes from a house that was the subject of a search warrant, provided RS

State v. McKnight, ___ N.C. App. ___, 767 S.E.2d 689 (Jan. 20, 2015). In this drug trafficking case, the trial court did not commit plain error by finding that officers had reasonable suspicion to stop the defendant's vehicle. The court began by rejecting the State's argument that the defendant's evasive action while being followed by the police provided reasonable suspicion for the stop. The court reasoned that there was no evidence showing that the defendant was aware of the police presence when he engaged in the allegedly evasive action (backing into a driveway and then driving away without exiting his vehicle). The court noted that for a suspect's action to be evasive, there must be a nexus between the defendant's action and the police presence; this nexus was absent here. Nevertheless, the court found that other evidence supported a finding that reasonable suspicion existed. Immediately before the stop and while preparing to execute a search warrant for drug trafficking at the home of the defendant's friend, Travion Stokes, the defendant pulled up to Stokes' house, accepted 2 large boxes from Stokes, put them in his car, and drove away. The court noted that the warrant to search Stokes' home allowed officers to search any containers in the home that might contain marijuana, including the boxes in question.

Seizure of cigarette butt discarded by defendant in parking lot in front of defendant's apartment was lawful; parking lot was not within curtilage of defendant's building and defendant had no possessory interest in butt as it was abandoned property

State v. Williford, ___ N.C. App. ___, 767 S.E.2d 139 (Jan. 6, 2015). The trial court did not err by denying the defendant's motion to suppress DNA evidence obtained from his discarded cigarette butt. When the defendant refused to supply a DNA sample in connection with a rape and murder investigation, officers sought to obtain his DNA by other means. After the defendant discarded a cigarette butt in a parking lot, officers retrieved the butt. The parking lot was located directly in front of the defendant's four-unit apartment building, was uncovered, and included 5-7 unassigned parking spaces used by the residents. The area between the road and the parking lot was heavily wooded, but no gate restricted access to the lot and no signs suggested either that access to the parking lot was restricted or that the lot was private. After DNA on the cigarette butt matched DNA found on the victim, the defendant was charged with the crimes. At trial the defendant unsuccessfully moved to suppress the DNA evidence. On appeal, the court rejected the defendant's argument that the seizure of the cigarette butt violated his constitutional rights because it occurred within the curtilage of his apartment:

> [W]e conclude that the parking lot was not located in the curtilage of defendant's building. While the parking lot was in close proximity to the building, it was not enclosed, was used for parking by both the buildings' residents and the general public, and was only protected in a limited way. Consequently, the parking lot was not a location where defendant possessed "a reasonable and legitimate expectation of privacy that society is prepared to accept.

Next, the court rejected the defendant's argument that even if the parking lot was not considered curtilage, he still maintained a possessory interest in the cigarette butt since he did not put it in a trash can or otherwise convey it to a third party. The court reasoned that the cigarette butt was abandoned property. Finally, the court rejected the defendant's argument that even if officers lawfully obtained the cigarette butt, they still were required to obtain a warrant before testing it for his DNA because he had a legitimate expectation of privacy in his DNA. The court reasoned that the extraction of DNA from an abandoned item does not implicate the Fourth Amendment.

Trial court properly considered statements other officers made to stopping officer regarding defendant's driving in determining whether RS to stop

State v. Shaw, ___ N.C. App. ___, ___ S.E.2d ___ (Dec. 16, 2014). When determining whether an officer had reasonable suspicion to stop the defendant's vehicle, the trial court properly considered statements made by other officers to the stopping officer that the defendant's vehicle had weaved out of its lane of travel several times. Reasonable suspicion may properly be based on the collective knowledge of law enforcement officers.

Exclusionary rule did not require exclusion of evidence of defendant's assault on officers following his arrest, even if the stop and arrest violated the Fourth Amendment

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). In an assault on an officer case, the court rejected the defendant's argument that evidence of his two assaults on law enforcement officers should be excluded as fruits of the poisonous tree because his initial arrest for resisting an officer was unlawful. The doctrine does not exclude evidence of attacks on police officers where those attacks occur while the officers are engaging in conduct that violates a defendant's Fourth Amendment rights; "[a]pplication of the exclusionary rule in such fashion would in effect give the victims of illegal searches a license to assault and murder the officers involved[.]" (quotation omitted). Thus the court held that even if the initial stop and arrest violated the defendant's Fourth Amendment rights, evidence of his subsequent assaults on officers were not "fruits" under the relevant doctrine.

Officer's mistake of law was objectively reasonable and supported stop of vehicle with one working brake light

Heien v. North Carolina, 574 U.S. ___, 135 S. Ct. 530 (Dec. 15, 2014). Affirming *State v. Heien*, 366 N.C. 271 (Dec. 14, 2012), the Court held that because an officer's mistake of law was reasonable, it could support a vehicle stop. In *Heien,* an officer stopped a vehicle because one of its two brake lights was out, but a court later determined that a single working brake light was all the law required. The case presented the question whether such a mistake of law can give rise to the reasonable suspicion necessary to uphold the seizure under the Fourth Amendment. The Court answered the question in the affirmative. It explained:

> [W]e have repeatedly affirmed, "the ultimate touchstone of the Fourth Amendment is 'reasonableness.'" To be reasonable is not to be perfect, and so the Fourth Amendment allows for some mistakes on the part of government officials, giving them "fair leeway for enforcing the law in the community's protection." We have recognized that searches and seizures based on mistakes of fact can be reasonable. The warrantless search of a home, for instance, is reasonable if undertaken with the consent of a resident, and remains lawful when officers obtain the consent of someone who reasonably appears to be but is not in fact a resident. By the same token, if officers with probable cause to arrest a suspect mistakenly arrest an individual matching the suspect's description, neither the seizure nor an accompanying search of the arrestee would be unlawful. The limit is that "the mistakes must be those of reasonable men." But reasonable men make mistakes of law, too, and such mistakes are no less compatible with the concept of reasonable suspicion. Reasonable suspicion arises from the combination of an officer's understanding of the facts and his understanding of the relevant law. The officer may be reasonably mistaken on either ground. Whether the facts turn out to be not what was thought, or the law turns out to be not what was thought, the result is the same: the facts are outside the scope of the law. There is no reason, under the text of the Fourth Amendment or our precedents, why this same result should be acceptable when reached by way of a reasonable mistake of fact, but not when reached by way of a similarly reasonable mistake of law.

Slip op. at 5-6 (citations omitted).

The Court went on to find that the officer's mistake of law was objectively reasonable, given the state statutes at issue:

> Although the North Carolina statute at issue refers to "*a* stop lamp," suggesting the need for only a single working brake light, it also provides that "[t]he stop lamp may be incorporated into a unit with one or more *other* rear lamps." N. C. Gen. Stat. Ann. §20–129(g) (emphasis added). The use of "other" suggests to the everyday reader of English that a "stop lamp" is a type of "rear lamp." And another subsection of the same provision requires that vehicles "have all originally equipped rear lamps or the equivalent in good working order," §20–129(d), arguably indicating that if a vehicle has multiple "stop lamp[s]," all must be functional.

Slip op. at 12-13.

Searches

Court reversed and remanded for findings on whether defendant had legitimate expectation of privacy in GPS device found on defendant during a search incident to arrest that was not justified under *Riley v. California*

State v. Clyburn, ___ N.C. App. ___, 770 S.E.2d 689 (April 7, 2015). The court reversed and remanded for further findings of fact regarding the defendant's motion to suppress evidence obtained as a result of a search of the digital contents of a GPS device found on the defendant's person which, as a result of the search, was determined to have been stolen. The court held that under *Riley v. California*, 134 S. Ct. 2473 (2014), the search was not justified as a search incident to arrest. As to whether the defendant had a reasonable expectation of privacy in the GPS device, the court held that a defendant may have a legitimate expectation of privacy in a stolen item if he acquired it innocently and does not know that the item was stolen. Here, evidence at the suppression hearing would allow the trial court to conclude that defendant had a legitimate possessory interest in the GPS. However, because the trial court failed to make a factual determination regarding whether the defendant innocently purchased the GPS device, the court reversed and remanded for further findings of fact, providing additional guidance for the trial court in its decision.

Search of defendant's vehicle incident to arrest for open container was lawful

State v. Fizovic, ___ N.C. App. ___, 770 S.E.2d 717 (April 7, 2015). A search of the defendant's vehicle was properly done incident to the defendant's arrest for an open container offense, where the officer had probable cause to arrest before the search even though the formal arrest did not occur until after the search was completed. The court noted that under *Gant* "[a]n officer may conduct a warrantless search of a suspect's vehicle incident to his arrest if he has a reasonable belief that evidence related to the offense of arrest may be found inside the vehicle." Here, the trial court's unchallenged findings of fact that it is common to find alcohol in vehicles of individuals stopped for alcohol violations; and that

the center console in defendant's car was large enough to hold beer cans support the conclusion that the arresting officer had a reasonable belief that evidence related to the open container violation might be found in the defendant's vehicle. The court rejected the defendant's argument that the search was an unconstitutional "search incident to citation," noting that the defendant was arrested, not issued a citation.

A police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment

State v. Miller, 367 N.C. 702 (Dec. 19, 2014). The court held that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment. Responding to a burglar alarm, officers arrived at the defendant's home with a police dog, Jack. The officers deployed Jack to search the premises for intruders. Jack went from room to room until he reached a side bedroom where he remained. When an officer entered to investigate, Jack was sitting on the bedroom floor staring at a dresser drawer, alerting the officer to the presence of drugs. The officer opened the drawer and found a brick of marijuana. Leaving the drugs there, the officer and Jack continued the protective sweep. Jack stopped in front of a closet and began barking at the closet door, alerting the officer to the presence of a human suspect. Unlike the passive sit and stare alert that Jack used to signal for the presence of narcotics, Jack was trained to bark to signal the presence of human suspects. Officers opened the closet and found two large black trash bags on the closet floor. When Jack nuzzled a bag, marijuana was visible. The officers secured the premises and obtained a search warrant. At issue on appeal was whether Jack's nuzzling of the bags in the closet violated the Fourth Amendment. The court of appeals determined that Jack's nuzzling of the bags was an action unrelated to the objectives of the authorized intrusion that created a new invasion of the defendant's privacy unjustified by the exigent circumstance that validated the entry. That court viewed Jack as an instrumentality of the police and concluded that "his actions, regardless of whether they are instinctive or not, are no different than those undertaken by an officer." The Supreme Court disagreed, concluding that "Jack's actions are different from the actions of an officer, particularly if the dog's actions were instinctive, undirected, and unguided by the police." It held:

> If a police dog is acting without assistance, facilitation, or other intentional action by its handler (. . . acting "instinctively"), it cannot be said that a State or governmental actor intends to do anything. In such a case, the dog is simply being a dog. If, however, police misconduct is present, or if the dog is acting at the direction or guidance of its handler, then it can be readily inferred from the dog's action that there is an intent to find something or to obtain information. In short, we hold that a police dog's instinctive action, unguided and undirected by the police, that brings evidence not otherwise in plain view into plain view is not a search within the meaning of the Fourth Amendment or Article I, Section 20 of the North Carolina Constitution. Therefore, the decision of the Court of Appeals that Jack was an instrumentality of the police, regardless of whether his actions were instinctive, is reversed.

(citation omitted).

Ultimately, the court remanded for the trial court to decide whether Jack's nuzzling in this case was in fact instinctive, undirected, and unguided by the officers.

Affidavit did not provide probable cause to support search warrant; court found that confidential informant must be treated as anonymous tipster and tip was not supported by sufficient corroboration

State v. Benters, 367 N.C. 660 (Dec. 19, 2014). The court held that an affidavit supporting a search warrant failed to provide a substantial basis for the magistrate to conclude that probable cause existed. In the affidavit, the affiant officer stated that another officer conveyed to him a tip from a confidential informant that the suspect was growing marijuana at a specified premises. The affiant then recounted certain corroboration done by officers. The court first held that the tipster would be treated as anonymous, not one who is confidential and reliable. It explained:

> It is clear from the affidavit that the information provided does not contain a statement against the source's penal interest. Nor does the affidavit indicate that the source previously provided reliable information so as to have an established 'track record.' Thus, the source cannot be treated as a confidential and reliable informant on these two bases.

The court rejected the State's argument that because an officer met "face-to-face" with the source, the source should be considered more reliable, reasoning: "affidavit does not suggest [the affiant] was acquainted with or knew anything about [the] source or could rely on anything other than [the other officer's] statement that the source was confidential and reliable." Treating the source as an anonymous tipster, the court found that the tip was supported by insufficient corroboration. The State argued that the following corroboration supported the tip: the affiant's knowledge of the defendant and his property resulting "from a criminal case involving a stolen flatbed trailer"; subpoenaed utility records indicating that the defendant was the current subscriber and the kilowatt usage hours are indicative of a marijuana grow operation; and officers' observations of items at the premises indicative of an indoor marijuana growing operation, including potting soil, starting fertilizer, seed starting trays, plastic cups, metal storage racks, and portable pump type sprayers. Considering the novel issue of utility records offered in support of probable cause, the court noted that "[t]he weight given to power records increases when meaningful comparisons are made between a suspect's current electricity consumption and prior consumption, or between a suspect's consumption and that of nearby, similar properties." It continued: "By contrast, little to no value should be accorded to wholly conclusory, non-comparative allegations regarding energy usage records." Here, the affidavit summarily concluded that kilowatt usage was indicative of a marijuana grow operation and "the absence of any comparative analysis severely limits the potentially significant value of defendant's utility records." Thus, the court concluded: "these unsupported allegations do little to establish probable cause independently or by corroborating the anonymous tip." The court was similarly unimpressed by the officers' observation of plant growing items, noting:

> The affidavit does not state whether or when the gardening supplies were, or appeared to have been, used, or whether the supplies appeared to be new, or old and in disrepair. Thus, amid a field of speculative possibilities, the affidavit impermissibly requires the magistrate to make what otherwise might be

> reasonable inferences based on conclusory allegations rather than sufficient underlying circumstances. This we cannot abide.

As to the affidavit's extensive recounting of the officers' experience, the court held:

> We are not convinced that these officers' training and experience are sufficient to balance the quantitative and qualitative deficit left by an anonymous tip amounting to little more than a rumor, limited corroboration of facts, non-comparative utility records, observations of innocuous gardening supplies, and a compilation of conclusory allegations.

Search of defendant's garage pursuant to search warrant was improper where warrant was issued based in part on detective's unlawful search of residence's curtilage

State v. Gentile, __ N.C. App. __, __ S.E.2d __ (Nov. 18, 2014). A search of the defendant's garage pursuant to a search warrant was improper. Following up on a tip that the defendant was growing marijuana on his property, officers went to his residence. They knocked on the front door but received no response. They then went to the back of the house because they heard barking dogs and thought that an occupant might not have heard them knock. Once there they smelled marijuana coming from the garage and this discovery formed the basis for the search warrant. The court concluded that "the sound of barking dogs, alone, was not sufficient to support the detectives' decision to enter the curtilage of defendant's property by walking into the back yard of the home and the area on the driveway within ten feet of the garage." The court went on to conclude that when the detectives smelled the odor of marijuana, "their purported general inquiry about the information received from the anonymous tip was in fact a trespassory invasion of defendant's curtilage, and they had no legal right to be in that location." The subsequent search based, in part, on the odor of marijuana was unlawful.

(1) Additional findings necessary to determine whether exigent circumstances supported warrantless blood draw; (2) Trial court did not err in denying motion to dismiss where defendant failed to allege irreparable damage to his case

State v. McCrary, __ N.C. App. __, 764 S.E.2d 477 (Oct. 21, 2014), *temporary stay allowed*, __ N.C. __, 764 S.E.2d 475 (Nov. 7, 2014). (1) In this DWI case, the court—over a dissent—remanded for additional findings of fact on whether exigent circumstances supported a warrantless blood draw. The trial judge denied the motion to suppress before the U.S. Supreme Court issued its decision in *McNeely*, holding that the natural dissipation of alcohol in the bloodstream does not constitute an exigency in every DWI case sufficient to justify conducting a blood test without a warrant. The court remanded for additional findings of fact as to the availability of a magistrate and the "additional time and uncertainties" in obtaining a warrant, as well as the "other attendant circumstances" that may support the conclusion of law that exigent circumstances existed. The dissenting judge would have reversed the trial court's denial of the motion to suppress and remanded for a new trial. (2) The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss, which was predicated on a flagrant violation of his constitutional rights in connection with the warrantless blood draw. Noting that the defendant's motion failed to detail irreparable damage to the preparation of his case and made no such argument on appeal, the court concluded that the only appropriate action by the trial court under the circumstances was to consider suppression of the evidence as a remedy for any constitutional violation.

Interrogation

Defendant's incriminating statements were not rendered involuntary by officer's improper promises to defendant

State v. Flood, __ N.C. App. __, 765 S.E.2d 65 (Nov. 18, 2014). In a child sexual assault case, the trial court erred by finding that the defendant's statements were made involuntarily. Although the court found that an officer made improper promises to the defendant, it held, based on the totality of the circumstances, that the statement was voluntarily. Regarding the improper promises, Agent Oaks suggested to the defendant during the interview that she would work with and help the defendant if he confessed and that she "would recommend . . . that [the defendant] get treatment" instead of jail time. She also asserted that Detective Schwab "can ask for, you know, leniency, give you this, do this. He can ask the District Attorney's Office for certain things. It's totally up to them [what] they do with that but they're going to look for recommendations[.]" Oaks told the defendant that if he "admit[s] to what happened here," Schwab is "going to probably talk to the District Attorney and say, 'hey, this is my recommendation. Hey, this guy was honest with us. This guy has done everything we've asked him to do. What can we do?' and talk about it." Because it is clear that the purpose of Oaks' statements "was to improperly induce in Defendant a belief that he might obtain some kind of relief from criminal charges if he confessed," they were improper promises. However, viewing the totality of the circumstances (length of the interview, the defendant's extensive experience with the criminal justice system given his prior service as a law enforcement officer, etc.), the court found his statement to be voluntary.

(1) Defendant not in custody during interview at police station about missing child; (2) Trial court did not err by finding that defendant's statements were given freely and voluntarily, despite officer's promise that she would "walk out" of the interview regardless of what she said

State v. Davis, __ N.C. App. __, 763 S.E.2d 585 (Oct. 21, 2014). (1) The court rejected the defendant's argument that she was in custody within the meaning of *Miranda* during an interview at the police station about her missing child. The trial court properly used an objective test to determine whether the interview was custodial. Furthermore competent evidence supported the trial court's findings of fact that the defendant was not threatened or restrained; she voluntarily went to the station; she was allowed to leave at the end of the interviews; the interview room door was closed but unlocked; the defendant was allowed to take multiple bathroom and cigarette breaks and was given food and drink; and defendant was offered the opportunity to leave the fourth interview but refused. (2) The trial court did not err by finding that the defendant's statements were given freely and voluntarily. The court rejected the defendant's argument that they were coerced by fear and hope. The court held that an officer's promise that the defendant would "walk out" of the interview regardless of what she said did not render her confession involuntary. Without more, the officer's statement could not have led the defendant to believe that she would be treated more favorably if she confessed to her involvement in her child's disappearance and death. Next, the court rejected—as a factual matter—the defendant's argument that officers lied about information provided to them by a third party. Finally, the court rejected the defendant's argument that her mental state rendered her confession involuntary and coerced, where the evidence indicated that the defendant understood what was happening, was coherent and did not appear to be impaired.

Pretrial and Trial Procedure

Right to Counsel

Defendant forfeited his right to counsel by willfully obstructing and delaying the proceedings

State v. Brown, ___ N.C. App. ___, 768 S.E.2d 896 (Mar. 3, 2015). Because defendant engaged in repeated conduct designed to delay and obfuscate the proceedings, including refusing to answer whether he wanted the assistance of counsel, he forfeited his right to counsel. Citing *State v. Leyshon*, 211 N.C. App. 511 (2011), the court began by holding that defendant did not waive his right to counsel. When asked whether he wanted a lawyer, defendant replied that he did not and, alternatively, when the trial court explained that defendant would proceed without counsel, defendant objected and stated he was not waiving any rights. Defendant's statements about whether he waived his right to counsel were sufficiently equivocal such that they did not constitute a waiver of the right to counsel. However, defendant forfeited his right to counsel. In addition to refusing to answer whether he wanted assistance of counsel at three separate pretrial hearings, defendant repeatedly and vigorously objected to the trial court's authority to proceed. Although defendant on multiple occasions stated that he did not want assistance of counsel, he also repeatedly made statements that he was reserving his right to seek Islamic counsel, although over the course of four hearings and about 3½ months he never obtained counsel. As in *Leyshon,* this behavior amounted to willful obstruction and delay of trial proceedings and therefore defendant forfeited his right to counsel.

(1) Trial court did not abuse its discretion by ruling that defendant was competent to represent himself; (2) Defendant's obstructive actions absolved trial court from conducting inquiry required by G.S. 15A-1242; (3) Trial court did not err by forcing defendant to accept standby counsel

State v. Joiner, __ N.C. App. __, 767 S.E.2d 557 (Dec. 2, 2014). (1) Based on assessments from mental health professionals and the defendant's own behavior, the trial court did not abuse its discretion by ruling that the defendant was competent to represent himself at trial. (2) The court rejected the defendant's argument that the trial court failed to make the proper inquiry required by G.S. 15A-1242 before allowing him to proceed pro se, concluding that the defendant's actions "absolved the trial court from this requirement" and resulted in a forfeiture of the right to counsel. As recounted in the court's opinion, the defendant engaged in conduct that obstructed and delayed the proceedings. (3) Because the defendant would not allow the trial to proceed while representing himself, the trial court did not err by denying the defendant the right to continue representing himself and forcing him to accept the representation of a lawyer who had been serving as standby counsel.

(1) Even if counsel's performance was deficient, no prejudice was shown; (2) Appellate court declined to consider defendant's IAC claim a conflict of interest that was per se prejudicial

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). (1) Even if counsel provided deficient performance by informing the trial court, with the defendant's consent, that the defendant wanted to go to trial and "take the chance that maybe lightning strikes, or I get lucky, or something," no prejudice was shown. (2) The court declined the defendant's invitation to consider his ineffective assistance claim a conflict of interest that was per se prejudicial, noting that the court has limited such claims to cases involving representation of adverse parties.

Pleadings

(1) Indictment charging injury to real property was fatally defective where it failed to allege victim was entity capable of owning property; (2) Trial court did not err by allowing State to amend victim's name in indictment for assault with a deadly weapon

State v. Spivey, ___ N.C. App. ___, 769 S.E.2d 841 (April 7, 2015), *temporary stay allowed*, ___ N.C. ___, ___ S.E.2d. ___ (Apr. 24, 2015). (1) An indictment charging injury to real property was fatally defective where it alleged the property owner as "Katy's Great Eats" but failed to allege that this entity was one capable of owning property. The court explained that for this offense, "where the victim is not a natural person, the indictment must allege that the victim is a legal entity capable of owning property, and must separately allege that the victim is such a legal entity unless the name of the entity itself, as alleged in the indictment, imports that the victim is such a legal entity." (2) The trial court did not err by allowing the State to amend the victim's name as stated in an indictment for assault with a deadly weapon from "Christina Gibbs" to "Christian Gibbs."

Citation signed by charging officer but not signed by defendant was sufficient

State v. Wainwright, ___ N.C. App. ___, 770 S.E.2d 99 (Mar. 17, 2015). In this DWI case, the court rejected the defendant's argument that the trial court erred by denying his motion to quash a citation on grounds that he did not sign that document and the charging officer did not certify delivery of the citation. Specifically, the defendant argued that the officer's failure to follow the statutory procedure for service of a citation divested the court of jurisdiction to enter judgment. The court found that the citation, which was signed by the charging officer, was sufficient. [Author's note: The court's opinion indicates that the citation was converted to a Magistrate's Order and that Order was properly served on the defendant. Thus, the Magistrate's Order, not the citation, was the relevant charging document and it is not clear why any defect with respect to the defendant's and officer's signatures on the citation was material.]

Indictment charging felony peeping was not defective for failing to explicitly allege that conduct was done without the victim's consent

State v. Mann, __ N.C. App. __, 768 S.E.2d 138 (Dec. 2, 2014). An indictment charging felony peeping was not defective. Rejecting the defendant's argument that the indictment was defective because it failed to allege that the defendant's conduct was done without the victim's consent, the court concluded that "any charge brought under N.C.G.S. § 14-202 denotes an act by which the defendant has spied upon another without that person's consent." Moreover, the charging language, which included the word "surreptitiously" gave the defendant adequate notice. Further, the element of "without consent" is adequately alleged in an indictment that indicates the defendant committed an act unlawfully, willfully, and feloniously.

An information charging injury to personal property was fatally flawed where it failed to allege that one of the victims was a legal entity capable of owning property

State v. Ellis, __ N.C. App. __, 763 S.E.2d 574 (Oct. 7, 2014), *review allowed*, __ N.C. __, 766 S.E.2d 631 (Dec. 18, 2014). An information charging injury to personal property was fatally flawed where it failed to allege that one of the victims was a legal entity capable of owning property. The information alleged the victims as: "North Carolina State University (NCSU) and NCSU High Voltage Distribution." Noting that G.S. 116-4 provides that NCSU is a constituent institution of UNC, "a body politic and corporate" expressly authorized under G.S. 116-3 to own property, the court found that the words "North Carolina State University" sufficiently allege a legal entity capable of owning property. However, the allegation "NCSU High Voltage Distribution" "does not identify a legal entity necessarily capable of owning property because the additional words after 'NCSU' do not indicate what type of organization it is."

Jury Instructions

In DVPO with a deadly weapon case, any error by the trial court in failing to charge the jury on the lesser included offense of misdemeanor violation of a DVPO did not rise to the level of plain error

State v. Edgerton, ___ N.C. ___, 769 S.E.2d 837 (April 10, 2015). In a case where the defendant was found guilty of violation of a DVPO with a deadly weapon, the court per curiam reversed and remanded for the reasons stated in the dissenting opinion below. In the decision below, *State v. Edgerton*, ___ N.C. App. ___, 759 S.E.2d 669 (2014), the court held, over a dissent, that the trial court committed plain error by failing to instruct the jury on the lesser included offense, misdemeanor violation of a DVPO, where the court had determined that the weapon at issue was not a deadly weapon per se. The dissenting judge did not agree with the majority that any error rose to the level of plain error.

In a murder case based on the underlying felony of sexual offense based on penetration with an object, there was insufficient evidence to support an instruction on the affirmative defense of penetration for an accepted medical purposes where there was no direct testimony that the conduct was for such a purpose

State v. Stepp, 367 N.C. 772 (Jan. 23, 2015) (per curiam). For reasons stated in the dissenting opinion below, the court reversed the court of appeals. In the decision below, *State v. Stepp*, __ N.C. App. __, 753 S.E.2d 485 (Jan. 21, 2014), the majority held that the trial court committed reversible error by failing to instruct the jury on an affirmative defense to a felony that was the basis of a felony-murder conviction. The jury convicted the defendant of first-degree felony-murder of a 10-month old child based on an underlying sexual offense felony. The jury's verdict indicated that it found the defendant guilty of sexual offense based on penetration of the victim's genital opening with an object. At trial, the defendant admitted that he penetrated the victim's genital opening with his finger; however, he requested an instruction on the affirmative defense provided by G.S. 14-27.1(4), that the penetration was for "accepted medical purposes," specifically, to clean feces and urine while changing her diapers. The trial court denied the request. The court of appeals found this to be error, noting that the defendant offered evidence supporting his defense. Specifically, the defendant testified at trial to the relevant facts and his medical expert stated that the victim's genital opening injuries were consistent with the defendant's stated purpose. The court of appeals reasoned:

> We believe that when the Legislature defined "sexual act" as the penetration of a genital opening with an object, it provided the "accepted medical purposes" defense, in part, to shield a parent – or another charged with the caretaking of an infant – from prosecution for engaging in sexual conduct with a child when caring for the cleanliness and health needs of an infant, including the act of cleaning feces and urine from the genital opening with a wipe during a diaper change. To hold otherwise would create the absurd result that a parent could not penetrate the labia of his infant daughter to clean away feces and urine or to apply cream to treat a diaper rash without committing a Class B1 felony, a consequence that we do not believe the Legislature intended.

(Footnote omitted). The court of appeals added that in this case, expert testimony was not required to establish that the defendant's conduct constituted an "accepted medical purpose." The dissenting judge did not believe that there was sufficient evidence that the defendant's actions fell within the definition of accepted medical purpose and thus concluded that the defendant was not entitled to an instruction on the affirmative defense. The dissenting judge reasoned that for this defense to apply, there must be "some direct testimony that the considered conduct is for a medically accepted purpose" and no such evidence was offered here.

In possession of a firearm by a felon case, trial court did not err by failing to instruct on self-defense where evidence did not indicate threat of death or serious bodily injury

State v. Monroe, 367 N.C. 771 (Jan. 23, 2015) (per curiam). The court affirmed the decision below in *State v. Monroe*, __ N.C. App. __, 756 S.E.2d 376 (April 15, 2014) (holding, over a dissent, that even assuming arguendo that the rationale in *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), applies in North Carolina, the trial court did not err by denying the defendant's request to give a special instruction on self-defense as to the charge of possession of a firearm by a felon; the majority concluded that the evidence did not support a conclusion that the defendant possessed the firearm under unlawful and present, imminent, and impending threat of death or serious bodily injury).

(1) In an assault and second-degree murder case, defendant was not entitled to instruction on self-defense or voluntary manslaughter where he testified that he did not intend to shoot anyone; (2) Trial court did not err by refusing to instruct on involuntary manslaughter where defendant intentionally fired a gun under circumstances dangerous to human life

State v. Hinnant, ___ N.C. App. ___, 768 S.E.2d 317 (Dec. 31, 2014). (1) In this assault and second-degree murder case, the trial court did not err by refusing to instruct the jury on self-defense and by omitting an instruction on voluntary manslaughter. The court noted that the defendant himself testified that when he fired the gun he did not intend to shoot anyone and that he was only firing warning shots. It noted: "our Supreme Court has held that a defendant is not entitled to jury instructions on self-defense or voluntary manslaughter 'while still insisting . . . that he did not intend to shoot anyone[.]'" (2) The trial court did not err by denying the defendant's request to instruct the jury on involuntary manslaughter. Involuntary manslaughter is a killing without malice. However, where death results from the intentional use of a firearm or other deadly weapon, malice is presumed. Here, the defendant intentionally fired the gun under circumstances naturally dangerous to human life and the trial court did not err by refusing to give an instruction on involuntary manslaughter.

Trial court committed plain error by instructing jury on sexual offense with a child by an adult offender under G.S. 14-27.4A where indictment charged defendant with the lesser included crime of first-degree sexual offense under G.S. 14-27.4(a)(1)

State v. Hicks, ___ N.C. App. ___, 768 S.E.2d 373 (Feb. 17, 2015). The trial court committed plain error by instructing the jury on sexual offense with a child by an adult offender under G.S. 14-27.4A when the indictment charged the defendant with first-degree sexual offense in violation of G.S. 14-27.4(a)(1), a lesser-included of the G.S. 14-27.4A crime. The court vacated defendant's conviction under G.S. 14-27.4A and remanded for resentencing and entry of judgment on the lesser-included offense. Additionally, the court appealed to the General Assembly to clarify the relevant law:

> This case illustrates a significant ongoing problem with the sexual offense statutes of this State: the various sexual offenses are often confused with one another, leading to defective indictments.
>
> Given the frequency with which these errors arise, we strongly urge the General Assembly to consider reorganizing, renaming, and renumbering the various sexual offenses to make them more easily distinguishable from one another. Currently, there is no uniformity in how the various offenses are referenced, and efforts to distinguish the offenses only lead to more confusion. For example, because "first degree sexual offense" encompasses two different offenses, a violation of N.C. Gen. Stat. § 14-27.4(a)(1) is often referred to as "first degree sexual offense with a child" or "first degree statutory sexual offense" to distinguish the offense from "first degree sexual offense by force" under N.C. Gen. Stat. § 14-27.4(a)(2). "First degree sexual offense with a child," in turn, is easily confused with "statutory sexual offense" which could be a reference to a violation of either N.C. Gen. Stat. § 14-27.4A (officially titled "[s]exual offense with a child; adult offender") or N.C. Gen. Stat. § 14-27.7A (2013) (officially titled "[s]tatutory rape or sexual offense of person who is 13, 14, or 15 years old"). Further adding to the confusion is the similarity in the statute numbers of N.C. Gen. Stat. § 14-27.4(a)(1) and N.C. Gen. Stat. § 14-27.4A. We do not foresee an end to this confusion until the General Assembly amends the statutory scheme for sexual offenses.

(citations omitted).

Other Procedural Issues

Court of Appeals declined to take judicial notice of certain SBI Laboratory testing protocols where, among other things, the protocols were not presented at trial

State v. James, ___ N.C. App. ___, 770 S.E.2d 736 (April 7, 2015). In this drug trafficking case where an SBI agent testified as an expert for the State and identified the substance in question as oxycodone, the court declined the defendant's request to take judicial notice of Version 4 and 7 of SBI Laboratory testing protocols. Among other things, the defendant did not present the protocols at trial, the State had no opportunity to test their veracity, and the defendant presented no information indicating that the protocols applied at the time of testing.

Defendant was competent to stand trial and represent himself despite fact that one doctor opined that he was incompetent where numerous doctors opined that he was malingering; Trial court did not err by failing to hold an additional competency hearing when defendant disrupted courtroom; Trial court did not err by allowing defendant to proceed pro se

State v. Newson, ___ N.C. App. ___, 767 S.E.2d 913 (Feb. 3, 2015). The defendant was competent to stand trial and to represent himself. As to competency to stand trial, the defendant had several competency evaluations and hearings; the court rejected the defendant's argument that a report of the one doctor who opined that he was incompetent was determinative of the issue, noting that numerous other doctors opined that he was malingering. The court also rejected the defendant's argument that even after several competency hearings, the trial court erred by failing to hold another competency hearing when the defendant disrupted the courtroom, noting in part that four doctors had opined that the defendant's generally disruptive behavior was volitional. The court also rejected the defendant's argument that even if he was competent to stand trial, the trial court erred by allowing him to proceed pro se. The court found *Indiana v. Edwards* inapplicable because here--and unlike in *Edwards*--the trial court granted the defendant's request to proceed pro se. Also, the defendant did not challenge the validity of the waiver of counsel colloquy.

(1) Trial court committed prejudicial error by ordering, under threat of contempt, that defense counsel's legal assistant appear as a witness for the State where the assistant had not been properly subpoenaed to appear on trial dates; (2) On re-trial, trial court must conduct a hearing on whether conflict of interest exists

State v. Johnson, ___ N.C. App. ___, 767 S.E.2d 891 (Dec. 31, 2014). (1) The trial court erred by ordering, under threat of contempt, that defense counsel's legal assistant appear as a witness for the State. The State served the assistant with a subpoena directing her to appear to testify on the weeks of Friday, November 8, 2013, Monday, December 2, 2013, and Monday, January 13, 2014. However, the trial did not begin on any of the dates listed on the subpoena; rather, it began on Monday, November 18, 2013 and ended on Wednesday, November 20, 2013. Because the assistant had not been properly subpoenaed to appear on Tuesday, November 19, the trial court erred by ordering, under threat of contempt, that she appear on that day as a witness for the State. The court went on to find the error prejudicial and ordered a new trial. (2) The court held that if on re-trial the assistant again testifies for the State, the trial court must conduct a hearing to determine whether an actual conflict of interest exists that denies the defendant the right to effective assistance of counsel.

The trial court did not err by conducting a voir dire rather than an evidentiary hearing on an issue of attorney conflict of interest

State v. Hunt, 367 N.C. 700 (Dec. 19, 2014). The court affirmed per curiam that aspect of the decision below that generated a dissenting opinion. In the decision below, *State v. Hunt*, 221 N.C. App. 489 (July 17, 2012), the court of appeals held, over a dissent, that the trial court did not err by conducting a voir dire when an issue of attorney conflict of interest arose and denying the defendant's mistrial motion. A dissenting judge believed that the trial court erred by failing to conduct an evidentiary hearing to determine whether defense counsel's conflict of interest required a mistrial.

Trial court erred by failing to adequately address an impasse between defendant and defense counsel regarding questioning a prosecution witness

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 (Apr. 9, 2015). The trial court erred by failing to adequately address an impasse between the defendant and defense counsel regarding the questioning of a prosecution witness. The record "clearly reveals" that the defendant and counsel "reached an absolute impasse concerning a specific tactical issue--the extent to which specific questions should be posed to Detective Braswell on cross-examination." In the face of the defendant's repeated statements that his trial counsel refused to ask questions that the defendant wanted posed, the trial court instructed the defendant, "that's between you and [counsel]" and stated that it was not the trial court's place "to interject" in the matter. As such, the trial court failed to inquire into the nature of the impasse and order defense counsel to comply with the defendant's lawful instructions.

Evidence

Confrontation Clause

Defendant's confrontation clause rights were not violated by a forensic psychologist's testimony about a report she prepared that contained third-party statements because the statements were not offered for their truth

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). In this homicide case where the defendant was charged with murdering his wife, the confrontation clause was not violated when the trial court allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. Defendant argued that Calloway's report and testimony violated the confrontation clause because they contained third party statements from non-testifying witnesses who were not subject to cross-examination at trial. The court rejected this argument concluding that the report and testimony were not admitted for the truth of the matter asserted but to show "defendant's state of mind." In fact, the trial court gave a limiting instruction to that effect, noting that the evidence was relevant "only to the extent it may have been read by . . . defendant" and "had some bearing" on how he felt about the custody dispute with his wife.

Admission of GPS tracking reports did not violate confrontation clause because they were non-testimonial business records

State v. Gardner, __ N.C. App. __, 769 S.E.2d 196 (Dec. 2, 2014). In a sex offender residential restriction case, the court held that because GPS tracking reports were non-testimonial business records, their admission did not violate the defendant's confrontation rights. The GPS records were generated in connection with electronic monitoring of the defendant, who was on post-release supervision for a prior conviction. The court reasoned:

> [T]he GPS evidence admitted in this case was not generated purely for the purpose of establishing some fact at trial. Instead, it was generated to monitor defendant's compliance with his post-release supervision conditions. The GPS evidence was only pertinent at trial because defendant was alleged to have violated his post-release conditions. We hold that the GPS report was non-testimonial and its admission did not violate defendant's Confrontation Clause rights.

Expert Opinion Testimony

(1) In a homicide case, the trial court properly allowed forensic psychologist to testify about a report she prepared in connection with a custody proceeding because the report and testimony were relevant to the issue of defendant's state of mind; (2) Trial court did not err by admitting evidence of lyrics of a song allegedly authored by defendant where lyrics were similar to facts surrounding the charged offense; (3) Trial court did not err by allowing State's expert witness pathologists to testify that the victim's cause of death was "homicide" where the term was not used as a legal term of art

State v. Hayes, ___ N.C. App. ___, 768 S.E.2d 636 (Mar. 3, 2015). (1) In this homicide case where the defendant was charged with murdering his wife, the trial court properly allowed forensic psychologist Ginger Calloway to testify about a report she prepared in connection with a custody proceeding regarding the couple's children. The report contained, among other things, Calloway's observations of defendant's drug use, possible mental illness, untruthfulness during the evaluation process and her opinion that defendant desired to "obliterate" the victim's relationship with the children. Because the report was arguably unfavorable to defendant and was found in defendant's car with handwritten markings throughout the document, the report and Calloway's testimony were relevant for the State to argue the effect of the report on defendant's state of mind—that it created some basis for defendant's ill will, intent, or motive towards the victim. (2) The trial court did not err by admitting into evidence lyrics of a song, "Man Killer," allegedly authored by defendant and containing lyrics about a murder, including "I'll take the keys to your car", "I'm just the one to make you bleed" and "I'll put my hands on your throat and squeeze." In this case the evidence showed that the victim's car had been moved, the victim had been stabbed, and that defendant said he strangled the victim. The court concluded: "In light of the similarities between the lyrics and the facts surrounding the charged offense, the lyrics were relevant to establish identity, motive, and intent, and their probative value substantially outweighed their prejudicial effect to defendant." (3) The trial court did not err by allowing the State's expert witness pathologists to testify that the victim's cause of death was "homicide[.]" It concluded:

> The pathologists in this case were tendered as experts in the field of forensic pathology. A review of their testimony makes clear that they used the words "homicide by unde[te]rmined means" and "homicidal violence" within the context of their functions as medical examiners, not as legal terms of art, to describe how the cause of death was homicidal (possibly by asphyxia by strangulation or repeated stabbing) instead of death by natural causes, disease, or accident. Their ultimate opinion was proper and supported by sufficient evidence, including injury to the victim's fourth cervical vertebra, sharp force injury to the neck, stab wounds, and damage to certain "tissue and thyroid cartilage[.]" Accordingly, the trial court did not err by admitting the pathologists' testimony.

Because experts did not offer expert opinions but rather testified to their own observations, no discovery violation occurred where State did not provide experts' opinions prior to trial

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). In this child sexual assault case no discovery violation occurred when the State's experts testified about their own observations regarding the characteristics of sexual abuse and the reasons for delayed reporting. At trial the State offered expert testimony of two medical professionals who had treated the victim. The defendant objected, arguing that because the State had not provided defendant with the experts' opinions prior to trial, they should not be permitted to offer expert opinions at trial. The trial court sustained defendant's objection, ruling that the witnesses could testify to their own observations, but could not offer expert opinions. Because neither witness offered an expert opinion, no error occurred.

State's medical experts did not vouch for victim's credibility by failing to qualify each of victim's reported symptoms or past experiences with terms such as "alleged" or "unproven"

State v. Davis, ___ N.C. App. ___, 768 S.E.2d 903 (Mar. 3, 2015). In this child sexual abuse case, the State's treating medical experts did not vouch for the victim's credibility. The court noted that defendant's argument appears to be based primarily on the fact that the experts testified about the problems reported by the victim without qualifying each reported symptom or past experience with a legalistic term such as "alleged" or "unproven." The court stated: "Defendant does not cite any authority for the proposition that a witness who testifies to what another witness reports is considered to be 'vouching' for that person's credibility unless each disclosure by the witness includes a qualifier such as 'alleged.' We decline to impose such a requirement."

(1) Psychologist's testimony did not impermissibly vouch for victim's credibility; (2) Trial court did not commit plain error by admitting evidence of victim's PTSD on re-direct where the evidence was offered not as substantive evidence but rather to rebut an inference raised by defense counsel on cross-examination

State v. Hicks, ___ N.C. App. ___, 768 S.E.2d 373 (Feb. 17, 2015). (1) In this child sexual abuse case, testimony from a psychologist, Ms. Bellis, who treated the victim did not constitute expert testimony that impermissibly vouched for the victim's credibility. Bellis testified, in part, that the victim "came in because she had been molested by her older cousin." The court noted that in the cases offered by

defendant, "the experts clearly and unambiguously either testified as to their opinion regarding the victim's credibility or identified the defendant as the perpetrator of the sexual abuse." It continued:

> Here, in contrast, Ms. Bellis was never specifically asked to give her opinion as to the truth of [the victim's] allegations of molestation or whether she believed that [the victim] was credible. When reading Ms. Bellis' testimony as a whole, it is evident that when Ms. Bellis stated that "[t]hey specifically came in because [the victim] had been molested by her older cousin[,]" Ms. Bellis was simply stating the reason why [the victim] initially sought treatment from Ms. Bellis. Indeed, Ms. Bellis' affirmative response to the State's follow-up question whether there was "an allegation of molestation" clarifies that Ms. Bellis' statement referred to [the victim]'s allegations, and not Ms. Bellis' personal opinion as to their veracity. Because Ms. Bellis' testimony, when viewed in context, does not express an opinion as to [the victim]'s credibility or defendant's guilt, we hold that the trial court did not err in admitting it.

(2) The court rejected defendant's argument that the trial court committed plain error by admitting Bellis' testimony that she diagnosed the victim with PTSD. The court concluded that the State's introduction of evidence of PTSD on re-direct was not admitted as substantive evidence that the sexual assault happened, but rather to rebut an inference raised by defense counsel during cross-examination. The court further noted that although defendant could have requested a limiting instruction, he did not do so.

No plain error occurred when a pediatric nurse practitioner testified to the opinion that her medical findings were consistent with the victim's allegation of sexual abuse

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). In this sexual assault case, no plain error occurred when a pediatric nurse practitioner testified to the opinion that her medical findings were consistent with the victim's allegation of sexual abuse. The nurse performed a physical examination of the victim. She testified that in girls who are going through puberty, it is very rare to discover findings of sexual penetration. She testified that "the research, and, . . . this is thousands of studies, indicates that it's five percent or less of the time that you would have findings in a case of sexual abuse -- confirmed sexual abuse." With respect to the victim, the expert testified that her genital findings were normal and that such findings "would be still consistent with the possibility of sexual abuse." The prosecutor then asked: "Were your medical findings consistent with her disclosure in the interview?" She answered that they were. The defendant argued that the expert's opinion that her medical findings were consistent with the victim's allegations impermissibly vouched for the victim's credibility. Citing prior case law, the court noted that the expert "did not testify as to whether [the victim's] account of what happened to her was true," that she was believable or that she had in fact been sexually abused. "Rather, she merely testified that the lack of physical findings was consistent with, and did not contradict, [the victim's] account."

Other Evidence Issues

It was not plain error to admit videotape of an interview with defendant's accomplice to corroborate the accomplice's trial testimony, although the interview included additional detail

State v. Duffie, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015). In this robbery case, the court held that no plain error occurred when the trial court admitted into evidence for purposes of corroboration a videotape of an interview with the defendant's accomplice, when the accomplice testified at trial. The defendant asserted that the accomplice's statements in the videotape contradicted rather than corroborated his trial testimony. The court disagreed noting that the accomplice's statements during the interview established a timeline of the robberies, an account of how they were committed, and the parties' roles in the crimes and that all of these topics were covered in his testimony at trial. While the accomplice did add the additional detail during the interview that he likely would not have committed the robberies absent the defendant's involvement, this did not contradict his trial testimony.

New trial ordered in capital case where trial court erred by admitting an excessive amount of 404(b) evidence pertaining to another murder; by admitting evidence of 404(b) murder victim's good character, and by allowing the prosecution to argue that defense counsel had suborned perjury

State v. Hembree, ___ N.C. ___, 770 S.E.2d 77 (April 10, 2015). In this capital murder case, the trial court erred by admitting an excessive amount of 404(b) evidence pertaining to the murder of another victim, Saldana. The court began by concluding that the trial court properly admitted evidence of the Saldana murder under Rule 404(b) to show common plan or design. However, the trial court abused its discretion under Rule 403 by admitting "so much" 404(b) evidence given the differences between the two deaths and the lack of connection between them, the uncertainty regarding the cause of the victim's death, and the nature and extent of the 404(b) evidence (among other things, of the 8 days used by the State to present its case, 7 were spent on the 404(b) evidence; also, the jury viewed over a dozen photographs of Saldana's burned remains). The court stated: "Our review has uncovered no North Carolina case in which it is clear that the State relied so extensively, both in its case-in-chief and in rebuttal, on Rule 404(b) evidence about a victim for whose murder the accused was not currently being tried." The trial court also erred by allowing Saldana's sister to testify about Saldana's good character. Evidence regarding Saldana's character was irrelevant to the charged crime. For this reason, the trial court also abused its discretion by admitting this evidence over the defendant's Rule 403 objection.

During closing arguments, the State improperly accused defense counsel of suborning perjury. The prosecutor argued in part: "Two years later, after [the defendant] gives all these confessions to the police and says exactly how he killed [the victims] . . . the defense starts. The defendant, along with his two attorneys, come together to try and create some sort of story." Although the trial court sustained the defendant's objection to this statement it gave no curative instruction to the jury. The prosecutor went to argue that the defendant lied on the stand in cooperation with defense counsel. These latter statements were grossly improper and the trial court erred by failing to intervene ex mero motu.

Probative value of a recorded telephone call was not outweighed by the danger of unfair prejudice

State v. Mitchell, ___ N.C. App. ___, 770 S.E.2d 740 (April 7, 2015). In this murder case, the court rejected the defendant's argument that the probative value of a recorded telephone call made by the

defendant to his father was substantially outweighed by the danger of unfair prejudice. During the call, the defendant's father asked: "Now who you done shot now?" and "That same gun, right?"

Testimony by victim's mother about changes she observed in victim was not improper lay opinion testimony

State v. Pace, ___ N.C. App. ___, 770 S.E.2d 677 (Mar. 17, 2015). In this child sexual assault case the trial court did not abuse its discretion by allowing the victim's mother to testify about changes she observed in her daughter that she believed were a direct result of the assault. The court rejected the defendant's argument that this testimony was improper lay opinion testimony, finding that the testimony was proper as a shorthand statement of fact.

(1) Reversible error to admit store surveillance video that was not properly authenticated; (2) prejudicial error to admit testimony from store's loss prevention manager that was based on surveillance video and not on first-hand knowledge

State v. Snead, ___ N.C. App. ___, 768 S.E.2d 344 (Feb. 17, 2015), *temporary stay allowed*, ___ N.C. ___, 768 S.E.2d 568 (Mar. 9, 2015). (1) In this store larceny case, the trial court committed prejudicial error by admitting as substantive evidence store surveillance video that was not properly authenticated. At trial Mr. Steckler, the store's loss prevention manager, explained how the store's video surveillance system worked and testified that he had reviewed the video images after the incident. Steckler also testified that the video equipment was "working properly" on the day of the incident. However, Steckler admitted he was not at the store on the date of the incident, nor was he in charge of maintaining the video recording equipment and ensuring its proper operation. The court also found that Steckler's testimony was insufficient to establish chain of custody of the CD, which was created from the store videotape. (2) The trial court committed prejudicial error by admitting into evidence testimony by Mr. Steckler, the store's loss prevention manager, regarding the total number of shirts stolen and the cumulative value of the stolen merchandise where his opinion was based on store surveillance video and not on first-hand knowledge.

Detective's testimony that certain physical evidence was inconsistent with defendant's account of the incident in question was not an impermissible statement regarding defendant's truthfulness but rather was an explanation of the investigative process

State v. Houser, ___ N.C. App. ___, 768 S.E.2d 626 (Feb. 17, 2015). In this felony child abuse case, the trial court did not commit plain error by admitting testimony from an investigating detective that the existence of the victim's hairs in a hole in the wall of the home where the incident occurred was inconsistent with defendant's account of the incident, that he punched the wall when he had difficulty communicating with a 911 operator. The detective's testimony did not invade the province of the jury by commenting on the truthfulness of defendant's statements and subsequent testimony. Rather, the court reasoned, the detective was explaining the investigative process that led officers to return to the home and collect the hair sample (later determined to match the victim). Contrary to defendant's arguments, testimony that the hair embedded in the wall was inconsistent with defendant's version of the incident was not an impermissible statement that defendant was not telling the truth. The detective's testimony served to provide the jury a clear understanding of why the officers returned to the home after their initial investigation and how officers came to discover the hair and request forensic testing of that evidence. It concluded: "these statements were rationally based on [the officer's]

experience as a detective and were helpful to the jury in understanding the investigative process in this case."

In felony indecent exposure case, trial court did not err by admitting 404(b) evidence that defendant had exposed himself in public on other occasions

State v. Waddell, ___ N.C. App. ___, 767 S.E.2d 921 (Feb. 3, 2015). In this felony indecent exposure case where the defendant exposed himself to a 14-year old boy, his mother and grandmother, the trial court did not err by admitting 404(b) evidence from two adult women who testified that the defendant exposed himself in public on other occasions. The court rejected the defendant's argument that the other acts were insufficiently similar to the charged conduct and only "generic features of the charge of indecent exposure," noting that the 404(b) testimony revealed that the defendant exposed himself to adult women, who were either alone or in pairs, in or in the vicinity of businesses near the courthouse in downtown Fayetteville, and each instance involved the defendant exposing his genitals with his hand on or under his penis. The court also rejected the defendant's argument that because the current charge was elevated because the exposure occurred in the presence of a child under 16 and the prior incidents involved adult women, the were not sufficiently similar, noting that the defendant acknowledged in his brief that in this case he did in fact expose himself to an adult woman as well. The court also rejected the defendant's argument that the evidence should have been excluded under the Rule 403 balancing test.

In case where defendant was prosecuted for possessing and transporting drugs in his car, trial court erred by admitting 404(b) evidence of drug contraband found in a home where there was no evidence connecting defendant to the contraband

State v. McKnight, ___ N.C. App. ___, 767 S.E.2d 689 (Jan. 20, 2015). In this drug trafficking case in which the defendant was prosecuted for possessing and transporting drugs in his car, the trial court erred by admitting evidence of drug contraband found in a home. The defendant picked up two boxes from suspected drug trafficker Travion Stokes, put them in his car, was stopped by officers and was charged with drug crimes in connection with controlled substances found in the boxes. The defendant claimed that he did not know what was in the boxes and that he was simply doing a favor for Stokes by bringing them to a home on Shellburne Drive. The police got a warrant for the home at Shellburne Drive and found drug contraband there. The State successfully admitted this evidence over the defendant's objection at trial under Rule 404(b) to show the defendant's knowledge that the boxes he was transporting contained controlled substances. Relying on *State v. Moctezuma*, 141 N.C. App. 90 (2000), the court held this was error, finding that no evidence connected the *defendant* to the contraband found in the Shellburne Drive home.

In sexual abuse case, trial court properly admitted 404(b) evidence of sexual abuse that occurred 10-20 years prior to trial

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). In this child sexual abuse case, the trial court properly admitted 404(b) evidence from several witnesses. As to two of the witnesses, the defendant argued that the incidents they described were too remote and insufficiently similar. The court concluded that although the sexual abuse of these witnesses occurred 10-20 years prior to trial, the lapses of time between the instances of sexual misconduct involving the witnesses and the victims can be explained by the defendant's incarceration and lack of access to a victim. Furthermore, there are several similarities between what happened to the witnesses and what happened to the victims: each

victim was a minor female who was either the daughter or the niece of the defendant's spouse or live-in girlfriend; the abuse frequently occurred at the defendant's residence, at night, and while others slept nearby; and the defendant threatened each victim not to tell anyone. When considered as a whole, the testimony shows that the defendant engaged in a pattern of conduct of sexual abuse over a long period of time and the evidence meets Rule 404(b)'s requirements of similarity and temporal proximity. Testimony by a third witness was properly admitted under Rule 404(b) where it "involved substantially similar acts by defendant against the same victim and within the same time period." The trial court also performed the proper Rule 403 balancing and gave a proper limiting instruction to the jury.

In a child sexual abuse case, evidence of defendant's general good character and being respectful towards children was not admissible

State v. Walston, 367 N.C. 721 (Dec. 19, 2014). In a child sexual abuse case, although evidence of the defendant's law abidingness was admissible under Rule 404(a)(1), evidence of his general good character and being respectful towards children was not admissible. On appeal, the defendant's argument focused on the exclusion of character evidence that he was respectful towards children. The court found that this evidence did not relate to a pertinent character trait, stating: "Being respectful towards children does not bear a special relationship to the charges of child sexual abuse . . . nor is the proposed trait sufficiently tailored to those charges." It continued:

> Such evidence would only be relevant if defendant were accused in some way of being disrespectful towards children or if defendant had demonstrated further in his proffer that a person who is respectful is less likely to be a sexual predator. Defendant provided no evidence that there was a correlation between the two or that the trait of respectfulness has any bearing on a person's tendency to sexually abuse children.

Trial court committed plain error by permitting detective to testify that she believed that the victim "seemed to be telling me the truth"

State v. Taylor, ___ N.C. App. ___, 767 S.E.2d 585 (Dec. 16, 2014), *temporary stay allowed*, ___ N.C. ___, 767 S.E.2d 53 (Jan. 2, 2015). Over a dissent, the court held that the trial court committed plain error by permitting a Detective to testify that she moved forward with her investigation of obtaining property by false pretenses and breaking or entering offenses because she believed that the victim, Ms. Medina, "seemed to be telling me the truth." The challenged testimony constituted an impermissible vouching for Ms. Medina's credibility in a case in which the only contested issue was the relative credibility of Ms. Medina and the defendant.

Trial court abused its discretion by admitting officer's testimony that field test kit indicated presence of cocaine in the residence in question

State v. Carter, __ N.C. App. __, 765 S.E.2d 56 (Nov. 18, 2014). Relying on *State v. Meadows*, 201 N.C. App. 707 (2010) (trial court abused its discretion by allowing an officer to testify that substances were cocaine based on NarTest field test), the court held that the trial court abused its discretion by admitting an officer's testimony that narcotics indicator field test kits indicated the presence of cocaine in the residence in question.

Crimes

Generally

For offense of possessing or carrying weapons on educational property, State must prove that defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon"

State v. Huckelba, ___ N.C. App. ___, 771 S.E.2d 809 (April 21, 2015), *temporary stay allowed*, __ N.C. __, 771 S.E.2d 809 (May 8, 2015). Deciding an issue of first impression, the court held that to be guilty of possessing or carrying weapons on educational property under G.S. 14-269.2(b) the State must prove that the defendant "both knowingly possessed or carried a prohibited weapon and knowingly entered educational property with that weapon." With regard to proving that the defendant knowingly entered educational property, the court explained:

> [T]he State is not saddled with an unduly heavy burden of proving a defendant's subjective knowledge of the boundaries of educational property. Rather, the State need only prove a defendant's knowledge of her presence on educational property "by reference to the facts and circumstances surrounding the case." If, for example, the evidence shows that a defendant entered a school building and interacted with children while knowingly possessing a gun, the State would have little difficulty proving to the jury that the defendant had knowledge of her presence on educational property. If, however, the evidence shows that a defendant drove into an empty parking lot that is open to the public while knowingly possessing a gun—as in this case—the jury will likely need more evidence of the circumstances in order to find that the defendant knowingly entered educational property.

The court went on to hold that to the extent *State v. Haskins*, 160 N.C. App. 349 (2003), "conflicts with this opinion, it is now overruled." It also held, over a dissent, that in light of the above, the trial court committed plain error by failing to instruct the jury that it must find that the defendant knowingly possessed the weapon on educational property. [Author's note: This holding will require modification of the relevant pattern jury instructions, here N.C.P.I.—Crim 235.17.]

Trial court erred by sentencing the defendant for both assault inflicting serious bodily injury under G.S. 14-32.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), when both charges arose from the same assault

State v. Coakley, ___ N.C. App. ___, 767 S.E.2d 418 (Dec. 31, 2014). The trial court erred by sentencing the defendant for both assault inflicting serious bodily injury under G.S. 14-32.4(a) and assault with a deadly weapon inflicting serious injury under G.S. 14-32(b), when both charges arose from the same assault. The court reasoned that G.S. 14-32(b) prohibits punishment of any person convicted under its provisions if "the conduct is covered under some other provision of law providing greater punishment." Here, the defendant's conduct pertaining to his charge for and conviction of assault with a deadly

weapon inflicting serious injury was covered by the provisions of G.S. 14-32(b), which permits a greater punishment than that provided for in G.S. 14-32.4(a).

Trial court did not err by convicting defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discrete conduct

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). The trial court did not err by convicting the defendant of both robbery with a dangerous weapon and assault with a deadly weapon where each conviction arose from discrete conduct.

A prior conviction for the nonexistent offense of attempted assault cannot serve as the predicate felony for the charge of felon in possession and cannot support a determination that defendant attained habitual felon status

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 (Apr. 9, 2015). Because attempted assault with a deadly weapon inflicting serious injury is not a recognized offense in North Carolina, the trial court erred by denying the defendant's motion to dismiss a charge of felon in possession when it was based on a felony conviction for attempted assault. The court noted that prior cases—*State v. Currence*, 14 N.C. App. 263 (1972), and *State v. Barksdale*, 181 N.C. App. 302 (2007)—held that attempted assault is not a crime. It concluded that the trial court lacked jurisdiction to enter judgment on the attempted assault conviction and that therefore that judgment was void. The court rejected the State's argument that a different result should obtain because the defendant plead guilty to attempted assault as part of a plea agreement, stating: "The fact that Defendant's attempted assault conviction stemmed from a guilty plea rather than a jury verdict does not . . . affect the required jurisdictional analysis." The court also rejected the State's argument that the defendant cannot collaterally attack the validity of his attempted assault conviction in an appeal on the felon in possession case; the State had argued that the appropriate procedural mechanism was a motion for appropriate relief. Finally, the court held that for the reasons noted above, the attempted assault conviction could not support a determination that the defendant attained habitual felon status.

Sentencing defendant for both first-degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge violated protection against double jeopardy

State v. Barksdale, __ N.C. App. __, 768 S.E.2d 126 (Dec. 2, 2014). The State conceded and the court held that by sentencing the defendant for both first-degree kidnapping and the underlying sexual assault that was an element of the kidnapping charge a violation of double jeopardy occurred.

Evidence of restraint was insufficient to support kidnapping conviction where the restraint was inherent in underlying felonies of rape and sexual assault

State v. Parker, __ N.C. App. __, 768 S.E.2d 1 (Dec. 2, 2014). In a case in which the defendant was convicted of kidnapping, rape and sexual assault, because the restraint supporting the kidnapping charge was inherent in the rape and sexual assault, the kidnapping conviction cannot stand. The court explained:

> Defendant grabbed Kelly from behind and forced her to the ground. Defendant put his knee to her chest. He grabbed her hair in order to turn her around after penetrating her vaginally from behind, and he put his hands around her throat as he penetrated her vaginally again and forced her to engage him in oral sex. Though the amount of force used by Defendant in restraining Kelly may have been more than necessary to accomplish the rapes and sexual assault, the restraint was inherent "in the actual commission" of those acts. Unlike in *Fulcher*, where the victims' hands were bound before any sexual offense was committed, Defendant's acts of restraint occurred as part of the commission of the sexual offenses.

(citation omitted).

(1) Failure to provide identifying information during lawful stop can constitute resist, delay, or obstruct; (2) Sufficient evidence supported conviction for assault causing physical injury on a law enforcement officer

State v. Friend, __ N.C. App. __, 768 S.E.2d 146 (Dec. 2, 2014). (1) The trial court properly denied the defendant's motion to dismiss the charge of resisting, delaying, or obstructing a public officer where the evidence showed that the defendant refused to provide the officer with his identification so that the officer could issue a citation for a seatbelt violation. The court held: "failure to provide information about one's identity during a lawful stop can constitute resistance, delay, or obstruction within the meaning of [G.S.] 14-223." It reasoned that unlike failing to provide a social security number, the "Defendant's refusal to provide identifying information did hinder [the] Officer . . . from completing the seatbelt citation." It continued:

> There are, of course, circumstances where one would be excused from providing his or her identity to an officer, and, therefore, not subject to prosecution under N.C. Gen. Stat. §14-223. For instance, the Fifth Amendment's protection against compelled self-incrimination might justify a refusal to provide such information; however, as the United States Supreme Court has observed, "[a]nswering a request to disclose a name is likely to be so insignificant in the scheme of things as to be incriminating only in unusual circumstances.

Hiibel v. Sixth Judicial Dist. Court of Nev., 542 U.S. 177, 191, 124 S. Ct. 2451, 2461, 159 L. Ed.2d 292, 306 (2004). In the present case, Defendant has not made any showing that he was justified in refusing to provide his identity to Officer Benton.

(2) The court rejected the defendant's argument that the trial court erred by denying his motion to dismiss the charge of assault causing physical injury on a law enforcement officer, which occurred at the local jail. After arresting the defendant, Captain Sumner transported the defendant to jail, escorted him to a holding cell, removed his handcuffs, and closed the door to the holding cell, believing it would lock behind him automatically. However, the door remained unlocked. When Sumner noticed the defendant standing in the holding cell doorway with the door open, he told the defendant to get back inside the cell. Instead, the defendant tackled Sumner. The defendant argued that there was insufficient evidence that the officer was discharging a duty of his office at the time. The court rejected this argument, concluding that "[b]y remaining at the jail to ensure the safety of other officers," Sumner was discharging the duties of his office. In the course of its holding, the court noted that "unlike the offense of resisting, delaying, or obstructing an officer, . . . criminal liability for the offense of assaulting an officer is not limited to situations where an officer is engaging in lawful conduct in the performance or attempted performance of his or her official duties."

(1) Trial court erred by sentencing defendant for both habitual misdemeanor assault and assault on a female where both convictions arose out of same assault; (2) Trial court erred by entering judgment and sentencing defendant on three counts of habitual violation of a DVPO and one count of interfering with a witness based on same conduct

State v. Jones, __ N.C. App. __, 767 S.E.2d 341 (Dec. 2, 2014). (1) The trial court erred by sentencing the defendant for both habitual misdemeanor assault and assault on a female where both convictions arose out of the same assault. The statute provides that "unless the conduct is covered under some other provision of law providing greater punishment," an assault on a female is a Class A1 misdemeanor. Here, the conduct was covered under another provision of law providing greater punishment, habitual misdemeanor assault, a Class H felony. (2) The trial court erred by entering judgment and sentencing the defendant on both three counts of habitual violation of a DVPO and one count of interfering with a witness based on the same conduct (sending three letters to the victim asking her not to show up for his court date). The DVPO statute states that "[u]nless covered under some other provision of law providing greater punishment," punishment for the offense at issue was a Class H felony. Here, the conduct was covered under a provision of law providing greater punishment, interfering with a witness, which is a Class G felony.

Impaired Driving

Statutory right to be re-advised of implied consent rights before blood draw was not triggered where defendant volunteered to submit to a blood test without prompting

State v. Sisk, ___ N.C. App. ___, 766 S.E.2d 694 (Dec. 31, 2014). In this habitual impaired driving case, the trial court did not err in admitting the defendant's blood test results into evidence. The court rejected the defendant's argument that the officer's failure to re-advise him of his implied consent rights before the blood draw violated both G.S. 20-16.2 and 20-139.1(b5). Distinguishing *State v. Williams*, __ N.C. App. __, 759 S.E.2d 350 (2014), the court noted that in this case the defendant—without any prompting—volunteered to submit to a blood test. The court concluded: "Because the prospect of Defendant submitting to a blood test originated with Defendant—as opposed to originating

with [the officer]—we are satisfied that Defendant's statutory right to be readvised of his implied consent rights was not triggered."

(1) In a DWI case, defendant lacked standing to challenge the G.S. 20-179(d)(1) aggravating factor as an unconstitutional mandatory presumption; (2) Use of breath test result to establish factual basis for plea and to support aggravating factor to enhance punishment did not violate double jeopardy

State v. Roberts, __ N.C. App. __, 767 S.E.2d 543 (Dec. 2, 2014). (1) In this DWI case, the court rejected the defendant's invitation to decide whether G.S. 20-179(d)(1) (aggravating factor to be considered in sentencing of gross impairment or alcohol concentration of 0.15 or more) creates an unconstitutional mandatory presumption. Defendant challenged that portion of the statute that provides: "For purposes of this subdivision, the results of a chemical analysis presented at trial or sentencing shall be sufficient to prove the person's alcohol concentration, shall be conclusive, and shall not be subject to modification by any party, with or without approval by the court." In this case, instead of instructing the jury in accordance with the challenged language, the trial court refrained from incorporating any reference to the allegedly impermissible mandatory presumption and instructed the prosecutor to refrain from making any reference to the challenged language in the presence of the jury. Because the jury's decision to find the G.S. 20-179(d)(1) aggravating factor was not affected by the challenged statutory provision, the defendant lacked standing to challenge the constitutionality of the statutory provision. (2) The court rejected the defendant's argument that a double jeopardy violation occurred when the State used a breath test result to establish the factual basis for the defendant's plea and to support the aggravating factor used to enhance punishment. The court reasoned that the defendant was not subjected to multiple punishments for the same offense, stating: "instead of being punished twice, he has been subjected to a more severe punishment for an underlying substantive offense based upon the fact that his blood alcohol level was higher than that needed to support his conviction for that offense."

G.S. 20-16.2 is not applicable to cases where blood is drawn pursuant to a search warrant and defendant had no constitutional right to have a witness present for execution of search warrant

State v. Chavez, __ N.C. App. __, 767 S.E.2d 581 (Dec. 2, 2014). The court rejected the defendant's argument that the right to have a witness present for blood alcohol testing performed under G.S. 20-16.2 applies to blood draws taken pursuant to a search warrant. The court also rejected the defendant's argument that failure to allow a witness to be present for the blood draw violated his constitutional rights, holding that the defendant had no constitutional right to have a witness present for the execution of the search warrant.

(1) Results of blood test of sample taken from defendant pursuant to search warrant after he refused to submit to breath test were admissible under G.S. 20-139.1 and procedures for obtaining sample did not have to comply with G.S. 20-16.2; (2) Officer had reasonable suspicion to stop defendant's moped based on helmet infraction

State v. Shepley, ___ N.C. App. ___, 764 S.E.2d 658 (Nov. 4, 2014). (1) Relying on *State v. Drdak*, 330 N.C. 587, 592-93 (1992), and *State v. Davis*, 142 N.C. App. 81 (2001), the court held that where an officer obtained a blood sample from the defendant pursuant to a search warrant after the defendant refused to submit to a breath test of his blood alcohol level, the results were admissible under G.S. 20-139.1(a)

and the procedures for obtaining the blood sample did not have to comply with G.S. 20-16.2. (2) The officer had reasonable suspicion to stop the defendant's moped based on a helmet infraction.

(1) There was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32); (2) Assuming there was sufficient evidence to submit issue to jury, trial court erred by abbreviating definition of public vehicular area in jury instructions

State v. Ricks, __ N.C. App. __, 764 S.E.2d 692 (Nov. 18, 2014). (1) In this impaired driving case, there was insufficient evidence that a cut through on a vacant lot was a public vehicular area within the meaning of G.S. 20-4.01(32). The State argued that the cut through was a public vehicular area because it was an area "used by the public for vehicular traffic at any time" under G.S. 20-4.01(32)(a). The court concluded that the definition of a public vehicular area in that subsection "contemplates areas generally open to and used by the public for vehicular traffic as a matter of right or areas used for vehicular traffic that are associated with places generally open to and used by the public, such as driveways and parking lots to institutions and businesses open to the public." In this case there was no evidence concerning the lot's ownership or that it had been designated as a public vehicular area by the owner. (2) Even if there had been sufficient evidence to submit the issue to the jury, the trial court erred in its jury instructions. The trial court instructed the jury that a public vehicular area is "any area within the State of North Carolina used by the public for vehicular traffic at any time including by way of illustration and not limitation any drive, driveway, road, roadway, street, alley or parking lot." The court noted that:

> the entire definition of public vehicular area in [G.S.] 20-4.01(32)(a) is significant to a determination of whether an area meets the definition of a public vehicular area; the examples are not separable from the statute. . . . [As such] the trial court erred in abbreviating the definition of public vehicular area in the instructions to the jury and by preventing defendant from arguing his position in accordance with [G.S.] 20-4.01(32)(a)."

Robbery

(1) Trial court properly denied defendant's motion to dismiss one of two charges of attempted robbery where defendant and accomplices attempted to rob two individuals inside a single residence; (2) Attempted robbery of second individual inside residence was part of group's common plan

State v. Jastrow, __ N.C. App. __, 764 S.E.2d 663 (Nov. 18, 2014). (1) Where the defendant and his accomplices attempted to rob two victims inside a residence, the trial court properly denied the defendant's motion to dismiss one of the charges. The defendant argued that because only one residence was involved, only one charge was proper. Distinguishing cases holding that only one robbery occurs when the defendant robs a business of its property by taking it from multiple employees, the court noted that here the defendant and his accomplices demanded that both victims turn over their own personal property. (2) Although the group initially planned to rob just one person, the defendant properly was convicted of attempting to rob a second person they found at the residence. The attempted robbery of the second person was in pursuit of the group's common plan.

Sexual Offenses

(1) Multiple sexual acts during a single encounter supported convictions for two counts of indecent liberties with a single victim; (2) Evidence was insufficient to support a sexual offense conviction

State v. Pierce, ___ N.C. App. ___, 767 S.E.2d 860 (Dec. 31, 2014). (1) The defendant was properly convicted of two counts of indecent liberties with victim Melissa in Caldwell County. The State presented evidence that the defendant had sex with his girlfriend in the presence of Melissa, performed oral sex on Melissa, and then forced his girlfriend to perform oral sex on Melissa while he watched. The defendant argued that this evidence only supports one count of indecent liberties with a child. The court disagreed, holding that pursuant to *State v. James*, 182 N.C. App. 698 (2007), multiple sexual acts during a single encounter may form the basis for multiple counts of indecent liberties. (2) With respect to a sexual offense charge allegedly committed on Melissa in Burke County, the court held that the State failed to present substantial evidence that a sexual act occurred. The only evidence presented by the State regarding a sexual act that occurred was Melissa's testimony that the defendant placed his finger inside her vagina. However, this evidence was not admitted as substantive evidence. The State presented specific evidence that the defendant performed oral sex on Melissa—a sexual act under the statute--but that act occurred in Caldwell County, not Burke. Although Melissa also testified generally that she was "sexually assaulted" more than 10 times, presumably in Burke County, nothing in her testimony clarified whether the phrase "sexual assault," referred to sexual acts within the meaning of G.S. 14-27.4A, vaginal intercourse, or acts amounting only to indecent liberties with a child. Thus, the court concluded the evidence is insufficient to support the Burke County sexual offense conviction.

Counsel was not ineffective for failing to make a double jeopardy objection where defendant was properly convicted and sentenced for both statutory rape and second-degree rape

State v. Banks, 367 N.C. 652 (Dec. 19, 2014). Because the defendant was properly convicted and sentenced for both statutory rape and second-degree rape when the convictions were based on a single act of sexual intercourse, counsel was not ineffective by failing to make a double jeopardy objection. The defendant was convicted of statutory rape of a 15-year-old and second-degree rape of a mentally disabled person for engaging in a single act of vaginal intercourse with the victim, who suffers from various mental disorders and is mildly to moderately mentally disabled. At the time, the defendant was 29 years old and the victim was 15. The court concluded that although based on the same act, the two offenses are separate and distinct under the *Blockburger* "same offense" test because each requires proof of an element that the other does not. Specifically, statutory rape involves an age component and second-degree rape involves the act of intercourse with a victim who suffers from a mental disability or mental incapacity. It continued:

> Given the elements of second-degree rape and statutory rape, it is clear that the legislature intended to separately punish the act of intercourse with a victim who, because of her age, is unable to consent to the act, and the act of intercourse with a victim who, because of a mental disability or mental incapacity, is unable to consent to the act. . . .

Because it is the General Assembly's intent for defendants to be separately punished for a violation of the second-degree rape and statutory rape statutes arising from a single act of sexual intercourse when the elements of each offense are satisfied, defendant's argument that he was prejudiced by counsel's failure to raise the argument of double jeopardy would fail. We therefore conclude that defendant was not prejudiced.

Trial court erred by excluding defense evidence that rape victim and her neighbor had a consensual sexual encounter the day before the rape occurred

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). In a rape case, the trial court erred by excluding defense evidence that the victim and her neighbor had a consensual sexual encounter the day before the rape occurred. This prior sexual encounter was relevant because it may have provided an alternative explanation for the existence of semen in her vagina; "because the trial court excluded relevant evidence under Rule 412(b)(2), it committed error." However, the court went on to conclude that no prejudice occurred, in part because multiple DNA tests identified the defendant as the perpetrator.

(1) Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim; (2) Neither first-degree statutory sexual offense nor crime against nature require proof of a sexual purpose; (3) Proof of penetration is not required in sexual offense case involving fellatio; (4) There was insufficient evidence of penetration to support conviction for crime against nature

In re J.F., __ N.C. App. __, 766 S.E.2d 341 (Nov. 18, 2014). (1) In a delinquency case where the petitions alleged sexual offense and crime against nature in that the victim performed fellatio on the juvenile, the court rejected the juvenile's argument that the petitions failed to allege a crime because the victim "was the actor." Sexual offense and crime against nature do not require that the accused perform a sexual act on the victim, but rather that the accused engage in a sexual act with the victim. (2) The court rejected the juvenile's argument that to prove first-degree statutory sexual offense and crime against nature the prosecution had to show that the defendant acted with a sexual purpose. (3) In a sexual offense case involving fellatio, proof of penetration is not required. (4) Penetration is a required element of crime against nature and in this case insufficient evidence was presented on that issue. The victim testified that he licked but did not suck the juvenile's penis. Distinguishing *In re Heil*, 145 N.C. App. 24 (2001) (concluding that based on the size difference between the juvenile and the victim and "the fact that the incident occurred in the presumably close quarters of a closet, it was reasonable for the trial court to find . . . that there was some penetration, albeit slight, of juvenile's penis into [the four-year-old victim's] mouth"), the court declined the State's invitation to infer penetration based on the surrounding circumstances.

Trial court erred by denying defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act

State v. Spence, __ N.C. App. __, 764 S.E.2d 670 (Nov. 18, 2014). In this child sexual abuse case, the trial court erred by denying the defendant's motion to dismiss first-degree sex offense charges where there was no substantive evidence of a sexual act; the evidence indicated only vaginal penetration, which cannot support a conviction of sexual offense.

Trial court erred by failing to dismiss one of three charged counts of rape where victim ambiguously characterized the number of times defendant penetrated her vagina as "a couple" of times

State v. Blow, ___ N.C. App. ___, 764 S.E.2d 230 (Nov. 4, 2014). In a child sexual assault case in which the defendant was convicted of three counts of first-degree rape, the court held, over a dissent, that the trial court erred by failing to dismiss one of the rape charges. The court agreed with the defendant that because the victim testified that the defendant inserted his penis into her vagina "a couple" of times, without identifying more than two acts of penetration, the State failed to present substantial evidence of three counts of rape. The court found that the defendant's admission to three instances of "sex" with the victim was not an admission of vaginal intercourse because the defendant openly admitted to performing oral sex and other acts on the victim but denied penetrating her vagina with his penis.

Defenses

Trial court did not err by denying defense request to instruct jury on imperfect self-defense where there was no evidence that defendant tried to get away from victim or attempted to end the altercation

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). In this homicide case in which defendant was found guilty of second-degree murder, the trial court did not err by denying defendant's request to instruct the jury on voluntary manslaughter based on imperfect self-defense. The trial court instructed the jury on first-degree murder, second-degree murder and voluntary manslaughter based on heat of passion. During the charge conference, defendant requested an instruction on voluntary manslaughter based on imperfect self-defense. The trial court denied this request. On appeal, defendant argued that evidence of his stature and weight compared with that of the victim and testimony that the victim held him in a headlock when the stabbing occurred was sufficient to allow the jury to infer that he reasonably believed it was necessary to kill the victim to protect himself from death or great bodily harm. The court disagreed, concluding:

> Here, the uncontroverted evidence shows that defendant fully and aggressively participated in the altercation with [the victim] in the yard of [the victim's] home. No evidence was presented that defendant tried to get away from [the victim] or attempted to end the altercation. Where the evidence does not show that defendant reasonably believed it was necessary to stab [the victim], who was unarmed, in the chest to escape death or great bodily harm, the trial court properly denied defendant's request for a jury instruction on voluntary manslaughter based upon imperfect self-defense.

Even if justification is an affirmative defense to possession of a firearm by a felon, defendant was not entitled to an instruction on duress or necessity in this case

State v. Edwards, ___ N.C. App. ___, 768 S.E.2d 619 (Feb. 17, 2015). The trial court did not err by denying defendant's request for an instruction on duress or necessity as a defense to possession of a firearm by a felon. On appeal, defendant urged the court to adopt the reasoning of *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000), an opinion recognizing justification as an affirmative defense to possession of a firearm by a felon. The court declined this invitation, instead holding that assuming without deciding that the *Deleveaux* rule applies, defendant did not satisfy its prerequisites. Specifically, even when viewed in the light most favorable to defendant, the evidence does not support a conclusion that defendant, upon possessing the firearm, was under unlawful and present, imminent, and impending threat of death or serious bodily injury.

Though issue was not raised on appeal, court issued warning about trial delays in a case where nearly four years elapsed between arrest and trial

State v. Broussard, ___ N.C. App. ___, 768 S.E.2d 367 (Feb. 17, 2015). Although the issue does not appear to have been raised by the defendant on appeal in this second-degree murder case, the court noted: "[O]ur review of the record shows defendant was arrested on 1 September 2009 and was tried in August and September of 2013, almost four years later. . . . The record on appeal does not show any motions for speedy trial or arguments of prejudice from defendant." The court continued, in what may be viewed as a warning about trial delays:

> While we are unaware of the circumstances surrounding the delay in bringing defendant to trial, it is difficult to conceive of circumstances where such delays are in the interest of justice for defendant, his family, or the victim's family, or in the best interests of our citizens in timely and just proceedings.

Trial court did not err by denying defendant's motion to dismiss on grounds of excessive pre-indictment delay where defendant failed to show that he sustained actual and substantial prejudice as a result of delay

State v. Floyd, ___ N.C. App. ___, 766 S.E.2d 361 (Dec. 16, 2014), *review allowed*, ___ N.C. ___, 771 S.E.2d 295 (Apr. 9, 2015). The trial court did not err by denying the defendant's motion to dismiss on grounds of excessive pre-indictment delay. A challenge to a pre-indictment delay is predicated on an alleged violation of the due process clause. To prevail, a defendant must show both actual and substantial prejudice from the delay and that the delay was intentional on the part of the State in order to impair defendant's ability to defend himself or to gain tactical advantage. Here, the defendant failed to show that he sustained actual and substantial prejudice as a result of the delay.

Trial court erred by denying defendant's request for an instruction on entrapment

State v. Ott, __ N.C. App. __, 763 S.E.2d 530 (Oct. 7, 2014). In this drug case, the trial court erred by denying the defendant's request for an instruction on entrapment. The court agreed with the defendant that the plan to sell the pills originated in the mind of the defendant's friend Eudy, who was acting as an agent for law enforcement, and the defendant was only convinced to do so through trickery and persuasion. It explained:

> [A]ccording to defendant's evidence, Eudy was acting as an agent for the Sherriff's office when she approached defendant, initiated a conversation about selling pills to her buyer, provided defendant the pills, and coached her on what to say during the sale. While it is undisputed that defendant was a drug user, defendant claimed that she had never sold pills to anyone before. In fact, the only reason she agreed to sell them was because she was "desperate for some pills," and she believed Eudy's story that she did not want her husband to find out what she was doing. Defendant's testimony established that Eudy told defendant exactly what to say such that, during the encounter, defendant was simply playing a role which was defined and created by an agent of law enforcement. In sum, this evidence, if believed, shows that Eudy not only came up with the entire plan to sell the drugs but also persuaded defendant, who denied being a drug dealer, to sell the pills to [the undercover officer] by promising her pills in exchange and by pleading with her for her help to keep the sale secret from her husband. Furthermore, viewing defendant's evidence as true, she had no predisposition to commit the crime of selling pills.

Sex Offender Registration and Satellite-Based Monitoring

(1) Registration requirements that took effect January 1996 applied to offenders such as defendant who were serving time for a reportable sexual offense; (2) There was insufficient evidence of submitting information under false pretenses to the sex offender registry where defendant never filled out a verification form listing a false address

State v. Surratt, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2015). (1) The State presented sufficient evidence to support a conviction for failure to register as a sex offender. The court rejected the defendant's argument that he was not required to register in connection with a 1994 indecent liberties conviction. The court took judicial notice of the fact that the defendant's prison release date for that conviction was Sept. 24, 1995 but that he was not actually released until Jan. 24, 1999 because he was serving a consecutive term for crime against nature. Viewing the later date as the date of the defendant's release from prison, the court held that the registration requirements were applicable to him because they took effect in January 1996 and applied to offenders then serving time for a reportable sexual offense. The court further held that because the defendant was a person required to register when the 2008 amendments to the sex offender registration statute took effect, those amendments applied to him as well. (2) Where there was no evidence that the defendant willfully gave an address he knew to be false, the evidence was insufficient to support a conviction for submitting information under false pretenses to the sex offender registry in violation of G.S. 14-208.9A(a)(1). The State's theory of the case was that the defendant willfully made a false statement to an officer, stating that he continued to reside at his father's residence. Citing prior case law, the court held that the statute only applies to providing false or misleading information on forms submitted pursuant to the sex offender law. Here, the defendant never filled out any verification form listing the address in question. It ruled: "An executed verification form is required before one can be charged with falsifying or forging the document."

In a failure to register case based on willful failure to return a verification form, trial court erred by denying defendant's motion to dismiss where there was insufficient evidence of various elements of the offense

State v. Moore *(No. 14-1033),* ___ N.C. App. ___, 770 S.E.2d 131 (April 7, 2015), *temporary stay allowed*, ___ N.C. ___, 771 S.E.2d 533 (Apr. 27, 2015). In this failure to register case based on willful failure to return a verification form as required by G.S. 14-208.9A, the trial court erred by denying the defendant's motion to dismiss. To prove its case, the State must prove that the defendant actually received the letter containing the verification form. It noted: "actual receipt could have been easily shown by the State if it simply checked the box marked "Restricted Delivery?" and paid the extra fee to restrict delivery of the … letter to the addressee, the sex offender." The court also found that there was insufficient evidence that the sheriff's office made a reasonable attempt to verify the defendant's address, another element of the offense. The evidence indicated that the only attempt the Deputy made to verify that the defendant still resided at his last registered address was to confirm with the local jail that the defendant was not incarcerated. Finally, the court found that State failed to show any evidence that the defendant willfully failed to return the verification form.

Trial court did not err by imposing SBM where findings of fact were supported by competent evidence

State v. Smith, ___ N.C. App. ___, 769 S.E.2d 838 (Mar. 17, 2015). In this indecent liberties case, the trial court did not err by considering evidence regarding the age of the alleged victims, the temporal proximity of the events, and the defendant's increasing sexual aggressiveness; making findings of fact based on this evidence; and imposing SBM. Although the trial court could not rely on older charges that had been dismissed, the other evidence supported the trial court's findings, was not part of the STATIC-99 evaluation, and could be considered by the trial court.

Where indictment alleged failure to register based on a change of address, there was insufficient evidence that defendant changed his address after being released from incarceration

State v. Barnett, ___ N.C. App. ___, 768 S.E.2d 327 (Jan. 20, 2015), *temporary stay allowed*, ___ N.C. ___, 767 S.E.2d 856 (Feb. 6, 2015). In a failure to register case, there was insufficient evidence that the defendant changed his address. The indictment alleged that the defendant failed to notify the sheriff's office within three business days of his change of address; it did not allege that he failed to update his registration information upon release from a penal institution. The court rejected the State's argument that when the defendant was incarcerated after his initial registration, his subsequent release from incarceration required him to register a change of address, concluding that the statutory provisions regarding registration upon release from a penal institution applied to such situations.

(1) Trial court did not err by relying on federal SORNA statute to deny defendant's petition to terminate his sex offender registration; (2) Retroactive application of SORNA does not constitute an ex post facto violation

In re Hall, ___ N.C. App. ___, 768 S.E.2d 39 (Dec. 31, 2014). (1) The trial court did not err by relying on the federal SORNA statute to deny the defendant's petition to terminate his sex offender registration. The language of G.S. 14-208.12A shows a clear intent by the legislature to incorporate the requirements of SORNA into NC's statutory provisions governing the sex offender registration process and to retroactively apply those provisions to sex offenders currently on the registry. (2) The retroactive

application of SORNA does not constitute an ex post facto violation. The court noted that it is well established that G.S. 14-208.12A creates a "non-punitive civil regulatory scheme." It went on to reject the defendant's argument that the statutory scheme is so punitive as to negate the legislature's civil intent.

(1) Indictment was not defective in a failing to register case; (2) Trial court did not err by allowing State to amend indictment to expand the dates of offense where amendment did not substantially alter charge

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). (1) In a failing to register case the indictment was not defective. The indictment alleged that the defendant failed to provide 10 days of written notice of his change of address to "the last registering sheriff by failing to report his change of address to the Wilkes County Sheriff's Office." The defendant allegedly moved from Burke to Wilkes County. The court rejected the defendant's argument that the indictment was fatally defective for not alleging that he failed to provide "in-person" notice. It reasoned that the defendant was not prosecuted for failing to make an "in person" notification, but rather for failing to give 10 days of written notice, which by itself is a violation of the statute. The court also rejected the defendant's argument that an error in the indictment indicating that the Wilkes County Sheriff's Office was the "the last registering sheriff" (in fact the last registering sheriff was the Burke County sheriff), invalidated the indictment. (2) The trial court did not err by allowing the State to amend the indictment and expand the dates of offense from 7 November 2012 to June to November 2012. It reasoned that the amendment did not substantially alter the charge "because the specific date that defendant moved to Wilkes County was not an essential element of the crime."

There was sufficient evidence that defendant violated sex offender registration statutes where he listed his address as the address of a non-profit organization where he could not live

State v. Crockett, ___ N.C. App. ___, 767 S.E.2d 78 (Dec. 16, 2014). There was sufficient evidence that the defendant violated the sex offender registration statutes by failing to notify authorities of a change of address. The defendant listed his address as 945 North College Street, the address of the Urban Ministry Center, a non-profit organization that provides services to the homeless community. The found that "Urban Ministry is not a valid address at which Defendant could register . . . because Defendant could not live there." It explained:

> Critical to our holding . . . that Defendant did not "live" at Urban Ministry is the fact that he was not permitted to keep any personal belongings there, nor could he sleep at Urban Ministry. In addition, Urban Ministry did not permit people to "reside" at the facility, as it closes each day. The activities which Defendant, and many other homeless people, are permitted to perform at the Urban Ministry facility does not make it his "residence" because he cannot "live" there. Urban Ministry's operational hours are similar to those of a business. It is open from 8:30 a.m. to 4:00 p.m. during the week and from 9:00 a.m. to 12:30 p.m. on weekends. Visitors at Urban Ministry may use the facility for activities such as showering, napping, and changing clothes, but no one is permitted to sleep there and there are no beds. The purpose of the sex offender registration program is "to assist law enforcement agencies and the public in knowing the

> whereabouts of sex offenders and in locating them when necessary." Allowing Defendant to register Urban Ministry as a valid address would run contrary to the legislative intent behind the sex offender registration statute.

(citation omitted).

There was sufficient evidence that defendant changed his address from Burke to Wilkes County even though defendant still maintained a home in Burke County

State v. Pierce, ___ N.C. App. ___, 766 S.E.2d 854 (Dec. 16, 2014). In a failing to register case there was sufficient evidence that the defendant changed his address from Burke to Wilkes County. Among other things, a witness testified that the defendant was at his ex-wife Joann's home in Wilkes County all week, including the evenings. The court concluded: "the State presented substantial evidence that, although defendant may still have had his permanent, established home in Burke County, he had, at a minimum, a temporary home address in Wilkes County." (quotation omitted). It explained:

> [T]he evidence . . . showed that defendant still received mail, maintained a presence, and engaged in some "core necessities of daily living," at his home in Burke County. However, the evidence also would allow a jury to reasonably conclude that he temporarily resided at Joann's in Wilkes County. Specifically, [witnesses] testified that defendant was often at Joann's all week. Furthermore, [a witness] testified that defendant engaged in activities that only someone living at Joann's would do. Thus . . . the evidence supported a reasonable conclusion that not only did defendant maintain a permanent domicile in Burke County, but he also had a temporary residence or place of abode at Joann's in Wilkes County. Although defendant may have considered the house in Burke County his "home," . . . his subjective belief and even the fact that he was "in and out" of the Burke County house does not prevent him from having a second, temporary residence.

(citations omitted).

Trial court erred by ordering defendant to submit to lifetime SBM where the date of defendant's offense preceded the enactment of G.S. 14-208.6(1a)

State v. Davis, __ N.C. App. __, 767 S.E.2d 565 (Dec. 2, 2014). The State conceded and the court held that the trial court erred by requiring the defendant to submit to lifetime SBM. The trial court imposed SBM based on its determination that the defendant's conviction for first-degree rape constituted an "aggravated offense" as defined by G.S. 14-208.6(1a). However, this statute became effective on 1 October 2001 and applies only to offenses committed on or after that date. Because the date of the offense in this case was 22 September 2001, the trial court erred by utilizing an inapplicable statutory provision in its determination.

Reversing the North Carolina courts, the U.S. Supreme Court held that under *Jones* and *Jardines, s*atellite based monitoring for sex offenders constitutes a search under the Fourth Amendment

Grady v. North Carolina, 575 U.S. ___, 135 S. Ct. 1368 (Mar. 30, 2015) (per curiam). Reversing the North Carolina courts, the Court held that under *Jones* and *Jardines, s*atellite based monitoring for sex offenders constitutes a search under the Fourth Amendment. The Court stated: “a State … conducts a search when it attaches a device to a person’s body, without consent, for the purpose of tracking that individual’s movements.” The Court rejected the reasoning of the state court below, which had relied on the fact that the monitoring program was “civil in nature” to conclude that no search occurred, explaining: “A building inspector who enters a home simply to ensure compliance with civil safety regulations has undoubtedly conducted a search under the Fourth Amendment.” The Court did not decide the “ultimate question of the program’s constitutionality” because the state courts had not assessed whether the search was reasonable. The Court remanded for further proceedings.

Sentencing and Probation

Trial court erred in imposing consecutive sentences based on misapprehension of G.S. 14-7

State v. Duffie, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2015). The court remanded for resentencing where the trial court imposed consecutive sentences based on a misapprehension of G.S. 14-7. The jury found the defendant guilty of multiple counts of robbery and attaining habitual felon status. The trial court sentenced the defendant as a habitual felon to three consecutive terms of imprisonment for his three common law robbery convictions, stating that “the law requires consecutive sentences on habitual felon judgments.” However, under G.S. 14-7.6, a trial court only is required to impose a sentence consecutively to “any sentence being served by” the defendant. Thus, if the defendant is not currently serving a term of imprisonment, the trial court may exercise its discretion in determining whether to impose concurrent or consecutive sentences.

Trial court lacked subject matter jurisdiction to revoke defendant’s probation when it did so after his probationary period had expired and he was not subject to a tolling period

State v. Moore *(No. 14-665),* ___ N.C. App. ___, 771 S.E.2d 766 (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant’s probation when it did so after his probationary period had expired and he was not subject to a tolling period.

Trial court lacked subject matter jurisdiction to revoke defendant’s probation when it did so after his probationary period had expired and he was not subject to a tolling period

State v. Sanders, ___ N.C. App. ___, 770 S.E.2d 749 (April 7, 2015). The trial court lacked subject matter jurisdiction to revoke the defendant’s probation when it did so after his probationary period had expired and he was not subject to a tolling period.

Defendant who acknowledged receiving revocation report, admitted allegations, and participated in hearing waived the notice requirements of G.S. 15A-1345(e); trial court had jurisdiction to revoke defendant's probation before it expired

State v. Knox, ___ N.C. App. ___, 768 S.E.2d 381 (Feb. 17, 2015). (1) Where counsel stated at the revocation hearing that defendant acknowledged that he had received a probation violation report and admitted the allegations in the report and defendant appeared and participated in the hearing voluntarily, the defendant waived the notice requirement of G.S. 15A-1345(e). (2) Because the trial court revoked defendant's probation before the period of probation expired, the court rejected defendant's argument that under G.S. 15A-1344(f) the trial court lacked jurisdiction to revoke.

Trial court erred by enhancing under G.S. 50B-4.1(d) defendant's convictions for AWDWIKISI and attempted second-degree kidnapping

State v. Jacobs, ___ N.C. App. ___, 768 S.E.2d 883 (Feb. 17, 2015). The trial court erred by enhancing under G.S. 50B-4.1(d) defendant's conviction for assault with a deadly weapon with intent to kill inflicting serious injury (AWDWIKISI) and attempted second-degree kidnapping. G.S. 50B-4.1(d) provides that a person who commits another felony knowing that the behavior is also in violation of a domestic violence protective order (DVPO) shall be guilty of a felony one class higher than the principal felony. However, subsection (d) provides that the enhancement "shall not apply to a person who is charged with or convicted of a Class A or B1 felony or to a person charged under subsection (f) or subsection (g) of this section." Subsection (g) enhances a misdemeanor violation of a DVPO to a Class H felony where the violation occurs while the defendant possesses a deadly weapon. Here, defendant was indicted for attempted first-degree murder; first-degree kidnapping, enhanced under G.S. 50B-4.1(d); AWDWIKISI, enhanced; and violation of a DVPO with the use of a deadly weapon. He was found guilty of three crimes: attempted second-degree kidnapping, enhanced; AWDWIKISI, enhanced; and violation of a DVPO with a deadly weapon pursuant to G.S. 50B-4.1(g). The court held:

> We believe the limiting language in G.S. 50B-4.1(d) - that the subsection "shall not apply to a person charged with or convicted of" certain felonies - is unambiguous and means that the subsection is not to be applied to "the person," as advocated by Defendant, rather than to certain felony convictions of the person, as advocated by the State. Accordingly, we hold that it was error for Defendant's convictions for AWDWIKISI and for attempted second-degree kidnapping to be enhanced pursuant to G.S. 50B- 4.1(d) since he was "a person charged" under subsection (g) of that statute.

State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in indictment the existence of the non-statutory aggravating factor that defendant committed sexual assault knowing that he was HIV positive

State v. Ortiz, ___ N.C. App. ___, 768 S.E.2d 322 (Dec. 31, 2014). In this sexual assault case, the State was not excused by G.S. 130A-143 (prohibiting the public disclosure of the identity of persons with certain communicable diseases) from pleading in the indictment the existence of the non-statutory aggravating factor that the defendant committed the sexual assault knowing that he was HIV positive. The court

disagreed with the State's argument that alleging the non-statutory aggravating factor would have violated G.S. 130A-143. It explained:

> This Court finds no inherent conflict between N.C. Gen. Stat. § 130A-143 and N.C. Gen. Stat. § 15A-1340.16(a4). We acknowledge that indictments are public records and as such, may generally be made available upon request by a citizen. However, if the State was concerned that including the aggravating factor in the indictment would violate N.C. Gen. Stat. § 130A-143, it could have requested a court order in accordance with N.C. Gen. Stat. § 130A-143(6), which allows for the release of such identifying information "pursuant to [a] subpoena or court order." Alternatively, the State could have sought to seal the indictment.

(citations omitted).

(1) Trial court lacked jurisdiction to revoke probation where defendant was not covered by statutory provisions authorizing tolling of probation periods for pending criminal charges; (2) Trial court erred in revoking defendant's probation in other cases where revocation was based in part on violations neither admitted by defendant nor proven by State

State v. Sitosky, ___ N.C. App. ___, 767 S.E.2d 623 (Dec. 31, 2014). (1) The trial court lacked jurisdiction to revoke the defendant's probation and activate her suspended sentences where the defendant committed her offenses prior to 1 December 2009 but had her revocation hearing after 1 December 2009 and thus was not covered by either statutory provision—G.S. 15A-1344(d) or 15A-1344(g)—authorizing the tolling of probation periods for pending criminal charges. (2) The trial court erred by revoking her probation in other cases where it based the revocation, in part, on probation violations that were neither admitted by the defendant nor proven by the State at the probation hearing.

(1) Trial court erred by determining that Tennessee offense of "domestic assault" was substantially similar to North Carolina offense of assault on a female without reviewing all relevant sections of Tennessee code; (2) Comparing elements of the offenses, court held that they are not substantially similar under G.S. 15A-1340.14(e)

State v. Sanders, 367 N.C. 716 (Dec. 19, 2014). (1) The trial court erred by determining that a Tennessee offense of "domestic assault" was substantially similar to the North Carolina offense of assault on a female without reviewing all relevant sections of the Tennessee code. Section 39-13-111 of the Tennessee Code provides that "[a] person commits domestic assault who commits an assault as defined in § 39-13-101 against a domestic abuse victim." Section 39-13-101 defines when someone commits an "assault." Here the State provided the trial court with a photocopy section 39-13-111 but did not give the trial court a photocopy of section 39-13-101. The court held: "We agree with the Court of Appeals that for a party to meet its burden of establishing substantial similarity of an out-of-state offense to a North Carolina offense by the preponderance of the evidence, the party seeking the determination of substantial similarity must provide evidence of the applicable law." (2) Comparing the elements of the offenses, the court held that they are not substantially similar under G.S. 15A-1340.14(e). The North Carolina offense does not require any type of relationship between the perpetrator and the victim but the Tennessee statutes does. The court noted: "Indeed, a woman assaulting her child or her husband could be convicted of "domestic assault" in Tennessee, but could not be convicted of "assault on a

female" in North Carolina. A male stranger who assaults a woman on the street could be convicted of "assault on a female" in North Carolina, but could not be convicted of "domestic assault" in Tennessee."

(1) Trial court did not err by ordering the defendant to serve a habitual felon sentence consecutive to sentences already being served; (2) Court rejected defendant's argument that trial court did not appreciate that a resentencing hearing must be de novo

State v. Jarman, ___ N.C. App. ___, 767 S.E.2d 370 (Dec. 16, 2014). (1) The trial court did not err by ordering the defendant to serve a habitual felon sentence consecutive to sentences already being served. The defendant argued that the trial court "misapprehend[ed]" the law "when it determined that it did not have the discretion to decide" to run the defendant's sentence concurrently with his earlier convictions. The court noted that G.S. 14-7.6 "has long provided" that habitual felon sentences "shall run consecutively with and shall commence at the expiration of any sentence being served by the person sentenced under this section." (2) The court rejected the defendant's argument that the trial court did not appreciate that a resentencing hearing must be de novo.

Post Conviction

Counsel was not per se ineffective when he was briefly absent during testimony regarding codefendants

Woods v. Donald, 575 U.S. ___, 135 S. Ct. 1372 (Mar. 30, 2015) (per curiam). In this habeas corpus case, the Court reversed the Sixth Circuit, which had held that defense counsel provided per se ineffective assistance of counsel under *United States v. Cronic*, 466 U. S. 648 (1984), when he was briefly absent during testimony concerning other defendants. The Court determined that none of its decisions clearly establish that the defendant is entitled to relief under *Cronic*. The Court clarified: "We have never addressed whether the rule announced in *Cronic* applies to testimony regarding codefendants' actions." The Court was however careful to note that it expressed no view on the merits of the underlying Sixth Amendment principle.