

CRIMINAL CASE UPDATE

Cases covered include reported decisions from the North Carolina Appellate Courts, the Fourth Circuit Court of Appeals, and the U.S. Supreme Court decided between Sept. 15, 2020 and May 18, 2021. To view all of the summaries, go to the [Criminal Case Compendium](#). To obtain the summaries automatically by email, sign up for the [Criminal Law Listserv](#).

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Appellate Issues

Where judgment on second count of obtaining property by false pretenses was arrested due to double jeopardy concerns, it nevertheless constituted a “final judgment” subject to appeal.

State v. Bradsher, ___ N.C. App. ___, 852 S.E.2d 716 (Dec. 31, 2020). The Court of Appeals previously published an opinion in this case on October 6, 2020, and a summary of that opinion is available [here](#) and also appears later in this document. As noted in the earlier summary, the defendant was convicted of several charges including two counts of obtaining property by false pretenses – one count based on a theory of acting in concert, and another count based on aiding and abetting. Since the same evidence supported both false pretenses counts, raising double jeopardy concerns, the trial court arrested judgment on the acting in concert count and only entered judgment on the aiding and abetting count. In this revised opinion, the appellate court added a discussion of the defendant’s ability to appeal from that arrested judgment. Citing to *State v. Pulaski*, 326 N.C. 434 (1990), the court explained that an arrest of judgment can have the effect of vacating the verdict in some cases, such as when a judgment is arrested due to a fatal flaw in the indictment. But when a judgment is arrested only to avoid double jeopardy concerns, it remains on the docket and can be revisited on remand. In this case, since judgment on the acting in concert count was arrested only because of double jeopardy concerns, the defendant’s appeal as to that count was from a “final judgment” and therefore properly before the appellate court.

(1) Despite failing to make an offer of proof, defendant’s evidentiary challenge was preserved based on admission of the witness’s plea transcript and the context of defendant’s questions; (2) The trial court did not abuse its discretion by excluding evidence of witness’s *Alford* plea as confusing to the jury; (3) Defendant’s unpreserved SBM challenge did not warrant grant of certiorari and invocation of Rule 2

State v. Tysinger, ___ N.C. App. ___, 853 S.E.2d 189 (Dec. 15, 2020). This Davidson County case involved the sexual abuse of a girl at ages 10 and 13. The defendant was the child’s grandfather. In addition to assaulting the child, the defendant also abused the child’s mother, his daughter. The child’s mother reportedly traded sex with her daughter for drugs from the defendant. The child’s mother cooperated with the investigation. She pled guilty pursuant to *Alford* to attempted felony child abuse on the condition that she truthfully testify against the defendant at his trial. Defense counsel thoroughly questioned the child’s mother regarding her plea arrangement, but the trial court sustained an objection to questions relating to the *Alford* aspect of the plea. It ruled that the evidence that the child’s mother took an *Alford* plea was not relevant and, if it was relevant, that it “did not survive the [Rule 403] balancing test.” Slip op. at 4. The defendant was convicted of all counts at trial and sentenced to a minimum term of 1200 months. The trial court also ordered lifetime sex offender registration and satellite-based monitoring without objection from the defendant. He appealed, challenging the trial court’s

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decision to exclude evidence of the *Alford* nature of the plea. He also sought certiorari review of the SBM order, as he failed to preserve his direct appeal of that issue.

(1) The defendant's objection to the evidentiary ruling was preserved. While the defendant failed to make an offer of proof by conducting voir dire of the witness, the plea transcript with the agreement between the State and the child's mother was made a part of the record. Trial counsel's extensive questioning about the plea deal also made the objection obvious from context, thus preserving the issue for appellate review.

(2) The defendant claimed that the *Alford* plea was relevant to the credibility of the witness and that the trial court erred in sustaining the objection to that line of questioning, causing prejudicial error. The court assumed that the *Alford* nature of the plea was relevant evidence, but found no abuse of discretion in the trial court's exclusion of the evidence under Rule 403 of the North Carolina Rules of Evidence as potentially confusing to the jury:

Under the circumstances of this case, we agree with the trial court that evidence [the] mother entered an *Alford* plea would serve to confuse the jury regarding the legal details of her plea. In particular, someone would have to explain the meaning of an *Alford* plea, and [the] mother's own understanding of the exact meaning of an *Alford* plea may have been different than the technical legal meaning or the intent Defendant assumes she had. Slip. op. at 14.

(3) The defendant failed to object on any basis to the order imposing SBM at the time of its entry and failed to give written notice of appeal of the order (as required for civil matters such as SBM orders). He sought review via petition for writ of certiorari and asked the court to invoke Rule 2 of the North Carolina Rules of Appellate Procedure to reach the merits of his unpreserved argument. The court declined both requests and dismissed the argument, finding the circumstances did not warrant the "extraordinary steps" of both granting certiorari and invoking Rule 2.

Judge Murphy wrote separately to concur. According to him, the trial court erred in finding the *Alford* plea evidence irrelevant. The trial court further erred in conducting a Rule 403 balancing test after it found the evidence irrelevant and excluding the evidence on the basis of Rule 403 was an abuse of discretion. However, these errors were not prejudicial under the circumstances of the case.

(1) Sufficiency and variance challenges to offense of acting as unlicensed bail runner were not preserved where defendants failed to move to dismiss that offense; (2) Evidentiary challenge to improper lay opinion not raised at trial was waived on appeal; (3) When in conflict, the definition of "surety" in Chapter 15A controls over the definition in Chapter 58, and defendants did not qualify as sureties or accommodation bondsmen under that definition

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State v. Gettleman, ___ N.C. App. ___, 853 S.E.2d 447 (Dec. 15, 2020). This Harnett County case involved a husband and wife who indemnified a bond on behalf of an employee. The employee was roommates with the couple's son. When the employee disappeared, the family members forcibly apprehended him, causing a traffic accident and apparently discharging a gun. The three defendants were charged with various offenses, including acting as unlicensed bail bondsmen or runners. (1) Two of the defendants failed to preserve their argument that the evidence was insufficient to support conviction for acting as an unlicensed bail bondsman or runner. Trial counsel for the defendants moved to dismiss some of the offenses but failed to make any motion as to all charges generally, or as to the charge of acting as an unlicensed bondsman specifically. While a motion to dismiss a charge preserves all sufficiency issues pursuant to *State v. Golder*, 374 N.C. 238 (2020) (discussed [here](#)), where there is no motion to dismiss as to a specific charge, appellate review of the sufficiency of evidence for that offense is waived under Rule 10(a)(3) of the North Carolina Rules of Appellate Procedure. For the same reason, one of the defendant's arguments regarding an alleged fatal variance between the indictment and the jury instructions was waived on appeal.

[A]ny fatal variance argument is, essentially, an argument regarding the sufficiency of the State's evidence. . .[A]s [the defendant's] argument fundamentally presents an issue 'related to the sufficiency of the evidence' that he did not 'mov[e] to dismiss at the proper time', he has waived appellate review of this issue. Slip op. at 17.

The court declined to suspend the Rules of Appellate Procedure under Rule 2 to consider the merits of the arguments.

(2) The trial court admitted into evidence a recording of a 911 call where the caller stated that a defendant hit the victim's truck with his vehicle "on purpose." On appeal, the defendant argued this evidence amounted to improper lay opinion testimony. Trial counsel objected to this evidence at the time on hearsay and confrontation grounds but did not argue improper lay opinion. This argument was therefore waived on appeal. This defendant also failed to "specifically and distinctly" raise this argument for plain error review on appeal, and the court declined to review it. The court observed that purported violations of Rule 701 are reviewed for abuse of discretion and that plain error has not previously been applied to discretionary decisions of the trial court.

(3) Several other issues turned on whether the defendants could be considered sureties or accommodation bondsmen. Two of the defendants claimed error in the trial court's refusal to instruct on a defense of lawful action by a surety; one defendant claimed a fatal defect in the indictment for failure to charge a crime; and one defendant claimed that a motion to dismiss for insufficiency as to a kidnapping conviction should have been granted based on the lawful authority of a surety to confine or restrain the subject of the bond. Article 71 of Chapter 58 of the General Statutes of North Carolina regulates the bail bond industry. The husband and wife argued that they met the definition of a surety in G.S. 58-71-1(10) as ones liable on the bail bond in the event of bail forfeiture. As a result, they argued that the common law right of

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sureties to arrest a principal on the bond who fail to appear justified their actions. The court rejected this argument, finding that the definition of surety in Chapter 15A of the General Statutes controls when the two definitions conflict, pursuant to G.S. 58-71-195 (so stating). Under that definition, the professional bondsman who posted the bond was the surety, but the defendants were not. While the husband-and-wife-defendants were liable to the professional bondsman if the bond were to be forfeited as indemnitors, they would not be liable to the State. “Simply put, agreeing to indemnify a bond does not a surety make.” *Gettleman* Slip op. at 26. The court also rejected the alternative argument by one of the defendants that she qualified as an accommodation bondman for the same reason—the defendant did not qualify as a surety on the bond. “We conclude that Defendants did not act lawfully, either as sureties or as accommodation bondsmen. Accordingly, we overrule Defendants’ issues brought on this basis.” *Id.* at 27. The unanimous court therefore affirmed all of the convictions.

(1) Defendant failed to properly preserve for appellate review the denial of her motion to suppress; (2) The trial court did not err by denying defendant’s motion to dismiss for insufficient evidence; (3) The trial court did not err in sentencing the defendant based on a grossly aggravating factor for which the State failed to provide the statutorily required notice.

State v. McGaha, ___ N.C. App. ___, 851 S.E.2d 659 (Nov. 3, 2020). The defendant was stopped by a state trooper who saw her driving erratically. The defendant smelled of alcohol, had slurred and mumbled speech, and stumbled and staggered when she got out of her car. She registered a positive result on a portable breath test and was arrested for driving while impaired. She subsequently refused to submit to a breath test. The defendant pled guilty in district court to driving while impaired and appealed. In superior court, the defendant moved to suppress evidence and requested a bench trial. The superior court denied the motion to suppress and found the defendant guilty. At sentencing, the court found the grossly aggravating factor of a prior impaired driving conviction within seven years of the date of the offense and imposed a Level Two sentence. The defendant appealed, arguing that the trial court erred in denying her motion to suppress, the evidence was insufficient to support her conviction, and that the trial court erred in sentencing her based on a grossly aggravating factor for which the State failed to provide the statutorily required notice.

(1) The court of appeals determined that the defendant did not properly preserve the denial of her motion to suppress for review on appeal as she did not renew her objection when the evidence was offered for consideration at her bench trial. And because the defendant did not argue plain error on appeal, the court did not review the denial of the motion for plain error.

(2) The court of appeals determined that the trial court did not err by denying defendant’s motion to dismiss for insufficient evidence. The trooper testified as to his opinion that the defendant was impaired by alcohol. He based that opinion on seeing the defendant stumbling and staggering when she got out of her car, smelling a moderate odor of alcohol on her breath, hearing her mumbled and slurred speech, and observing her erratic driving. Evidence of the defendant’s refusal to submit to a breath test at the police station also was admissible evidence

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of impairment. The appellate court held that, viewed in the light most favorable to the State, this evidence was sufficient to show that the defendant was under the influence of an impairing substance.

(3) The State failed to file notice of its intent to rely at sentencing upon the aggravating factor of a prior impaired driving conviction. Such notice is required by G.S. 20-179(a1)(1) for misdemeanor impaired driving charges appealed to superior court. The court explained that the right to notice of the State's intent to rely on a prior conviction is a statutory right, not a constitutional one, and thus may be waived. The defendant admitted to the prior conviction on cross-examination, and her counsel stipulated at sentencing that she "did have the prior DWI." Slip op. at 12. Moreover, defense counsel did not object to the court's consideration of the prior conviction as an aggravating factor. The court of appeals determined that the defendant's admission and her counsel's stipulation along with her failure to object to lack of notice at the sentencing hearing amounted to a waiver of her statutory right to notice.

The record before the court was not sufficient to review defendant's speedy appeal and ineffective assistance of appellate counsel claims on direct appellate review.

State v. Quick, ___ N.C. App. ___, 851 S.E.2d 385 (Oct. 20, 2020). In 2000, the defendant was convicted of felony possession of cocaine, possession of a firearm by a felon, possession of a weapon on school property, misdemeanor resisting a public officer, second-degree trespass, and carrying a concealed weapon. The defendant gave notice of appeal in open court and a lawyer was notified that he was responsible for the defendant's appeal. That lawyer withdrew in 2002 and a new lawyer, Mr. Hinton, was appointed. Nothing was done to process the appeal until 2019 when the Appellate Defender was appointed to represent the defendant. Mr. Hinton had mistakenly allowed time to lapse for preparing the appeal. The defendant argued that he was deprived of his right to a speedy appeal and effective assistance of counsel during the nineteen years it took to process his appeal. The Court considered the following factors, derived from *State v. China*, 150 N.C. App. 469 (2002), in its analysis: the length of the delay; the reason for the delay; defendant's assertion of his right to a speedy appeal; and any prejudice to defendant. The Court found that the first two factors were relatively well-established on the record because nineteen years was a very lengthy delay and the defendant's prior appellate counsel acknowledged his mistake. However, analysis of the remaining factors required additional evidentiary development. The Court therefore dismissed the appeal without prejudice so that the Defendant could seek a Motion for Appropriate Relief in the trial court to develop the facts relevant to his claim.

(1) Court of Appeals had appellate jurisdiction despite defective notices of appeal where court granted defendant's petitions for writ of certiorari in its discretion and State did not object; (2) Sufficiency of evidence argument was not preserved and defendant's argument did not warrant invocation of Rule 2 of the Appellate Rules of Procedure; (3) Where the

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defendant was not given an opportunity to be heard and no other evidence showed that the defendant had notice and an opportunity to be heard, attorney fee award was vacated

State v. Baungartner, ___ N.C. App. ___, 850 S.E.2d 549 (Oct. 6, 2020). The defendant was convicted at trial of driving while impaired and habitual DWI in Guilford County. (1) In its discretion, the Court of Appeals granted the defendant's petitions for writ of certiorari to review the criminal judgment and civil judgment for attorney fees. Following his conviction for habitual impaired driving, the defendant filed two pro se notices of appeal. Those notices did not contain a certificate of service indicating service on the State and failed to name the court to which the appeals were taken. Appellate counsel was later appointed, who recognized the pro se notices of appeal were potentially defective and filed two petitions for writ of certiorari seeking appellate review. The pro se notices of appeal were an indication that the defendant intended to preserve his right to appellate review, and the Court of Appeals previously held in an unpublished case that the types of defects in the notices of appeal at issue did not require dismissal for lack of jurisdiction. Where (as happened here) the State does not object, the Court of Appeals may exercise jurisdiction by granting the petitions for writ of certiorari. Thus, the Court of Appeals had jurisdiction to consider the defendant's arguments.

(2) During trial, the defendant moved to dismiss for insufficiency of the evidence at the close of the State's case in chief. The defendant thereafter presented evidence and failed to renew the sufficiency motion at the close of all evidence. Because sufficiency review was therefore not preserved, the defendant requested that the Court of Appeals invoke Rule 2 of the Rules of Appellate Procedure to suspend the preservation rules and review the issue. The court declined to do so and thus affirmed the habitual DWI conviction.

(3) The trial court awarded the defendant's trial counsel attorney fees as a civil judgment without giving the defendant an opportunity to personally be heard, in violation of G.S. § 7A-455. More than 35 recent cases have reversed the attorney fee award in similar circumstances. Following that line of cases, the majority of the panel vacated the attorney fee order and remanded for a hearing on the matter where the defendant could be personally heard or for "other evidence in the record demonstrating that the defendant received notice, was aware of the opportunity to be heard on the issue, and chose not to be heard." Slip op. at 11. Judge Tyson dissented. He would have refused to grant the petitions for writ of certiorari and dismissed all the defendant's arguments as frivolous.

Indictment & Pleading Issues

(1) Indictment charging defendant with trafficking opium or heroin based on her transport and possession of Fentanyl was not defective as Fentanyl is an opiate within meaning of former G.S. 90-95(h)(4); (2) Trial court did not commit plain error when it departed from the statutory instructions in G.S. 15A-1235(b) in instructing the deadlocked jury; the trial court's instructions communicated all of the core ideas of the statutory instructions.

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State v. Garrett, ___ N.C. App. ___, 2021-NCCOA-214 (May 18, 2021). In this Pasquotank County case, the defendant was convicted of trafficking Fentanyl by possession and possession of Fentanyl with intent to sell or deliver, among other drug crimes. (1) The defendant argued on appeal that the indictment for these offenses was fatally defective because Fentanyl was not covered by the version of G.S. 90-95(h)(4) that was in effect at the time of her offense on December 31, 2006. The Court of Appeals determined that Fentanyl was an “opiate” within the meaning of the statute, which made it unlawful to possess or transport certain quantities of “opium or opiates.” The Court reasoned that though the term “opiate” typically refers to natural drugs derived from opium, like heroin, morphine and codeine, rather than synthetic drugs like Fentanyl, that definition was not universal. It agreed with the State that the General Assembly intended for the term “opiate” to include any drug that produces an opium-like effect by binding to opium receptors in the brain, regardless of whether the drug is naturally derived from opium or is synthetic or semi-synthetic. The Court noted that the common dictionary definition of the term opiate supported this broader reading as did the statutory definition of opiate. The Court rejected the defendant’s contention that the legislature’s 2018 amendment of the statute to replace the terms “opium or opiate” with “opium, opiate, or opioid” indicated that the term opiate did not include opioids, which are partially or wholly synthetic drugs produced in a lab to mimic the effects of opium. The Court held that the amendment was intended to clarify that opium, opiates, and opioids were all prohibited substances rather than to alter the applicability of the statute.

(2) The defendant also argued on appeal that the trial court’s instructions to the jury, which reported that it was deadlocked on the second day of deliberations, were improper as they did not recite the language from G.S. 15A-1235(b) (the statute that describes how a judge should instruct a deadlocked jury). The defendant did not object to the instruction at trial, so the Court of Appeals reviewed the issue for plain error. The Court compared the instructions given by the trial court to the statutory instruction, and determined that the instructions provided contained “all of the key elements and ideas from § 15A-1235(b).” Slip op. at § 39. Thus, the Court determined that jurors was properly instructed about their duty to deliberate and the defendant did not demonstrate plain error.

(1) Trial court did not commit reversible error by failing to cause the defendant to be timely served with the indictment; (2) Trial court did not err by denying defendant’s motion for standby counsel, which was made following multiple waivers of counsel and after the jury was empaneled.

State v. Crudup, ___ N.C. App. ___, 2021-NCCOA-179 (May 4, 2021). The defendant was charged and convicted of felonious breaking and entering, felonious larceny after breaking and entering, and attaining the status of habitual felon for breaking into a neighbor’s house on April 24, 2018 and stealing a coffee canister of cash.

(1) The defendant, who had been arrested two days after the crime, did not receive copies of the initial indictment or a superseding indictment until December 17, 2018 – the day his trial

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began. After receiving the indictment, the defendant said he was ready to proceed with trial. The defendant argued on appeal that the trial court's failure to follow the timely notice requirements of G.S. 15A-630 undermined his ability to prepare for trial and to assert certain statutory rights. The Court of Appeals disagreed, reasoning that although the defendant was not timely served with the indictment, the delay was not jurisdictional, and the defendant did not show that he was prejudiced by the delay. The record established that the defendant was aware of the charges, had viewed the evidence against him, including home surveillance footage, and had ample opportunity to prepare an adequate defense.

(2) The defendant, who had waived counsel twice before in the case, requested standby counsel on the second day of trial. The trial court denied the request, noting that the jury was empaneled and there were no attorneys in the courtroom other than prosecutors. The defendant then changed into his orange jail jumpsuit and refused to participate in the trial. On appeal, the defendant argued that the trial court erred in denying his request. The Court of Appeals disagreed, determining that the trial court properly exercised its discretion to deny the request.

Short-form indictments for statutory sex offense and indecent liberties using identical language for each charge and joined for trial were not defective

State v. Helms, ___ N.C. App. ___, 2021-NCCOA-142 (April 20, 2021). The defendant was tried and convicted of two counts of first-degree statutory sex offense and two counts of indecent liberties in Union County. The convictions were affirmed on appeal, but the North Carolina Supreme Court found an error with the sentence and remanded for resentencing. On remand, the trial court sentenced the defendant to two consecutive 300-month minimum sentences for the sex offenses and arrested judgment on the indecent liberties convictions. The defendant again appealed, arguing that one of the indictments for each charge were defective. This argument was preserved despite the defendant's failure to raise the issue earlier, as jurisdictional challenges to the validity of an indictment may be raised at any time. Two separate indictments were issued charging the defendant with the sex offenses using identical language under one file number and two indictments for indecent liberties similarly used identical charging language under another file number. According to the defendant, the identical language in each set of indictments could have been duplicate originals and not separate offenses. The court rejected this argument. Both sets of indictments properly charged separate offenses in compliance with the requirements for short-form indictments under G.S. 15-144.2(b) (essentials of bill for sex offense) and under G.S. 15A-924 (contents of pleadings). The offenses were also properly joined for trial pursuant G.S. 15A-926 (joinder of offenses and defendants). That statute allows the State to join offenses under a single indictment but does not require it to do so. In the words of the court:

Defendant asks this Court to adopt a new rule by holding that, when read together, N.C. Gen. Stat. § 15A-924 and N.C. Gen. Stat. § 15A-926(a) bar the

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State from using multiple short-form indictments charging the same offense with the same file number. We decline to so hold. *Helms Slip op.* at 8.

The case was therefore affirmed.

Discovery

State's failure to disclose material and exculpatory evidence before defendant's trial was a *Brady* violation warranting reversal of defendant's conviction.

State v. Best, 376 N.C. 340 (Dec. 18, 2020). Defendant filed an MAR challenging his 1993 convictions and death sentence for burglary, rape, armed robbery, and two counts of first-degree murder. The MAR alleged that the state failed to disclose material and exculpatory evidence in violation of *Brady*. At his original trial, the state's primary evidence against the defendant included his fingerprint on a knife found next to one victim's body, a partial DNA match between the defendant and a semen sample recovered from one of the victims, and testimony from a witness that the defendant spent a large amount of money on drugs shortly after the victims were robbed and murdered. The defendant made several discovery requests prior to trial in 1993, but the evidence at issue in this MAR was not produced. Part of the additional evidence was voluntarily provided to postconviction counsel in 2011, while other evidence was located by defense counsel in the attic of Whiteville City Hall. The undisclosed evidence fell into four categories: (i) forensic testing on additional hair, fiber, fingerprint, and blood samples that were not a match to the defendant; (ii) a prior interview with the testifying witness in which she said the defendant had only a small amount of money on him around the time of the crimes; (iii) reports about glass particles found in the defendant's shoes that did not match the broken window glass at the crime scene, and additional cash found in the victim's purse; and (iv) investigative materials on two undisclosed alternate suspects.

The trial court denied the MAR, finding that the defendant failed to show prejudice, and the defendant appealed. On review, the state Supreme Court considered how the undisclosed evidence could have been used to either negate or cast doubt upon the principal evidence offered by the state, and was "sufficiently disturbed by the extent of the withheld evidence in this case, and by the materiality of that evidence, that it undermines our confidence in the jury's verdict." The trial court's denial of the MAR was therefore reversed, and the case was remanded with instructions to grant the MAR and order a new trial.

Justice Newby dissented, and would have held that the defendant failed to demonstrate a reasonable probability that the jury would have reached a different result even if the additional evidence had been made available at trial.

Joinder

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Applying the proper statute, the defendant sufficiently preserved for appellate review his motion to sever defendants on the basis of antagonistic defenses

State v. Melvin, ___ N.C. ___, 2021-NCSC-39 (Apr. 16, 2021). Six defendants were alleged to have committed an armed robbery at Raleigh’s Walnut Creek Amphitheater. The trial judge granted the State’s motion to try three of the defendant’s jointly, including Mr. Melvin. Before and during trial, Melvin repeatedly moved to sever his case from that against one of his co-defendants, Mr. Baker. After all three defendants were convicted, Melvin and Baker appealed, arguing that the trial court should have granted their motions for severance based on antagonistic defenses. The Court of Appeals concluded unanimously that the that their claims were not properly preserved for appeal, because neither had expressly argued before trial that they planned to present antagonistic defenses. *State v. Melvin*, No. COA18-843, 2019 WL 6134204 (N.C. Ct. App. 2019).

Melvin sought and obtained discretionary review by the Supreme Court, asking the court to review the Court of Appeals’ decision as to his objection to joint trial with Mr. Baker. The Supreme Court reversed, concluding that the Court of Appeals erred by considering only Melvin’s pretrial motion for severance and not considering his subsequent motions made after the close of evidence, after closing argument, and after conviction before sentencing. Under G.S. 15A-927, a trial court must deny joinder or grant severance of defendants whenever (1) the court finds *before trial* that severance is necessary to protect a defendant’s speedy trial right or to promote a fair determination of guilt or innocence, or (2) the trial court finds *during trial* that severance is necessary to achieve a fair determination of guilt or innocence. The statute thus contemplates objections both before trial and during trial, and defendants may therefore preserve severance claims for appellate review by objecting at any point during the trial. The Court of Appeals’ conclusion that Melvin’s argument for severance was not preserved was based on that court’s erroneous application of the rule for motions to sever *offenses*, which, under G.S. 15A-952, must generally be made with specificity before trial. There is no similar statutory requirement for motions to sever *defendants*. Therefore, on the facts of this case, where Melvin objected to joinder prior to trial, moved to sever during trial based on a co-defendant’s testimony implicating him, and again moved to sever based on a co-defendant’s argument during closing that Melvin was guilty, the Court held that Melvin sufficiently preserved for appellate review his motion to sever defendants on the basis of antagonistic defenses. The Supreme Court remanded the case to the Court of Appeals for consideration of the claim on the merits.

Justice Berger, joined by Justices Newby and Barringer, wrote separately, concurring in the result only. He agreed that the Court of Appeals applied the wrong joinder statute, but said that the Supreme Court should have simply remanded the matter for consideration under the proper statute, rather than concluding that the matter was indeed preserved based on the defendant’s motions before the trial court.

Counsel Issues

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The *Harbison* rule applies to situations where defense counsel makes an implied admission of the defendant's guilt to the jury

State v. McAllister, 375 N.C. 455 (Sept. 25, 2020). The rule of *State v. Harbison*, 315 N.C. 175 (1985) that a criminal defendant suffers a per se violation of the right to effective assistance of counsel when counsel concedes the defendant's guilt to the jury without the defendant's prior consent applies to situations involving an implied admission. The defendant was charged with habitual misdemeanor assault based on an underlying offense of assault on a female, assault by strangulation, second-degree sexual offense, and second-degree rape. During a recorded interview with police that was played for the jury, the defendant made inculpatory statements indicating that he had "pushed [the victim]," was in a "tussle" with her, had "backhanded" and "smacked" her, and that she was visibly injured as a result. During closing argument, defense counsel referenced these statements and referred to them as admissions while arguing that the jury should set aside its negative feelings about the defendant arising from that behavior to see that there was no basis for convicting him of rape, sexual offense, and assault by strangulation. The jury found the defendant guilty of assault on a female and not guilty of all other charged offenses. Following an extensive review of its precedent flowing from *Harbison*, the court explained that while this was not a case where defense counsel expressly asked the jury to find the defendant guilty of a specified offense, *Harbison* violations are not limited to such situations and also occur in situations where counsel "impliedly concedes his client's guilt without prior authorization." The court said that counsel's argument to the jury in this case was "problematic for several reasons," including his attestations to the accuracy of the defendant's admissions, his reminder to the jury that the victim was "hurt," and counsel's own opinion that "God knows he did [wrong]." The court further noted that counsel specifically asked the jury to return a not guilty verdict for every charged offense except assault on a female, and characterized this conspicuous omission as implicitly conceding the defendant's guilt on that charge in violation of *Harbison*. The court concluded by emphasizing "that a finding of *Harbison* error based on an implied concession of guilt should be a rare occurrence," and remanded the case for a determination of whether the defendant knowingly consented in advance to the admission.

Justice Newby, joined by Justice Ervin, dissented, stating the view that the jury argument in this case did not constitute the functional equivalent of an explicit admission and that a finding of ineffective assistance of counsel in a case like this requires proof of prejudice in accordance with *Strickland*.

Appellate counsel was not ineffective for failing to cite *State v. Pakulski*, 319 N.C. 562 (1987) in a case being reviewed for plain error

State v. Collington, 375 N.C. 401 (Sept. 25, 2020). On discretionary review of a unanimous decision below, 259 N.C. App. 127 (2018), the court reversed the Court of Appeals and held that appellate counsel was not ineffective for failing to cite a particular line of cases because the facts of this case were distinguishable from those in the line of cases the Court of Appeals

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would have had appellate counsel cite. The Court of Appeals had held that appellate counsel was ineffective for failing to make the argument under *State v. Pakulski*, 319 N.C. 562 (1987) that a trial court commits plain error when it instructs a jury on disjunctive theories of a crime, one of which is erroneous, and it cannot be discerned from the record the theory upon which the jury relied. Noting that its opinion in *Pakulski* “lacks clarity” with respect to the standard of review applied there, the court explained that *Pakulski* applied the harmless error rather than plain error standard, as evidenced by subsequent precedent. Because the defendant in this case did not object to the trial court’s jury instructions, the court explained that *Pakulski* “would have had little precedential value in the instant case, and appellate counsel’s failure to cite it was not objectively unreasonable.” The court went on to explain that the arguments made by appellate counsel were appropriate for plain error review as counsel argued that the jury was presented with multiple theories of guilt, one of which was erroneous, and the error had a probable impact on the jury’s verdict.

Justice Ervin, joined by Justice Newby, concurred, agreeing with the court’s interpretation of *Pakulski* and its determination that appellate counsel was not ineffective, but writing separately to clarify the general matter that a defendant may be convicted of possession of a firearm by a felon under an acting in concert theory. Noting that neither the North Carolina Supreme Court nor the Court of Appeals has ever directly held that a defendant can be convicted of that offense on the basis of an acting in concert theory, Justice Ervin described the “general availability of the acting in concert doctrine in possession-related cases” and stated that he was not persuaded that the theory is inapplicable to the offense of possession of a firearm by a felon.

Justice Earls, joined by Justice Davis, dissented, expressing the view that the majority opinion’s explanations of *Pakulski* and appellate counsel’s arguments were inaccurate. In Justice Earls’ view, *Pakulski* applied the plain error standard of review and appellate counsel did not meet the obligation to argue to the Court of Appeals that the defendant could not be convicted of possession of a firearm by a felon based on someone else’s possession.

Trial court failed to ensure that the defendant validly waived his right to counsel before a resentencing hearing

State v. Doisey, ___ N.C. App. ___, 2021-NCCOA-181 (May 4, 2021).

The defendant was convicted in 1997 of two counts of first-degree statutory sex offense and was sentenced as a prior record level IV to 339 - 416 months in prison. He filed a motion for appropriate relief (MAR), arguing that he should have been sentenced at prior record level III. Before the hearing on the MAR, the trial judge asked the defendant whether he wanted to continue representing himself. The defendant said he did. The trial court asked the defendant to sign a waiver indicating that he had been apprised of his right to have counsel and indicating that he would like to represent himself. The trial court then proceeded with the hearing, which culminated in the defendant being resentenced as a prior record level III to 336 - 413 months imprisonment. The defendant appealed.

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The Court of Appeals held that the trial court failed to ensure that the defendant validly waived his right to counsel before the resentencing hearing. The Court explained that the colloquy between the trial court and the defendant did not comply with the requirements for a valid waiver under G.S. 15A-1242. That statute requires a trial judge to make a thorough inquiry to determine whether the defendant: (1) has been clearly advised of his right to counsel, including appointed counsel; (2) understands and appreciates the consequences of the decision to waive counsel; and (3) comprehends the nature of the charges and proceedings and the range of permissible punishments. The surface inquiry conducted by the trial court in this case did not suffice.

The Court did not consider the State's argument on appeal that the trial court erred in granting the MAR in the first place. The Court explained that the State failed to cross-appeal or seek discretionary review of this issue; nor did it oppose the defendant's MAR before the trial court. Finally, the Court rejected the State's argument that the defendant was required to show prejudice resulting from the invalid waiver of counsel for resentencing on an MAR, which the State characterized as denial of a statutory rather than a constitutional right. The Court held that a constitutional right to counsel attaches at a resentencing proceeding; thus, the defendant was not required to show prejudice resulting from the invalid waiver.

The trial court did not err by accepting the defendant's waiver of counsel because the defendant clearly and unequivocally expressed his desire to waive his right to counsel and the trial court conducted a thorough inquiry, in compliance with G.S. 15A-1242, to ensure that his waiver was knowing, intelligent, and voluntary

State v. Bannerman, ___ N.C. App. ___, 2021-NCCOA-67 (Mar. 16, 2021). On appeal, the defendant's sole argument was that the trial court erred because his waiver of counsel was not voluntary and was a result of the defendant's belief that representing himself was the only way to avoid delaying his trial. On May 19, 2019, the defendant requested that his first appointed counsel be removed. The defendant was appointed new counsel on June 3, 2019. On October 10, 2019, the defendant's second appointed counsel filed a motion to withdraw because the defendant asked him to and the defendant was threatening to file a complaint with the state bar.

After the trial court granted the motion to withdraw and announced new appointed counsel, the ADA told the trial court that the trial would need to be pushed back from the calendared date of December 16, 2019, to February 24, 2020, so that the new appointed counsel had time to become familiar with the case. Upon hearing this, the defendant stated to the court: "Excuse me, Your Honor. I withdraw for an attorney if we can have this date of December the 16th. I withdraw, and I will represent myself if I can have a date in court," and "I would withdraw counsel if I could have my date in court." Slip op. at ¶ 10. The trial court asked the defendant if he wanted to represent himself and the defendant responded, "Yes, I'm ready. I'll represent

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myself.” Slip op. at ¶ 11. Following this response, the defendant signed a waiver of counsel form.

The defendant later sent a letter to the trial court requesting a “co-counselor” for trial and the defendant was brought back to court on December 10, 2020 to address this matter. The trial court again asked the defendant if he wanted to represent himself, to which he responded “yes”. The ADA asked the court to further go over with the defendant what it would mean to represent himself. The court ensured the defendant was competent and that he understood that he had a right to an attorney, that one would be appointed to him if he couldn’t afford one, that he would be required to follow the same rules of evidence and procedure if he represented himself, the nature of the charges against him, and the potential punishment. The trial court also explained that the defendant would not be given a co-counsel and explained the purpose of standby counsel. Following this conversation, the trial court again asked whether the defendant was waiving his right to be represented by counsel at trial to which the defendant said “Yes. I don’t want my court date pushed back. I don’t want the court date pushed back.” The defendant also said, “I’ll waive that if I could have a standby, if you don’t mind, for some legal issues.” Slip op. at ¶ 16. The trial court then accepted the Defendant’s waiver and appointed standby counsel.

Noting that the trial court’s questions mirrored a fourteen-question checklist published by the School of Government cited approvingly in *State v. Moore*, 362 N.C. 319, 327 (2008), the Court of Appeals determined that “[t]hese exchanges show that on several occasions, Defendant clearly and unequivocally stated his desire to waive counsel and represent himself.” Slip op. at ¶ 18. The Court of Appeals also distinguished the defendant’s situation from that of the defendants in *State v. Bullock*, 316 N.C. 180 (1986) and *State v. Pena*, 257 N.C. App. 195 (2017). The Court of Appeals reasoned that “[u]nlike in *Bullock* and *Pena* where the trial court was unwilling to allow defendants more time to secure attorneys and, thus, defendants had no option but to represent themselves at trial, the trial court in this case had just announced that it would appoint” the defendant a new attorney. Slip op. at ¶ 22. The defendant then “voluntarily waived counsel to accommodate his own desire to keep a December trial date. His understanding, either correct or incorrect, that his trial could be delayed until February if he accepted the appointment of the third attorney did not make his choice to waive counsel involuntary. His motivation simply explains why he chose to voluntarily waive counsel and proceed pro se with standby counsel.” Slip op. at ¶ 22.

Trial court erred in failing to adequately investigate potential conflict of interest; remand for hearing to determine whether actual conflict existed

State v. Lynch, ___ N.C. App. ___, 852 S.E.2d 924 (Dec. 15, 2020). In this Lincoln County case, the defendant’s trial counsel also represented the City of Lincolnton. Lincolnton police officers investigated and charged the defendant and testified at his trial. After the charge conference, the defendant expressed concerns about his attorney’s potential conflict of interest. Trial counsel responded that he had not communicated with the police department about the case

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and that he believed no conflict of interest existed. The defendant acknowledged he had been aware of this issue for at least one year. When asked by the trial court if he wished to question his attorney on the issue, the defendant declined. The trial court made no factual findings or legal conclusions on the matter. The jury returned guilty verdicts and the defendant appealed, alleging ineffective assistance of counsel based on his trial counsel's conflict of interest.

The defendant's right to counsel includes the right to conflict-free representation. Looking to the Rules of Professional Conduct for guidance, the court observed:

[A] conflict of interest that cannot be waived arises where law enforcement officers testify against a defendant and the defendant's appointed counsel also advises the officers' department or its members and, in effect, represents the officers who are prosecuting witnesses against the defendant. Slip op. at 8.

The trial court erred in failing to investigate the potential conflict of interest claim more thoroughly. While trial counsel represented to the court that he had no contact with the police department about this case, "the trial court failed to determine the extent to which [the defense attorney's] role as city attorney required him to advise or represent the Lincolnton Police Department or its individual officers." *Id.* This information was necessary to determine whether a conflict existed. The trial court also erred in placing the burden on the defendant to ask questions about the potential conflict:

[W]hen a trial court is made aware of a possible conflict of interest prior to the conclusion of a trial, "the trial court must 'take control of the situation.'" Where the trial court 'knows or reasonably should know' of 'a particular conflict,' that court must inquire 'into the propriety of multiple representation.' *Id.* at 5 (citations omitted).

The matter was therefore remanded for the trial court to conduct a proper inquiry into the potential conflict of interest. If the trial court determines that defense counsel actually represented or advised the police department or its officers "at any relevant time," the defendant would be entitled to a new trial based on the non-waivable conflict of interest. If no conflict of interest is found to have existed, the defendant's convictions will remain intact.

(1) Trial court's findings were insufficient to resolve ineffective assistance of counsel claim for failure to advise of immigration consequences and required remand for further hearing; (2) Where the trial court failed to analyze voluntariness of plea as instructed in earlier remand, the matter was again remanded for consideration of that issue

State v. Jeminez, ___ N.C. App. ___, 853 S.E.2d 265 (Dec. 15, 2020). In this Stokes County case, the defendant was an undocumented Mexican citizen living in North Carolina. In 2010, he was charged with felony drug offenses and pled guilty. Defense counsel advised the defendant that there "may" be immigration consequences as a result. In 2017, he was arrested by immigration

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authorities and filed a motion for appropriate relief (“MAR”), alleging ineffective assistance of plea counsel under *Padilla v. Kentucky*, 559 U.S. 356 (2010) (holding that when immigration consequences stemming from a criminal conviction are clear, defense counsel must correctly advise the defendant of those consequences as a matter of effective assistance of counsel). The defendant argued that his drug conviction clearly made him ineligible for cancellation of removal proceedings, subject to mandatory detention, and permanently inadmissible to the United States under federal law. He asserted that he would have not pled guilty but for the erroneous advice of counsel.

The trial court initially denied the MAR without hearing. The Court of Appeals granted certiorari and unanimously reversed, directing the trial court to conduct a hearing and determine whether the defendant’s plea was knowing and voluntary and whether the defendant received ineffective assistance of counsel. On remand, the trial court again denied the MAR following an evidentiary hearing. It determined that while trial counsel’s advice was objectively unreasonable, the defendant (as a person eligible for deportation with or without a criminal conviction) could not demonstrate prejudice. The trial court did not address whether the plea was knowing and voluntary. The defendant again sought appellate review, and the Court of Appeals again reversed.

Regarding deportability based on the drug conviction, the relevant federal statute (8 U.S.C. § 1227(a)(2)(B)(i)) did not apply to the defendant. That statute covers people lawfully admitted into the country who are convicted of a drug crime, and the defendant was never lawfully admitted. As such, there could be no deficient performance by trial counsel in failing to advise on the impact of this statute, and the trial court correctly determined that the defendant could not show prejudice.

The defendant also pointed to the federal statute imposing mandatory detention for aliens convicted of a drug offense (U.S.C. § 1226(c)(1)(A)) as basis for the ineffective assistance claim. That argument was not raised on appeal and was deemed abandoned.

However, the federal statute rendering one convicted of a drug offense ineligible for cancellation of removal (U.S.C. § 1229b(b)(1)) may have applied to the defendant. The matter was remanded to the trial court for it to consider the potential availability of cancellation of removal for the defendant. If the defendant can demonstrate that he would have qualified for cancellation of removal absent the conviction, then the application of that statute was “truly clear,” and trial counsel would have had a duty to correctly advise on its operation. If the trial court finds that such deficient performance occurred, it would then need to determine prejudice by analyzing whether the defendant would have refused to plead guilty and gone to trial but for the erroneous advice.

The drug conviction also clearly made the defendant permanently inadmissible to the country under 8 U.S.C. § 1182(a)(2)(A)(i)(II), and trial counsel’s failure to advise on this point was deficient. On remand, the trial court was instructed to consider prejudice by examining the impact of this erroneous advice on the defendant’s decision to plead guilty.

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(2) The earlier remand by the Court of Appeals had directed the trial court to consider both whether the defendant's plea was knowing and voluntary, and whether the defendant received ineffective assistance of counsel. The trial court failed to consider the voluntariness of the plea and was again directed to make findings and resolve that claim on remand.

Defendant received ineffective assistance of counsel where his attorney failed to object to a non-statutory aggravating factor that was not alleged in the indictment

State v. Gleason, ___ N.C. App. ___, 848 S.E.2d 301 (Sept. 15, 2020). The defendant was indicted for stalking, violating a domestic violence protective order, and making a false report to law enforcement. The state gave notice of two statutory aggravating factors under G.S. 15A-1340.16(d)(5) (disrupting enforcement of laws) and 1340.16(d)(15) (taking advantage of position of trust), and notice that the state would seek to prove the existence of an additional prior record level point under G.S. 15A-1340.14(b)(7) (defendant was on probation at the time of the offense) for sentencing purposes. The state filed superseding indictments alleging additional offenses, and the defendant was ultimately convicted at trial of one count of perjury and one count of violating a DVPO. At sentencing, the state asked to proceed only on an "aggravating factor" for the defendant being on probation at the time of the offense, and defense counsel admitted that the defendant was on probation. The trial judge found it as an aggravating factor under the catch-all provision in G.S. 15A-1340.16(d)(20) for "any other aggravating factor reasonably related to the purposes of sentencing" and entered an aggravated judgment.

On appeal, the defendant argued he received ineffective assistance of counsel based on his attorney's failure to object to the aggravating factor, and the appellate court agreed. To pursue one of the enumerated aggravating factors listed in G.S. 15A-1340.16(d), the state must give notice of its intent, but the factor does not have to be pleaded in the indictment. However, aggravating factors under the catch-all provision in section (d)(20) must be "included in an indictment or other charging instrument." G.S. 15A-1340.16(a4). Defense counsel erred by failing to object to the factor used at sentencing since it was not alleged in any of the indictments, and the defendant suffered prejudice because he otherwise could not have received an aggravated sentence. Even if the state had offered the factor as originally indicated in its notice to add 1 point to defendant's prior record under G.S. 15A-1340.14(b)(7), it would not have changed his record level and therefore did not expose him to a higher sentence. The appellate court vacated the judgment and remanded for resentencing. Judge Tyson concurred with the majority opinion, but wrote separately because he also would have found that the trial court erred by accepting a stipulation from defense counsel, instead of addressing the defendant personally to ensure that it was a knowing and voluntary waiver of his right to have the factor proved beyond a reasonable doubt.

Mistrial

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Double jeopardy barred retrying the defendant when his first trial ended in a mistrial that was not justified by manifest necessity.

State v. Grays, ___ N.C. App. ___, 2021-NCCOA-6 (Feb. 2, 2021). In this Bertie County case, the defendant was charged with first-degree murder and felony possession of a weapon by a prisoner for an alleged fight at Bertie Correctional Institution that left another inmate dead. After court adjourned on the first day of the defendant’s trial, one of the State’s witnesses, the prison’s assistant superintendent, told the prosecutor for the first time that the defendant’s blood-stained clothes from the day of the alleged incident were at the prison and had never been turned over to law enforcement. (The prosecutor was clearly frustrated by the oversight and the trial judge called it “ridiculous.”) The next morning, the State moved for a mistrial, arguing that it would be unfair to proceed with the trial without first testing the evidence, because it could be either corroborative or exculpatory depending what DNA testing showed. After a hearing on the issue, the trial court granted the State’s motion, concluding as a matter of law that “it is in the public’s interest in a fair trial” to enter a mistrial and give the SBI time to test the clothing. Almost 3 years later the case came on for a second trial before a different judge. That judge denied the defendant’s motions to dismiss both charges on double jeopardy grounds. The defendant was convicted of possession of a weapon by a prisoner, but the jury deadlocked on first-degree murder, resulting in another mistrial on that charge. On appellate review, the Court of Appeals concluded that the second trial judge erred by denying the defendant’s motion to dismiss on double jeopardy grounds. To grant the motion, the appellate court said, would have required a showing that the first mistrial had been properly entered for “manifest necessity.” Manifest necessity can be based on physical necessity (like when a juror falls ill), or the necessity of doing justice (like when there is evidence of jury tampering). Here, the court concluded, there was no evidence of physical necessity or misconduct by any party—just new evidence that was already in the possession of State officials, but of which the prosecution was unaware. Because the State bore the risk of proceeding to trial based on an incomplete investigation of evidence already in its possession, there was no manifest necessity justifying the mistrial in the first case. Jeopardy therefore attached and barred the State from further prosecuting the defendant. The Court of Appeals vacated the weapon possession conviction and remanded the case for dismissal of both charges.

Double Jeopardy

(1) The trial court did not err by sentencing the defendant for both insurance fraud and obtaining property by false pretenses; (2) The trial court did not err by failing to set a completion date for imprisonment imposed as a condition of special probation.

State v. Ray, ___ N.C. App. ___, 851 S.E.2d 653 (Nov. 3, 2020). The defendant was charged with insurance fraud and obtaining property by false pretenses based on her submission of claims for living expenses that she did not incur. Following Hurricane Matthew, the defendant submitted a lease agreement purportedly signed by her stepfather providing that the defendant would pay \$100 per day to stay in his home. Defendant’s stepfather subsequently

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told investigators that he did not have a lease agreement with the defendant and that she had not stayed in his home. The defendant was convicted of both charges at a jury trial. The trial court consolidated the convictions for judgment and sentenced the defendant to 10 to 21 months imprisonment, suspended for 24 months of supervised probation. The trial court ordered the defendant to serve 60 days imprisonment as a condition of special probation. The defendant appealed, arguing that the trial court erred by sentencing her for both obtaining property by false pretenses and insurance fraud for the same alleged misrepresentation. She also argued that the trial court improperly delegated its authority to the defendant's probation officer by failing to set a date by which the term of special probation had to be completed.

(1) The court of appeals determined that the trial court did not err by sentencing her for obtaining property under false pretenses and insurance fraud even though both offenses arose from the same misrepresentation. To determine whether multiple punishments may be imposed for multiple convictions in a single trial based on a single course of conduct, the court must look to the intent of the legislature. Each of the offenses for which the defendant was convicted contained an element the other did not. Insurance fraud requires proving that the defendant presented a statement in support of a claim for payment under an insurance policy; obtaining property by false pretenses requires proving that the defendant's misrepresentation did in fact deceive. Based on the separate and distinct elements that must be proven, the appellate court reasoned that the legislature clearly expressed its intent to proscribe and punish a misrepresentation intended to deceive under both statutes. Additionally, the court noted that the subject of each crime is violative of two separate, distinct social norms: "Where obtaining property by false pretenses is generally likely to harm a single victim, a broader class of victims is harmed by insurance fraud." Slip. op. at 8. Finally, regarding the history of the treatment of the two crimes for sentencing purposes, the court noted that previous panels had sustained sentencing for convictions of obtaining property by false pretenses and insurance fraud arising from the same misrepresentation. For these reasons, the court of appeals determined that the trial court did not err by consolidating the Class H felony convictions for judgment and sentencing the defendant in the high presumptive range for one Class H felony.

(2) The trial court did not err by delegating authority to the defendant's probation officer and by not setting a completion deadline for the active term of the sentence as a condition of special probation. G.S. 15A-1351(a) permits a trial court to require that a defendant submit to periods of imprisonment during probation at "whatever time or intervals within the period of probation . . . the court determines," so long as the total period of such confinement does not exceed one-fourth of the maximum sentence imposed. It further requires that imprisonment imposed as a condition of special probation be completed within two years of conviction. In this case, the trial court sentenced the defendant to 10 to 21 months of imprisonment and suspended that sentence for 24 months of supervised probation. As a condition of probation, the trial court ordered the defendant to serve 60 days of imprisonment as a condition of special probation. The court specified that the defendant was "TO SERVE 30 DAYS AT ONE TIME AND 30 DAYS AT ANOTHER TIME AS SCHEDULED BY PROBATION." Slip op. at 11. The court of appeals held that the trial court appropriately determined the "intervals within the period of probation" as two 30-day periods, and the completion date was set by statute as August 27,

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2021—which, in defendant’s case, was both the end of the two-year probationary period and two years from the date of conviction.

Jury Selection

Trial court’s refusal to allow any questions during jury selection about issues of race, implicit bias, or police shootings of black men was prejudicial error.

State v. Crump, 376 N.C. 375 (Dec. 18, 2020). The defendant was indicted for multiple charges of armed robbery, kidnapping, possession of firearm by a felon, assault with a deadly weapon with intent to kill, and assaulting a law enforcement officer with a firearm. The charges arose out of the robbery of an illegal poker game and the intended robbery of a second game. The second game was a set-up by one of the victims from the first game, who called 911 when the robbers arrived. Officers responding to the 911 call encountered the defendant in a car parked outside the office complex where the fake game was to be held, and a shootout ensued. The defendant was apprehended after a low-speed chase involving several law-enforcement agencies, and went to trial on all charges. Three of the charges were dismissed at trial by the court, and the jury acquitted the defendant of two others, but he was convicted of the remaining charges and received thirteen consecutive judgments totaling 872 to 1,203 months incarceration. The defendant appealed his conviction. A more detailed summary of the facts of this case and a discussion of the Court of Appeals’ holding regarding the application of the statutory felony disqualification provisions to the defendant’s self-defense claims can be found here: [John Rubin, “A Lose-Lose Situation for ‘Felonious’ Defendants Who Act in Self-Defense,” N.C. Criminal Law Blog, May 1, 2018.](#)

The Court of Appeals unanimously affirmed the conviction, but the state Supreme Court granted discretionary review to consider whether the trial court erred by restricting the defendant’s voir dire of prospective jurors on issues of race, implicit bias, and police shootings of black men. Concluding that the “the trial court did abuse its discretion and that the trial court’s improper restrictions on defendant’s questioning during voir dire did prejudice defendant,” the higher court reversed the conviction.

During voir dire, the trial court sustained objections to the defendant’s attempts to ask prospective jurors about “the possibility that they harbored racial biases against African Americans” as well as “their awareness of a case that had recently occurred in Charlotte where a police officer shot and killed an unarmed black man.” On appeal, the defense argued that the questions were relevant to determine whether jurors could be unbiased and fair, while the state argued that the questions were an improper attempt to “stake out” the jurors and secure a forecast of how they would vote. The Supreme Court acknowledged that trial courts have broad discretion to restrict the manner and extent of questioning prospective jurors, but concluded that the trial court erred in this case when it “flatly prohibited” and “categorically denied” all questions about race, bias, and officer shootings of black men. The proposed questions were not an attempt to stake out the jurors, but rather an attempt to determine if

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any jurors had opinions or biases that would impact their ability to decide the facts of the case. Additionally, since the case involved a dispute over whether the defendant or the officers fired first, as well as what inferences to draw from the defendant's refusal to immediately surrender after the shooting, the error was prejudicial because it impacted the defendant's ability to identify and challenge any jurors who "might struggle to fairly and impartially determine whose testimony to credit, whose version of events to believe, and, ultimately, whether or not to find defendant guilty." Because it held that the exclusion of these issues during voir dire was prejudicial error warranting reversal, the Supreme Court did not reach the remaining issue of whether there must be a causal nexus between the use of defensive force and the felonious conduct that would bar a self-defense claim under G.S. 14-51.4.

Justice Davis dissented, joined by Justices Newby and Morgan. The dissent would have held that the limited series of questions rejected by the trial court did not establish that all inquiry into issues of potential juror bias was prohibited, and also would have found that the only reason offered at trial for these questions was to gauge how jurors might assess the defendant's state of mind while fleeing the scene, rather than for the purpose of identifying potential bias on the part of the jurors as argued on appeal. The majority responded that both issues were addressed by viewing the questions in context and considering the entire record of the voir dire.

(1) The trial court did not make a record adequately addressing its consideration of the totality of the circumstances in ruling on the defendant's *Batson* claim. (2) The trial court erred by assessing costs in each of four judgments against the defendant in violation of *State v. Rieger*.

State v. Alexander, ___ N.C. App. ___, 851 S.E.2d 411 (Oct. 20, 2020). (1) The defendant, on trial for multiple drug charges, challenged the prosecutor's peremptory strike of the only Black juror in the venire under *Batson v. Kentucky*. The trial court overruled the defendant's objection, finding that although the "100 percent rejection rate of African American jurors" established a prima facie showing of discrimination, the State gave credible race-neutral reasons for striking the prospective juror, and the defendant therefore did not prove purposeful discrimination. The defendant appealed, arguing that the trial court erred in denying his *Batson* challenge or, in the alternative, failed to make adequate findings of fact as required by *State v. Hobbs*, 374 N.C. 345 (2020). The Court of Appeals rejected the State's argument that the defendant had not preserved the issue because the record did not disclose direct evidence of the race of the challenged juror and the jury selection process was not recorded. The Court held that the record sufficed to permit appellate review when the record of the *Batson* hearing included express statements, undisputed by the State, that the defendant was African American and that the lone African American in the jury pool was excluded. On the merits of the *Batson* challenge, the Court concluded that the trial court failed to make sufficient findings of fact on its comparative analysis of the answers regarding prior criminal history given by the stricken Black juror (who had a previous child abuse charge dismissed) and a White juror passed by the State (who had a prior drug charge dismissed). The trial court also failed to make findings

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of fact on the defendant's argument that the State's purported concern about the defendant's "tone of voice" suggested racial bias. The Court remanded the matter to the trial court for specific findings, including, but not limited to the details of the court's comparative juror analysis and on the defendant's assertion that the prosecutor's statements regarding the defendant's answers to questions and tone of voice evinced racial bias. (2) The trial court erred by assessing costs in each of the four judgments against the defendant. Under *State v. Rieger*, ___ N.C. App. ___, 833 S.E.2d 699 (2019), the trial court should assess costs only once for cases adjudicated together in the same hearing or trial regarding multiple charges arising from the same underlying event or transaction.

Jury Argument

Trial court did not err by failing to intervene during State's closing argument, which characterized the defendant's explanation as ridiculous

State v. Hensley, ___ N.C. App. ___, 2021-NCCOA-185 (May 4, 2021). The defendant was convicted of taking indecent liberties with a minor, charges that arose from sexual assaults against his daughters. During closing argument, the prosecutor said that the defendant's excuse for possibly touching his daughters' breasts—that he lacked feeling in his hands and fingers—was "ridiculous." (Slip op. at ¶ 10). He explained that the defendant could adjust a microphone and open candy wrappers, which defendant demonstrated during the trial. The prosecutor also stated that the fight between the defendant and one of his daughters over her phone occurred because "he wanted to get in, and I guess see what was in there, what those pictures were, what those text messages were." *Id.* He explained, "it makes a lot more sense when you put it in the context of a father who has a sexual attraction to his daughters." *Id.* The defendant (who did not object to these statements when they were made) argued on appeal that the trial court erred by failing to intervene on its own motion to correct these statements.

The Court of Appeals rejected the defendant's argument. The Court characterized the "ridiculous excuse" statements as a small part of an otherwise proper argument that the jury should not believe the defendant's claim that a lack of feeling in his fingers prevented him from knowing if he had touched his daughters' breasts. Additionally, the Court noted that the prosecutor used the word "ridiculous" only twice in his lengthy closing argument. The Court said that although the prosecutor should not have expressed his personal belief that the defendant's testimony was false, his remarks were not so grossly improper as to render the proceeding fundamentally unfair.

The Court further determined that it was not improper for the prosecutor to argue that the defendant wanted to access his daughter's phone to look at inappropriate photos. This was a reasonable inference based upon the evidence introduced at trial. Because the argument was not improper, the trial court was not required to intervene.

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(1) Presuming, without deciding, that defense counsel impliedly admitted in trial for felony breaking and entering that defendant committed misdemeanor breaking and entering, there was no *Harbison* error because counsel acted with defendant's consent; (2) Prosecutor's remarks attacking the credibility of the defendant's expert witness were improper, but not so grossly improper as to impede defendant's right to a fair trial; (3) Civil judgment for attorney's fees is vacated and remanded to the trial court to allow the defendant an opportunity to be heard.

State v. Bowman, ___ N.C. App. ___, 851 S.E.2d 665 (Nov. 3, 2020). The defendant was charged with first degree burglary after she was found inside the victims' home in the early morning hours, having taken items from their cars and placed them inside a purse belonging to one of the homeowners. The defendant appeared to be impaired at the time she was arrested. She claimed during the encounter that, alternatively, she was an emergency medical worker, someone had chased her inside the house, and someone had invited her to the house.

(1) Before making an opening statement, defense counsel notified the court that he would be admitting all of the elements of the charged offense besides intent. The trial court asked the defendant whether she understood and agreed with this decision. She said she did. While defense counsel's express or implied admission of the defendant's guilt of a charged offense to the jury without the defendant's consent is per se ineffective assistance of counsel, such an admission may be made with the defendant's consent. Here, the trial court had an exchange with the defendant where she expressed her understanding and agreed to admit the elements of felony breaking and entering other than intent. Therefore, even assuming, without deciding, that defense counsel impliedly admitted that defendant was guilty of misdemeanor breaking and entering, that admission was consensual and did not constitute ineffective assistance of counsel.

(2) An expert in forensic psychology testified for the defendant that she had diagnosed the defendant with post-traumatic stress disorder, severe alcohol use disorder, severe amphetamine use disorder, and a personality disorder. The expert testified that the defendant admitted to using methamphetamine daily and that such use can result in a methamphetamine-associated psychosis which presents with delusions, paranoia, and hallucinations. The expert characterized the defendant's symptoms as congruent with this condition.

During closing argument, the prosecutor attacked the expert's credibility, stating that "psychosis is quite convenient as an excuse" and that the defendant "had Dr. James come and testify . . . with the end in mind." Slip op. at 14. The prosecutor argued to the jury that the expert was "paid by the defense, for the defense, to give good stuff for the defense" and that "[y]ou get what you put out. What you put in, you get out." *Id.* After questioning the utility of Dr. James's diagnoses of the defendant, the prosecutor remarked to the jury, "So I ask you to take that for what it is. At the end of the day, hired by the defense, for the defense, to say good things for the defense . . ." *Id.* The defendant did not object to the remarks. The court of appeals held that the prosecutor's remarks were improper because they went beyond arguing

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that the expert witness was potentially biased, which is permissible. Instead, the prosecution impermissibly suggested to the jury that the defendant's expert was paid to fabricate an excuse for her conduct and acts, regardless of the truth. The court explained:

By arguing that psychosis was an "excuse," Dr. James testified with an end in mind, Dr. James was paid "to give good stuff for the defense," and Dr. James was hired "to say good things for the defense," the prosecutor inappropriately suggested that Dr. James "should not be believed because [s]he would give untruthful or inaccurate testimony in exchange for pay."

Slip op. at 14 (quoting, in last clause of last sentence, *State v. Huey*, 370 N.C. 174, 183 (2017)).

While these remarks were improper, the court of appeals held that in the absence of an objection by the defendant, they were not so grossly improper as to impede the defendant's right to a fair trial. The court noted that similar remarks had been held not to amount to prejudicial error. Moreover, the court said it could not conclude that the remarks were so prejudicial as to merit a new trial considering the substantial amount of evidence tending to show that the defendant had the requisite intent for first-degree burglary.

(3) The Court vacated the civil judgment for attorney's fees and remanded the matter to the trial court for a waiver by the defendant or a hearing on the issue. Although at trial the defendant stated she had no objection to the entry of a civil judgment, she did not know at that time the number of hours her appointed counsel planned to submit or what amount she would owe. She was, therefore, deprived of a meaningful opportunity to be heard before the judgment was entered.

Jury Instructions

The trial court committed prejudicial error by refusing to give the defendant's requested instruction on self-defense and the doctrine of transferred intent with respect to felony murder and an underlying assault charge

State v. Greenfield, 375 N.C. 434 (Sept. 25, 2020). In this felony murder case based on the underlying felony of assault with a deadly weapon with intent to kill inflicting serious injury, the trial court erred by not instructing the jury on self-defense and the doctrine of transferred intent. The evidence at trial showed that the defendant and a friend arrived at the apartment of Beth and Jon intending to buy marijuana from Jon. By the time the defendant and his friend left the apartment, Jon, Beth, and the defendant had been shot. Jon died as a result. The defendant testified that while in the apartment living room, he picked up a gun he found on a coffee table because "it looked cool," which caused Jon to become aggressive and Beth to emerge from a bedroom pointing a gun at the defendant. After convincing Beth to drop her weapon by threatening to kill Jon, the defendant testified that he ran from the apartment, saw Jon pull a gun, and felt himself be shot in the side. This caused the defendant to shoot in Jon's

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direction “as best as [he] could” and “intentionally” at him. The court explained that this testimony taken in the light most favorable to the defendant entitled him to a jury instruction on perfect self-defense for any shot intended for Jon because, if believed, it showed (1) he subjectively believed that he was going to die if he did not return fire; (2) such a belief was reasonable; (3) he was not the aggressor; and (4) did not use excessive force. Further, he was entitled to an instruction on self-defense through transferred intent for the AWDWIKISI charge relating to Beth as her injury could have been caused by a bullet intended for Jon. The trial court correctly gave a self-defense instruction on premeditated murder but erred by refusing to give the defendant’s requested self-defense instruction on felony murder or any underlying felony, including the assault. This error was prejudicial because it impaired the defendant’s ability to present his defense to felony murder and the assault charge.

In addition, the Court of Appeals erred by remanding the case for entry of a judgment convicting the defendant of second-degree murder, a verdict the jury returned after the trial court accepted a partial verdict on the felony murder charge and directed the jury to continue to deliberate on the premeditated murder charge. The trial court’s decision to require continued deliberation and its associated instructions could have resulted in an improper finding by the jury that the defendant was guilty of second-degree murder. Thus, the court remanded for a new trial on all charges.

Justice Newby dissented, stating his view that the trial court’s jury instructions, which included a general transferred-intent instruction but not the specific instruction requested by the defendant, enabled the defendant to make the jury argument he desired. Justice Newby interpreted the jury’s verdicts as a rejection of the defendant’s self-defense theory.

The trial court properly denied the defendant’s request for a jury instruction on lack of flight, and even if failing to offer the instruction was error, it was harmless due to the overwhelming evidence of the defendant’s guilt.

State v. Edwards, ___ N.C. App. ___, 2021-NCCOA-19 (Feb. 16, 2021). The defendant was charged and convicted of first-degree felony murder for the attempted robbery and fatal shooting of a taxi cab driver whom the defendant had summoned to his apartment complex. When the taxi cab arrived, witnesses saw a man shoot the driver, drag the driver from his car, and then rummage through his pockets. The shooter then ran to a white four-door car, which then left the apartment complex.

Officers found a sweatshirt on the rear floorboard of the taxi cab with a prepaid cell phone inside. The cell phone contained photos of the defendant, his State-issued identification card, and his electric bill. The cell phone also contained texts between the defendant and another man regarding the defendant’s obtaining a handgun and his need for money to pay his electric bill.

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Officers went to the defendant's home a short time later. The defendant agreed to come to the station for questioning and went there in his girlfriend's car – a white, four-door car like the one that left the crime scene.

At his trial on first degree murder charges, the defendant requested an instruction on flight that permitted the jury to infer lack of guilt from the defendant's decision not to flee when investigators approached him at his home. The trial court declined to provide the instruction. The jury found the defendant guilty of first-degree felony murder and he was sentenced to life in prison without the possibility of parole. The defendant appealed, arguing that the trial court erred by rejecting his proposed jury instruction.

The Court of Appeals determined that the trial court did not err in failing to give the instruction because the defendant's request was not based on his conduct at the crime scene. Indeed, the evidence established that the shooter, who the State alleged was the defendant, fled the scene after shooting the victim. The Court explained that providing an instruction on lack of flight in these circumstances would inappropriately allow defendants "to make evidence for themselves by their subsequent acts." Slip op. at ¶ 17 (quoting *State v. Burr*, 341 N.C. 263, 297 (1995)). As a general rule, defendants are not allowed to use their failure to flee before arrest or to escape from jail as proof of innocence.

In addition, the Court held that even assuming that the trial court erred by refusing to give the instruction, the error was harmless in light of the State's overwhelming evidence of the defendant's guilt.

Judge Murphy concurred in part and concurred in the result only in part. He wrote separately to express his view that though the Court was bound by caselaw to reject the defendant's argument, he agreed with the defendant that if courts were going to continue to instruct jurors that they could consider flight as evidence of guilt, jurors should be instructed in cases when the defendant did not flee that they could consider that as evidence of innocence.

The defendant failed to demonstrate reversible error in the trial court's failure to instruct the jury on "reasonable belief of consent" as a defense to the rape charge.

State v. Yelverton, ___ N.C. App. ___, 851 S.E.2d 434 (Nov. 17, 2020). The defendant and his longtime friend, Ivy, began dating in 2017. Per Ivy's clear and constant requests, their sexual contact with each other was limited to kissing and touching above the waist. Whenever the defendant tried to touch her below the waist, she told him to stop.

On August 1, 2017, Ivy visited the defendant at his home and went with the defendant into his bedroom where they began watching television. They then began to engage in "hot and heavy" physical contact, including kissing, touching Ivy's breasts, and removing Ivy's shirt, which she was "okay" with. When the defendant attempted to put his hand down Ivy's shorts, she pushed him away and told him "no." The defendant removed his hand momentarily but made repeated

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attempts. Ivy twisted her legs to keep them together, but eventually the defendant was able to remove her shorts. Ivy again told the defendant “no” and to stop because she “wasn’t ready for that.” The defendant then pinned Ivy’s hands over her head, pushed her underwear aside, and penetrated her vagina with his penis. Ivy told the defendant to stop and said “no,” but he continued to penetrate her. Eventually, Ivy gave up because the defendant did not listen.

After the events, Ivy got dressed and left the home. The defendant walked with her outside, asking if she was okay, to which she responded that she was. Ivy then left in her car. The defendant repeatedly texted Ivy after the incident, asking her via text to promise him she was okay and continuing to text her daily. The defendant made continued attempts to talk to and see Ivy, despite her pleas that he leave her alone. Five days after the incident, Ivy reported the incident to police.

The defendant was indicted on charges of second-degree forcible rape and attempted second-degree forcible rape. The defendant testified that he thought Ivy consented to sex although he admitted Ivy stated “she was not ready” that night and conceded that “she may have pushed me a little bit” when he initiated sexual contact. The defendant was found guilty of second-degree forcible rape and not guilty of attempted second-degree forcible rape.

On appeal, the defendant argued that the trial court erred, or plainly erred, by failing to provide a jury instruction on the defense of consent based on the defendant’s “reasonable belief” that Ivy consented to the sexual acts. The Court of Appeals reviewed the argument under the plain error standard because the defendant did not request this instruction at trial. The Court rejected this argument, noting that neither the Court nor the State Supreme Court have recognized a “reasonable belief of consent” defense to rape. The Court cited *State v. Moorman*, 320 N.C. 387, 389–92 (1987), in which the Supreme Court held “that a defendant could be convicted of rape by force and against the will of the victim, who was incapacitated and asleep at the time, despite the defendant’s testimony that he mistook the victim for someone he knew and believed she consented to vaginal intercourse.” The Court concluded that because a defendant’s knowledge of whether the victim consented is not a material element of rape and mistaken belief in consent has not been recognized as a defense to rape, the trial court did not err in failing to provide an instruction to that effect. The Court contrasted other statutes involving rape and sex offense in which the General Assembly has used reasonableness language, such as with respect to revocation of consent in G.S. 14-27.20(1a)(b).

The defendant alternatively argued that he had been denied his right to effective assistance of counsel because his defense counsel did not request an instruction on the defendant’s reasonable belief of consent defense. The Court rejected that argument based on the conclusion that the defendant was not entitled to the instruction.

Jury Misconduct

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Where a majority of jurors stated in open court that they were not convinced of defendant's guilt beyond a reasonable doubt, verdict of guilty was structural error.

State v. Blake, ___ N.C. App. ___, 853 S.E.2d 838 (Dec. 31, 2020). The defendant was indicted for one count of second-degree murder arising out of a fight at a party in which the victim was stabbed and later died. After a jury trial, the defendant was convicted of voluntary manslaughter. The jury indicated that the verdict was unanimous, and assented to the verdict again when the jurors were individually polled. However, during the judge's parting remarks to the jury and before the judgment was entered, a majority of the jurors disclosed that they did not believe the state's witnesses and they were not sure of the defendant's guilt, but they voted guilty anyway because "that man died, so someone needs to go to prison." The jurors' comments were not recorded at the time, but were reconstructed on the record during a conference in chambers the next day. The defense moved to set aside the verdict, based on the jurors' statements and other grounds, and the motion was denied. The defendant appealed, arguing that jury's disregard of the court's instructions on reasonable doubt constituted structural error.

The Court of Appeals conducted a de novo review and unanimously agreed, reversing the conviction. The court explained that structural error is a rare form of constitutional error that occurs when there is a defect in the trial mechanism that is so serious that the trial cannot reliably serve as a vehicle for determining guilt or innocence. U.S. Supreme Court precedent has established that only a limited number of errors rise to the level of being structural error, but the appellate court held that "the circumstances here present the same type of constitutional error present in some of those cases" because the defendant has a constitutional right to a verdict based upon a determination of guilt beyond a reasonable doubt. On appeal, the defendant was not required to demonstrate prejudice resulting from this type of error; instead, the burden was on the state to demonstrate that the structural error was harmless beyond a reasonable doubt, which the state failed to do.

The appellate court rejected the state's argument that this analysis was an impermissible inquiry into the validity of jury's verdict, in violation of Rule 606. In this case, the trial judge had immediate concerns about the jury's verdict and discussed it with them in open court, confirming that a majority of the jurors had voted for guilt despite their doubts about the defendant's guilt. Additionally, the jury's misconduct went "to the very heart of the defendant's right to a presumption of innocence and the requirement that he be convicted only upon proof 'beyond a reasonable doubt.'" In the court's view, these facts distinguished the case from the type of post-trial "inquiry" based on "mere suspicion" contemplated by Rule 606 and addressed in prior cases.

The defendant had also filed an MAR within 10 days after the trial, raising similar arguments to those made on appeal. The trial court denied the MAR, and the defendant appealed that denial. The appellate court vacated the ruling denying the MAR for the reasons given above, but also clarified that the portion of the trial court's order which purported to bar the defendant from raising arguments in a future MAR was erroneous. G.S. 15A-1419(a) provides for denial of a

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motion if the defendant “attempts to raise an issue in a MAR which has previously been determined if he was in the position to raise it in a prior motion or appeal,” but the statute “does not give a trial court authority to enter a gatekeeper order declaring in advance that a defendant may not, in the future, file an MAR; the determination regarding the merits of any future MAR must be decided based upon that motion.”

Judge’s Expression of Opinion

(1) Trial court’s instructions that the jury “will determine what the assault was” did not amount to an improper expression of opinion on the evidence in context; (2) The trial court’s response to a jury question during deliberations regarding a prior conviction was an not impermissible expression of opinion on the evidence

State v. Austin, ___ N.C. App. ___, 849 S.E.2d 307 (Oct. 6, 2020). The defendant was tried and convicted of assault on female and habitual misdemeanor assault in Forsyth County and thereafter pled guilty to attaining habitual felon status. On appeal, he argued that the trial court erred by expressing an opinion on the evidence during its instructions to the jury and by improperly answering a jury question during deliberations. A majority of the Court of Appeals found no error.

(1) G.S. §§ 15A-1222 and 1223 prohibit the trial court from expressing opinions on the evidence to the jury. An alleged violation of this statutory mandate may be reviewed on appeal notwithstanding the defendant’s failure to object at the time, but the defendant has the burden to show that remarks were prejudicial under the totality of circumstances. Here, the defendant pointed to parts of the jury instructions where the trial court described the various alleged assaults and told the jury “You will determine what the assault was . . .” Slip op. at 9. However, the jury instructions began with the trial court informing the jury that it must determine “*whether* the defendant [was] guilty or not guilty of [the assaults].” *Id.* (emphasis in original). Under the totality of circumstances, the trial court’s instructions properly left the question of guilt or innocence “entirely for the *jury*” and did not amount to an improper expression of opinion. *Id.* at 10 (emphasis in original).

(2) During deliberations, the jury asked the trial court whether the jury had to find guilt beyond a reasonable doubt for the habitual misdemeanor assault charge. One of the records of a prior assault conviction admitted at trial had an apparent mistake as to the dates of the offense and conviction (the date of offense was listed as October 2010 and the date of conviction as March 2010). The trial court had instructed the jury with those dates as to that prior assault conviction and reiterated those instructions in response to the jury question. The trial court also reminded the jury that the reasonable doubt standard applied to all parts of the trial and re-instructed the jury on the burden of proof, the presumption of innocence, and reasonable doubt. According to the defendant, the trial court’s responses amounted to an impermissible expression of opinion about the existence of the prior conviction. The Court of Appeals again disagreed:

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The trial court emphasized that it was the duty of the jury to determine the facts and whether the documents at issue were sufficient to indicate the State had met its burden of proof of as to the charge of habitual misdemeanor assault beyond a reasonable doubt. Thus, upon review of defendant’s challenge to these statements . . . [and] the context in which they were made, we discern no improper expression of opinion by the trial court. *Id.*

There was therefore no error, and the convictions affirmed.

Judge Brook dissented. He would have found that that comments by the trial court during its jury instructions “repeatedly assumed the proof of the central fact at issue in the case” (whether the assault occurred or not), that this violated the statutory mandate against expression of opinion, and that the error required new trial. *Id.* at 22 (Brook, J., dissenting).

Plea Agreements

Under G.S. 15A-1023(c), a trial court does not have the discretion to reject a defendant’s guilty plea when the plea is the defendant’s informed choice, is supported by a factual basis, and is the product of an agreement where the prosecutor does not make any recommendations concerning sentence.

State v. Chandler, 376 N.C. 361 (Dec. 18, 2020). Under G.S. 15A-1023(c), a trial court does not have the discretion to reject a defendant’s guilty plea when the plea is the defendant’s informed choice, is supported by a factual basis, and is the product of an agreement where the prosecutor does not make any recommendations concerning sentence. In this case, the defendant negotiated a plea arrangement with the State where he would plead guilty to indecent liberties in exchange for the State’s dismissal of a first-degree sexual offense charge. During the plea colloquy, the defendant stated that he was pleading guilty to prevent the child victim “from being more traumatized” but that he “did not intentionally do what they say I’ve done.” The trial judge rejected the plea, explaining that his practice was not to accept pleas in situations where a defendant asserts factual innocence. The defendant’s case was continued to a later court date where he entered a plea of not guilty and was convicted by a jury of first-degree sex offense and indecent liberties. Construing language in G.S. 15A-1023(c) that a trial judge “must accept the plea” when it is the product of an informed choice and is supported by a factual basis as a statutory mandate, court first found that the defendant’s argument that the trial court erred by not accepting the plea automatically was preserved for appellate review notwithstanding the defendant’s failure to raise the argument at trial. The court then found that because there was a factual basis for the plea and evidence that it was the product of the defendant’s informed choice, the trial judge lacked discretion to reject the plea on grounds of the defendant’s refusal to admit factual guilt and plainly erred by doing so. The court explained: “Nothing in [G.S.] 15A-1022 or our case law announces a statutory or constitutional requirement that a defendant admit factual guilt in order to enter a guilty

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plea.” The court remanded the case to the trial court with instructions to the district attorney to renew the plea offer.

Justice Morgan, joined by Justice Newby, dissented and expressed the view that the defendant’s argument was not properly preserved for appellate review. In Justice Morgan’s view, the trial judge is “the determiner” of whether there is a factual basis for a plea and whether it is the product of informed choice. While G.S. 15A-1023(c) mandates that a plea be accepted when those conditions are satisfied, the majority erred by substituting its judgement on those conditions for the trial court’s and by considering the defendant’s argument on appeal when the defendant had failed to object in the trial court.

Where defendant appeared for sentencing at a later date as required under a plea agreement, being late to court was not a breach of the terms.

State v. Knight, __ N.C. App. __, 2021-NCCOA-100 (Apr. 6, 2021). The state and the defendant negotiated a plea agreement in which the defendant would plead guilty to assault by strangulation, second-degree kidnapping, and assault with a deadly weapon, and agreed that he would receive one consolidated active sentence. Under the terms of the plea agreement, sentencing would be postponed for two months; however, if the defendant failed to appear for sentencing, the agreement would no longer be binding and sentencing would be in the court’s discretion. The defendant did appear on the scheduled sentencing date (a Tuesday), but the sentencing was first continued to Friday of the same week before being rescheduled again to Wednesday. Defendant’s attorney stated that he had informed the defendant of the new date, but on Wednesday the defendant was not present at the beginning of court. The defendant showed up an hour and fifteen minutes later, and said he thought that court started an hour later. The prosecutor argued that by failing to appear as agreed, the defendant had breached the terms of the plea bargain and was therefore subject to sentencing in the court’s discretion. After hearing from the victim and both attorneys, the judge agreed with the state and sentenced the defendant to consecutive active sentences instead of one consolidated sentence as laid out in the plea agreement.

The defendant filed a petition for writ of certiorari, arguing that the trial court erred by failing to sentence him in accordance with the plea agreement, and the appellate court agreed. Although plea agreements are contractual in nature, they also involve a waiver of the defendant’s constitutional rights and there must be safeguards to ensure that the defendant receives what he is due. In this case, the defendant did not breach the terms of the plea agreement because he appeared as ordered on the original sentencing date. Additionally, although the defendant was late to court on the rescheduled date, he did appear. Since the state still received the benefit of its bargain by securing the guilty pleas, and since the spirit of the agreement (that the defendant would appear for sentencing at a later date) was fulfilled, the appellate court concluded that the defendant should not have to forfeit what was promised to him under the agreement. The defendant’s “tardiness” did not constitute a breach; therefore, the state violated the plea agreement by asking the court to sentence the defendant

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in its discretion, and the trial court erred by imposing a sentence in violation of the defendant's due process rights. The appellate court vacated the judgment, reinstated the plea agreement, and remanded for further proceedings.

Jurisdictional Issues

(1) Drug overdose immunity provisions of G.S. 90-96.2 are not jurisdictional and are waived where not raised at trial; (2) Admission of lay opinion and field tests identifying substance as heroin was not plain error

State v. Osborne, ___ N.C. App. ___, 853 S.E.2d 241 (Dec. 15, 2020). In this case from Randolph County, the Court of Appeals initially vacated the defendant's conviction for possession of heroin (discussed [here](#)). The North Carolina Supreme Court reversed, finding the evidence sufficient to support the drug conviction. *State v. Osborne*, 372 N.C. 619 (2019) (discussed [here](#)). On remand, the Court of Appeals was instructed to consider the applicability of G.S. 90-96.2 to the case. That statute provides "limited immunity" from prosecution for certain drug offenses when the evidence is discovered as a result of a call for assistance relating to a drug overdose. The Court of Appeals was also directed to consider plain error challenges to the admission of certain evidence that it previously left undecided.

(1) The defendant did not raise the issue of potential immunity at trial or on appeal. While subject matter jurisdictional defects cannot be waived and may be asserted at any time, the court determined that the immunity provisions of G.S. 90-96.2 are not jurisdictional and are therefore waivable:

In sum, we hold that N.C. Gen. Stat. § 90-96.2(c) does not contain a clear indication that it is a jurisdictional requirement, and we therefore treat the provision as one granting traditional immunity from prosecution. This type of immunity must be asserted as a defense by the defendant in the trial court proceeding. The failure to raise the issue waives it and precludes further review on appeal. Slip op. at 9 (citations omitted).

The issue of immunity here was thus waived and the merits of the issue were not decided. The defendant could, however, assert ineffective assistance of counsel in post-conviction proceedings based on trial counsel's failure to raise the issue. [Jamie Markham blogged about the immunity provisions of G.S. 90-96.2 [here](#)].

(2) The defendant also claimed the admission of field tests and lay opinions from police officers that the substance discovered in her room was heroin amounted to plain error. The Supreme Court's opinion in the case acknowledged the "ample evidence" that the substance was heroin even without the challenged evidence, and the Court of Appeals agreed. Accordingly, the erroneous admission of field tests and lay opinion "is simply not the sort of fundamental error

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that calls into question the ‘fairness, integrity or public reputation of judicial proceedings’” making a finding of plain error inappropriate. *Id.* at 11.

(1) Where State filed MAR within 10 days of judgment, trial court retained jurisdiction to amend judgment notwithstanding defendant’s notice of appeal; (2) Where the trial court amended to judgment to correct duplicative larceny convictions, that issue was moot on appeal; (3) Where judgment incorrectly reflected a habitual felon sentence rather than a habitual breaking or entering sentence, the matter was remanded for correction of clerical error

State v. Joiner, ___ N.C. App. ___, 849 S.E.2d 106 (Oct. 6, 2020). The defendant in this Forsyth County case was charged with two counts felony breaking or entering, two counts felony larceny after b/e, two counts felony larceny of property over \$1000, and habitual breaking or entering, stemming from two break-ins and larcenies from Wake Forest University dormitory rooms. At trial, the jury convicted the defendant of the two felony breaking or entering offenses, two felony larceny after b/e offenses, one felony larceny for theft of property over \$1000, and one misdemeanor larceny, along with habitual breaking and entering. Following his notice of appeal, the State filed a motion for appropriate relief (“MAR”) within ten days of the judgment, asking the trial court to arrest judgment on the felony larceny for theft of property over \$1000 and the misdemeanor larceny as duplicative. The trial court granted that request and amended the judgment accordingly.

(1) The defendant argued that the trial court was divested of jurisdiction to amend the judgments in the case after he had given notice of appeal. This was incorrect. “The trial court retains jurisdiction until a notice of appeal is given and fourteen days have passed.” Slip op. at 5 (citation omitted). Further, once the State filed a timely 10-day MAR, the period of time for the defendant to give notice of appeal is extended 14 days under G.S. § 15A-1448(a)(2) from the date the trial court rules on the MAR. That statute provides that “when a proper motion for appropriate relief is made, the case shall remain open for the taking of an appeal until the court has ruled on the motion.” *Id.* (citing G.S. § 15A-1448). The trial court thus retained jurisdiction to amend the judgments.

(2) The defendant also argued that the trial court should have granted his motions to dismiss two of the larceny charges, pointing to the established rule that the taking of several items of property in the course of one act or event establishes only one larceny. Here, the defendant was improperly charged and convicted of multiple larcenies based on different items of property taken at one time. Because the trial court fixed the problem of duplicative larceny convictions with its MAR order, the issue was moot, and the argument dismissed.

(3) The trial court’s judgment incorrectly noted the defendant was a habitual felon, rather than one convicted of habitual breaking or entering. This was a clerical error, and the matter was remanded for correction of that error only. The convictions were otherwise affirmed.

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Capacity to Proceed

Trial court erred by not conducting another competency evaluation during trial, based on defendant's condition and history of mental illness.

State v. Hollars, 376 N.C. 432 (Dec. 18, 2020). Defendant was charged in 2012 with several counts of second-degree sex offense and taking indecent liberties against his step-daughter, and went to trial in 2018. During the intervening six years, defendant received a total of seven mental health evaluations in which there were “fluctuating determinations” of his competency to stand trial. The defendant was initially found to be suffering from mental illness and unable to assist in his own defense, rendering him incompetent. Subsequent evaluations found him competent as long as he continued receiving treatment, but also subject to rapid decompensation if his treatment regimen or sleeping arrangements were disrupted. The last evaluation, finding defendant competent, was conducted four months prior to trial. On the third day of trial, defense counsel raised competency concerns with the court based on the defendant's apparent confusion and vacant demeanor. During an inquiry the next morning, the trial judge concluded that the defendant's confusion was likely due to the technical nature of an evidentiary issue being argued, and defense counsel expressed no further concerns, so the trial continued. The defendant was convicted by the jury, sentenced to 150 years in prison, and appealed.

On review from a dissent in the Court of Appeals, the state Supreme Court held that the trial judge erred by failing to conduct another competency hearing *sua sponte* when faced with substantial evidence that raised a *bona fide* doubt about defendant's competency. That evidence included the lapse of time since defendant's last evaluation, his long history of mental illness and tendency for rapid deterioration, and the concerns raised by counsel during trial. Competence to stand trial is a due process right, and “the trial court must remain on guard over a defendant's competency” during trial, even in cases where the defendant was found competent at the start of the proceedings. In light of the defendant's history, the possibility that his confusion at trial could have been caused by his unfamiliarity with a technical legal issue “must yield to the necessity of the criminal justice system to ensure that a defendant's due-process rights are protected.” The ruling from the Court of Appeals, which remanded the case to the trial court for a hearing to determine defendant's competency at the time of trial, was therefore affirmed.

Justice Newby dissented, and would have held that “one isolated incident” of confusion did not create a duty to conduct further inquiry; he would have affirmed the trial court's actions based on the judge's in-court observations of the defendant, defense counsel's assurance that he had no further concerns, and the pretrial determinations of competency.

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When defendant attempted suicide during trial and was involuntarily committed, trial court erred by declaring defendant voluntarily absent and continuing the trial without first determining whether defendant was competent.

State v. Sides, 376 N.C. 449 (Dec. 18, 2020). The defendant was on trial for four counts of embezzlement when she attempted to commit suicide by ingesting 60 Xanax tablets during an evening recess. The defendant was found unresponsive, taken to the hospital, and involuntarily committed for evaluation and treatment. The trial was postponed until the following week, at which time the trial judge reviewed medical records and conferred with counsel before ruling that the defendant was voluntarily absent by her own actions and the trial could continue without her. The defendant was convicted by the jury, sentenced when she returned to court at a later date, and appealed. On appeal, the defendant argued that the trial court erred by failing to conduct a competency hearing *sua sponte* before declaring her voluntarily absent. A divided Court of Appeals found no error, since the trial court is only required to examine competency *sua sponte* if there is substantial evidence before it that raises a bona fide doubt about the defendant's competence. Based on a review of the record as a whole, the appellate court was not persuaded that the defendant's suicide attempt was a result of mental illness rather than a voluntary act intended to avoid facing prison.

The state Supreme Court disagreed and reversed. The higher court concluded that by "skipping over the issue of competency and simply assuming that defendant's suicide attempt was a voluntary act that constituted a waiver of her right to be present during her trial" the trial court and the Court of Appeals majority had "put the cart before the horse." In non-capital trials, a defendant may waive his or her right to be present, but the defendant must be competent to do so. In this case, there was substantial evidence before the court that raised a bona fide doubt about the defendant's competence. In addition to the suicide attempt itself, the court was aware that the defendant had been involuntarily committed due to a high risk of self-harm, and the court reviewed additional medical records regarding the defendant's history of mood disorders and prescribed medications. The trial court began an inquiry into defendant's competence by ordering the medical records and discussing the issue with counsel, but erred when it stopped short of conducting a formal competency hearing before declaring her voluntarily absent. Finally, due to the amount of time that has elapsed since the trial, a retrospective competency hearing was no longer feasible; therefore, the conviction was vacated and the case remanded for a new trial – if the defendant is found competent.

Justice Morgan dissented, joined by Justices Newby and Ervin, and would have held that the evidence before the trial court did not raise the same doubts about the defendant's competence as those that were present in the case precedent cited by the majority, and therefore the trial court did not err by declaring her voluntarily absent.

In the absence of substantial evidence of incompetency, the trial court was not required to *sua sponte* conduct another competency hearing for a defendant found capable of proceeding eight months earlier.

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State v. Allen, ___ N.C. ___, 2021-NCSC-38 (Apr. 16, 2021). In 2015, the defendant was charged with several drug crimes and with having attained habitual felon status. In November 2016, a forensic psychologist evaluated the defendant and determined that he suffered from an intellectual disability, memory impairment, and overall neurological dysfunction, and that he was not capable of proceeding to trial. An evaluation in February 2017 by a forensic psychiatrist, Dr. Berger, reached the same conclusion. After another evaluation in June 2017, however, Dr. Berger concluded that the defendant was capable of proceeding to trial. At the ensuing pretrial competency hearing in August 2017, the trial court determined that the defendant was capable to proceed. The charges came on for trial in February 2018 and the defendant was convicted by a jury of several substantive drug crimes and then pled guilty to having attained habitual felon status. On appeal, a divided panel of the Court of Appeals concluded that the trial court erred by failing to conduct another competency hearing before the defendant's trial began. *State v. Allen*, 269 N.C. App. 24 (2019). The panel noted that the trial court has a constitutional duty to initiate competency hearings on its own motion if the record contains substantial evidence tending to show that the defendant might not be competent, and that there was such evidence in the defendant's case, including his history of involuntary commitments, mental health history, significant intellectual disabilities, previous evaluations finding him incapable to proceed, and his mistaken responses to questions the trial judge posed to him at trial. The majority concluded that the evaluation from June 2017 "was not current, and may not have accurately reflected Defendant's mental state at trial in February 2018," and remanded the matter to the trial division to determine whether the defendant was competent at the time of trial. The dissent expressed the opinion that there was not "substantial evidence" tending to show the defendant might be incompetent at the time of trial.

On appeal, the Supreme Court considered whether there was substantial evidence sufficient to raise a bona fide doubt concerning the defendant's competence at the time of trial. The Court reviewed the facts of the case, including the defendant's mental health history and the course of treatment that ultimately led to the trial court's determination that he was competent to proceed. The Court noted that, at the time the case was called for trial, neither party made any attempt to revisit the issue of the defendant's competence. The Court was also unpersuaded that the defendant's remarks to the trial judge during the plea colloquy on the habitual felon charge were substantial evidence of incompetence. In the absence of substantial evidence, the Court concluded that the trial court was entitled to rely on the pretrial competency determination completed eight months before trial. The Court therefore reversed the Court of Appeals and remanded the case for proceedings not inconsistent with its opinion.

(1) Trial court properly denied defense counsel's motion to conduct an additional inquiry into defendant's capacity to proceed after the defendant jumped from a second-floor mezzanine during trial; (2) The trial court's jury instruction on first-degree sexual offense, which can be committed by multiple acts, did not deprive the defendant of his right to a unanimous jury verdict.

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State v. Flow, ___ N.C. App. ___, 2021-NCCOA-183 (May 4, 2021). The defendant was tried for possession of a firearm by a felon, first-degree kidnapping, burglary, DVPO violations with a deadly weapon, first-degree rape and first-degree forcible sexual offense arising from the violent kidnapping and rape of his former girlfriend.

(1) The morning before the sixth day of the trial, the defendant jumped feet first from a second-floor mezzanine in the jail, injuring his left leg and ribs. The defendant was taken to the hospital for surgery. After a hearing, the trial court determined that the defendant's absence from trial was voluntary and announced that the trial would proceed without him. The trial court considered and denied defense counsel's motion that the court inquire into defendant's capacity to proceed. The trial continued, and the defendant was convicted. He appealed, arguing that the trial court erred by denying defense counsel's motion for an inquiry into capacity.

The Court of Appeals rejected the defendant's argument. Nothing in the defendant's prior record, conduct or actions provided the trial court with notice or evidence that the defendant may have been incompetent. For that reason, the court did not err by declining to conduct a more intensive hearing on the defendant's capacity. The trial court had the opportunity to personally observe the defendant's conduct and demeanor, heard arguments from the State and defense counsel, and took evidence concerning the defendant's competency, including watching recorded footage of the defendant jumping 16 feet from the second-floor mezzanine.

(2) The trial court instructed the jury that it could find the defendant guilty of a first-degree sexual offense, if, in addition to the other required elements, it found the defendant had engaged in fellatio or anal intercourse. The defendant argued that this instruction deprived him of a unanimous jury verdict. The Court of Appeals rejected that argument, citing precedent that a jury verdict does not need to make a specific finding regarding precisely which sexual acts proscribed by G.S. 14-27.26 the defendant committed.

Failure to make findings on defendant's capacity and entry of insanity plea without deciding capacity issue violated statutory mandate, as well as defendant's due process rights, and was prejudicial error; (2) Defendant lacking capacity and in confinement for more than maximum possible punishment for the offense is entitled to dismissal under G.S. 15A-1008

State v. Myrick, ___ N.C. App. ___, 2021-NCCOA-146 (April 20, 2021). The defendant was charged with assault of a detention officer causing physical injury in Bertie County. Defense counsel obtained a capacity evaluation of the defendant. It showed that the defendant was not capable to stand trial but indicated his capacity could be restored. At a hearing on the defendant's capacity, the trial court failed to make findings regarding the defendant's capacity but instead found the defendant not guilty by reason of insanity ("NGRI") and ordered him involuntarily committed.

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The defendant failed to give notice of appeal in a timely manner and the Court of Appeals consequently lacked jurisdiction to consider it. In recognition of his defective notice of appeal, the defendant filed a petition for writ of certiorari. That petition was also flawed in that it failed to identify the order from which review was sought. The defendant subsequently filed a second petition for certiorari to remedy that defect. In its discretion, the court granted the second petition to reach the merits of the defendant's arguments.

(1) G.S. 15A-1002 requires a hearing when the defendant's capacity to proceed is at issue and requires the court to make findings supporting the trial court's conclusions. In failing to determine the defendant's capacity and make findings in support, the trial court violated a statutory mandate. In addition, the defendant's due process rights were violated when the NGRI plea was entered without a finding that the defendant was capable of proceeding. There was also no evidence that the defendant agreed to the entry of the plea. Although this was a question of first impression in North Carolina, the court agreed with other jurisdictions that a NGRI plea from a person lacking capacity is a due process violation. The court observed that this error was prejudicial, in that one acquitted by reason of insanity bears the burden of proof to show that the person is no longer mentally ill. *See* G.S. 122C-276.1(c). The NGRI order was therefore vacated, and the matter remanded for a capacity hearing.

(2) Under G.S. 15A-1008, a defendant who lacks capacity is entitled to dismissal once he or she has been confined for the maximum period of time authorized for a prior record level VI offender. Here, because the offense was a class I felony punishable by 21 months at most and the defendant had been confined for at least 23 months, in the event the trial court determines that the defendant lacks capacity on remand, the charge must be dismissed.

Motions

The State has the burden of showing that a federal constitutional error is harmless beyond a reasonable doubt

State v. Scott, ___ N.C. ___, 2021-NCSC-41 (Apr. 16, 2021). In 2013, the defendant's car collided with another vehicle, killing its driver. The defendant was taken to the hospital, where he was treated and released. The State later obtained an order directing the hospital to provide the defendant's medical records and blood. Tests of the blood indicated a blood alcohol concentration of 0.22. The defendant was charged with second-degree murder and death by vehicle. Before trial, the defendant moved to suppress, arguing that the blood was obtained in violation of the state and federal constitutions because there was no exigent circumstance or finding of probable cause. The trial court denied the motion and the defendant was convicted. The Court of Appeals held that the trial court erred by denying the motion to suppress, but went on to conclude over a dissent that "Defendant ha[d] failed to carry his burden to show any prejudicial error in the denial of the motion to suppress." *State v. Scott*, 269 N.C. App. 457 (2020). The dissent argued that the proper legal standard for evaluating whether a federal constitutional error is prejudicial is whether the State has proved its harmlessness beyond a

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reasonable doubt. *Id.* (Brook, J., dissenting). On appeal, the Supreme Court agreed with the dissent, holding that the Court of Appeals applied the incorrect standard and wrongly placed the burden on the defendant to show prejudice. The Court remanded the matter to the Court of Appeals for application of the proper standard.

(1) The trial court has inherent authority to grant a motion on grounds not argued and a party seeking to uphold the trial court's ruling on appeal may argue reasons to affirm not argued below; (2) Defendant was not entitled to expunction of DNA sample under G.S. 15A-146 or G.S. 15A-148 following exoneration and his DNA sample was properly retained by the SBI; (3) Lack of automatic expunction process following exoneration does not violate Article 1, Sec. 19 of the N.C. Constitution; (4) Federal due process claim on the lack of automatic expunction was not preserved when defendant never pursued expunction; (5) Defendant's DNA sample was not the fruit of the poisonous tree; (6) Taking of defendant's DNA sample did not otherwise violate the Fourth Amendment; (7) Attorneys representing defendant at innocence hearing were not ineffective for failing to expunge DNA results; (8) Trial court erred in limiting State's evidence in support of the inevitable discovery exception

State v. Womble, ___ N.C. App. ___, 2021-NCCOA-150 (April 20, 2021). In this Chatham County case, the State appealed from an order suppressing DNA evidence. The defendant was serving a life sentence for felony murder stemming from a robbery and killing in 1975. In 2008, the Court of Appeals ruled that inmates serving life under the Fair Sentencing Act were entitled to certain credits towards their sentence, which would have allowed the inmates (including the defendant) to be released. *See State v. Bowden*, 193 N.C. App. 597 (2008). In response, the Department of Public Safety began collecting DNA blood samples from inmates impacted by the *Bowden* decision to comply with the mandate of G.S. 15A-266.4 (requiring DNA samples before release from prison) and took the defendant's sample. The North Carolina Supreme Court later reversed *Bowden*, and the defendant remained in prison.

In 2013, a codefendant contacted the North Carolina Innocence Inquiry Commission and asserted that the defendant had not been involved in the 1975 murder. Investigation into the defendant's background revealed that he had significant intellectual limitations and mental health issues and was functionally illiterate. Other evidence showed that the defendant's confession at the time was unconstitutionally obtained. The Innocence Commission recommended release, and a three-judge panel found the defendant innocent and ordered him released from prison in 2014.

In 2017, law enforcement discovered a woman murdered in her apartment in Pittsboro. The defendant lived in the apartment complex at the time. Blood found on the crime scene matched to the defendant, but the SBI did not initially alert police to the match. Because the underlying murder conviction had been set aside, the SBI believed that the defendant's DNA sample should not have been in the database. Months later, the SBI alerted local law enforcement to the DNA match to the defendant. A search warrant was obtained to procure a new sample from the defendant. The affidavit acknowledged that the match was based on a

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sample provided for the earlier, now-vacated conviction, but noted that the SBI did not receive an order for expunction of that sample. The new sample of the defendant's DNA matched to the blood on the scene of the Pittsboro murder and the defendant could not be excluded as a source for other forensic evidence at the scene. The defendant was consequently charged with first-degree murder and moved to suppress the DNA results.

The suppression motion alleged that the DNA test results stemmed from the defendant's illegal confession in 1975 as well as an unjustified warrantless search of the defendant's DNA in 2017, and that counsel at the defendant's innocence hearing was ineffective for failing to seek an expunction of the defendant's DNA sample. The trial court found that the SBI lawfully obtained the defendant's DNA sample and that defense counsel was not ineffective. It nonetheless granted the motion to suppress. The trial court reasoned that the DNA expunction statute wrongfully placed the burden on the defendant to move for relief, and that the lack of an automatic process for expunction in cases of exoneration violated the Law of the Land clause of the state constitution under Article 1, section 19. Neither party raised this argument. The Court of Appeals reversed.

(1) The State sought to have the suppression order reversed on the basis that the Law of the Land clause argument was not raised in the trial court and was not therefore preserved for appellate review. This was incorrect. According to the court: "Our precedents clearly allow the party seeking to uphold the trial court's presumed-to-be-correct and ultimate ruling to, in fact, choose and run any horse to race on appeal to sustain the legally correct conclusion of the order appealed from." *Womble* Slip op. at 16. The trial court had inherent authority to grant the motion on grounds other than those argued before it and the issue was preserved for review.

(2) G.S. 15A-148 permits a defendant whose conviction is dismissed on appeal or by pardon of innocence to petition for expunction of a DNA sample provided in connection with the case. This statute did not apply to the defendant's situation because an appellate court did not dismiss his original conviction and he did not receive a pardon. Innocence Commission cases are heard by a three-judge panel. They conduct an evidentiary hearing and sit as finder of fact, unlike an appellate court. While a superior court can in some instances act as an appellate court (reviewing only record evidence), innocence-claim judicial panels are expressly tasked with taking and weighing evidence. G.S. 15A-1469.

G.S. 15A-146 permits expunction when a case is dismissed and may include a request for expunction of the defendant's DNA sample taken in connection with the case. Under the version of the statute in effect in 2019, a person did not qualify for this type of expunction if they had previously been convicted of a felony. The defendant had felony convictions unrelated to the original murder conviction, and those rendered the defendant ineligible for expunction under G.S. 15A-146 as well. The trial court therefore correctly determined that the SBI lawfully possessed and retained the defendant's DNA sample.

(3) The court agreed with the trial court that the defendant has the burden to seek expunction under the statutory framework. It further observed that expunctions act prospectively and not

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retrospectively—the criminal record is only erased after the final order of expunction has been filed. Here, the defendant did not seek expunction and alleged no disability preventing him from doing so. The trial court’s ruling on the Law of the Land clause was incorrect. In determining a violation under that clause, the court asks “(1) Does the regulation have a legitimate objective; and (2) if so, are the means chosen to implement that objective reasonable?” *Womble* Slip op. at 27. The State has a legitimate interest in maintaining records of convicted felons to assist with solving other crimes, and this is sufficient to satisfy the first prong of the test. The statutes regarding collection of DNA samples from convicted felons and the process by which those records may be expunged were also reasonable. According to the court:

The trial court’s suppression of the DNA evidence based upon the Law of the Land Clause denied the longstanding presumption of validity of legislative policy choices and is error. The application of N.C. Gen. Stat. § 15A-148 is presumed to be, and is, constitutional under the Law of the Land Clause. *Id.* at 28.

The trial court’s order to the contrary was therefore reversed.

(4) While not addressed by the trial court, the Court of Appeals also examined due process arguments under the Fourteenth Amendment as issues likely to recur on remand. North Carolina’s Law of the Land clause is the state counterpart to the Fourteenth Amendment to the U.S. Constitution and has been interpreted to provide greater protections than its federal relative. Because no violation occurred under the Law of the Land clause, no federal due process violation occurred either.

The defendant also argued *Nelson v. Colorado*, 581 U.S. ___, 137 S. Ct. 1249 (2017), as an additional ground to affirm the trial court. That case found Colorado’s process of requiring the defendant to prove by clear and convincing evidence in a new civil action that the person was actually innocent before refunding financial costs imposed in relation to an overturned conviction violated due process. Under *Nelson*, “a State may not impose anything more than minimal procedures on the refund of exactions dependent upon a conviction subsequently invalidated” to comport with due process. *Id.* The court assumed without deciding that the defendant’s DNA could be treated like the fees and fines in *Nelson*. Here though, the defendant never pursued the statutory minimum procedure of filing for an expunction. This precluded review by the Court of Appeals. “Defendant did not argue this basis before the trial court and his failure to request the return of his blood as an exaction of his invalidated conviction prevents us from considering the matter as a violation of his federal Due Process rights.” *Womble* Slip op. at 31. This claim was therefore dismissed.

(5) The defendant argued that his DNA sample obtained while in prison for his original conviction was the fruit of the poisonous tree as an additional ground to affirm the trial court. According to the defendant, the detective coerced his confession in 1975 and this rendered the DNA sample inadmissible. The Court of Appeals rejected this argument too, finding that the sample was obtained from an independent source. Under the independent source exception to

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the exclusionary rule, “evidence obtained illegally should not be suppressed if it is later acquired pursuant to a constitutionally valid search or seizure.” *Id.* at 32. No court had ever ruled that the detective at issue wrongfully obtained the defendant’s confession or that the confession was the fruit of the poisonous tree. Furthermore, the defendant also confessed to other law enforcement agents at the time, and this was an adequate independent source of the DNA sample. This argument was dismissed as well.

(6) The defendant argued his 2009 DNA sample was wrongfully obtained as a warrantless search unsupported by exigent circumstances. In *Maryland v. King*, 569 U.S. 435 (2013), the Supreme Court approved the taking of a DNA sample by swabbing the inner cheek of a person validly arrested on probable cause, reasoning that the search (the swab) was reasonable under the circumstances. The defendant’s case was different, in that the DNA sample was obtained by way of an intravenous blood-draw. While this process is more invasive than the swab at issue in *King*, it was not a significant intrusion. As an inmate at the time, the defendant had a reduced (though not nonexistent) expectation of privacy. The defendant was not singled out to provide a sample; he was part of a category of prisoners being prepared for release. “This intrusion is weighted against the government’s interest in preserving an identification record of convicted felons for resolving past or future crimes.” *Womble* Slip op. at 40. The court determined that the State’s interest outweighed the intrusion upon the defendant’s privacy rights and again affirmed that no Fourth Amendment violation occurred.

(7) The defendant claimed his innocence-claim attorneys were ineffective for failing to expunge his conviction and DNA sample. The State argued that there is no right to an attorney in collateral review and that there was therefore no ineffective assistance claim to be made. The defendant analogized this situation to that of *Kentucky v. Padilla*, 559 U.S. 356 (holding that the right to counsel requires the client to be correctly informed of clear immigration consequences). He argued that the DNA sample was a similar collateral consequence. The Court of Appeals again disagreed. In the words of the court:

Defendant did not have a statutory right to expungement under either N.C. Gen. Stat. §§ 15A-146 or 15A-148. Defendant’s counsel does not have a duty to pursue a remedy unavailable at law. Under *Strickland*, Defendant’s counsel’s performance cannot be ‘deficient’ for not pursuing a claim that is unavailable to him. *Womble* Slip op. at 43.

(8) The State argued that the DNA sample was admissible even if the defendant’s rights were violated under the inevitable discovery exception to the exclusionary rule. Pursuant to that rule, if State shows by a preponderance of evidence that law enforcement would have discovered the evidence despite their unconstitutional actions, the evidence may still be admitted. *See Nix v. Williams*, 467 U.S. 431 (1984). According to the State, law enforcement had already decided upon the defendant as a prime suspect in the 2017 murder and would have ultimately arrested him even without the DNA sample. The trial court precluded the State from presenting evidence of prior altercations between the defendant and his girlfriend spanning a period of time from the month before the 2017 murder to several months after. The trial court

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based its ruling on the fact that the detective did not learn of these prior disturbances until after the SBI alerted law enforcement to the DNA match. This was error. “Nowhere does our precedent impose a temporal component to evidence subject to inevitable discovery, only that the evidence ‘would have been inevitably discovered’ by police.” *Womble* Slip op. at 46. The case was therefore affirmed in part, reversed in part, and remanded for further proceedings.

(1) No error to deny motion for continuance; (2) Attorney fees awarded without notice to the defendant or an opportunity to be heard vacated and remanded for new hearing

State v. McMillian, ___ N.C. App. ___, 2021-NCCOA-145 (April 20, 2021). The defendant was convicted of armed robbery and resisting a public officer in Columbus County. Immediately before trial, the defendant moved to continue the case. He argued that he had only just received and reviewed recorded statements of the robbery victim and needed time to subpoena the victim’s wife to provide exculpatory evidence and to impeach the victim’s credibility. The trial court declined to continue the case. (1) Defense counsel had been involved in the case for more than nine months and the victim’s wife was listed in discovery materials provided to the defense as a potential witness for the State. Despite being on notice of her potential value as a witness before trial, defense counsel made no effort to locate or interview her. Further, the oral motion to continue did not specifically describe what testimony the witness would provide other than calling it “exculpatory” and “impeaching,” nor was it supported by affidavit. According to the court:

[T]he oral motion for continuance is not supported by affidavit or other proof. In fact, the record suggests only a natural reluctance to go to trial . . . [and] [w]e are left with the thought that defense counsel suffered more from lack of a defense than from lack of time. *McMillian* Slip op. at 9 (citation omitted).

The denial of the motion to continue therefore did not violate the defendant’s constitutional rights nor amount to an abuse of discretion.

(2) At the conclusion of the case, defense counsel was not able to provide the numbers of hours he had in the case and only later provided a fee application to the judge. This was done outside the presence of the defendant, who was in custody at the time. Attorney fees were awarded without the defendant being notified or present, and there was no other evidence in the record that the defendant had notice or waived his right to be heard. The defendant sought review on the issue.

Attorney fee awards are civil judgments that must be appealed in accordance with appellate rules for civil cases. Because the defendant failed to give written notice of appeal, his appeal was dismissed for lack of jurisdiction. However, the defendant also filed a petition for writ of certiorari on the issue. The Court of Appeals granted the petition to reach the merits of the issue. The State agreed that the defendant did not receive an opportunity to be heard on

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attorney fees, and the court vacated the order for attorney fees. The matter was remanded the matter for a hearing to be conducted on the issue with the defendant having notice and an opportunity to be heard.

On reconsideration in light of *State v. Golder*, trial court erred by denying defendant’s motion to dismiss the possession of a firearm by felon charge where state’s primary evidence was an unsupported confession, but there was sufficient evidence of constructive possession to support the controlled substance charges.

State v. Wynn, ___ N.C. App. ___, 2021-NCCOA-103 (Apr. 6, 2021). The defendant in this case previously appealed his convictions for possession of a firearm by a felon, trafficking in heroin, PWISD cocaine, and attaining habitual felon status. The Court of Appeals found no error in *State v. Wynn*, 264 N.C. App. 250 (2019) (unpublished) (“*Wynn I*”).

The state Supreme Court granted a petition for discretionary review and remanded to the Court of Appeals for the limited purpose of reconsideration in light of *State v. Golder*, 347 N.C. 238 (2020) (holding that a motion to dismiss made “at the proper time preserved all issues related to the sufficiency of the evidence for appellate review”). Applying *Golder* to the case at hand, the appellate court reconsidered defendant’s argument challenging the sufficiency of the evidence at trial, which the court in *Wynn I* had ruled was not preserved at the trial level. The court began by rejecting the state’s argument that *Golder* was inapplicable because defense counsel in this case moved for a directed verdict, rather than making a motion to dismiss; the court held that in criminal cases the terms are used interchangeably and are reviewed in the same manner.

Turning to the substantive offenses, the court held that the motion to dismiss the charge of possession of a firearm by a felon should have been granted. No firearm was found in this case; the state’s primary evidence for possession of a firearm was the defendant’s statement to the officers that he had one before they arrived but he had dropped it. Applying the *corpus delicti* principle, the court held that a confession alone cannot support a conviction unless there is substantial independent evidence to establish the trustworthiness of the confession, including facts which strongly corroborate the essential facts and circumstances in the confession. In this case, the police found a 9mm magazine in a home the defendant had broken into, and also found 9mm shell casings and bullet holes in the defendant’s own home; however, the court pointed out that a magazine is not a firearm, and it was unknown who caused the bullet holes or when. Without some additional evidence (such as recovering the firearm, testimony from a witness who saw a firearm or heard gunshots, or evidence of injury to a person or property), the court concluded that there was insufficient corroboration of the confession and vacated the conviction.

On his convictions for trafficking heroin and PWISD cocaine, the defendant challenged the sufficiency of the evidence that he possessed the drugs, but the appellate court held that there was sufficient evidence to establish constructive possession. The drugs were found inside a

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house where the defendant was seen actively moving from room to room, indicating that had dominion over the space, and the drugs were packaged in red plastic baggies that the defendant was known to use for selling drugs. When the defendant exited the house he also had over \$2,000 in cash on him and a white powdery substance in and on his nose. Taken together, these facts presented sufficient evidence to withstand a motion to dismiss regarding the defendant's constructive possession of the controlled substances, and the convictions were affirmed.

Finally, the court declined to revisit its earlier ruling on defendant's argument concerning the admissibility of evidence under Rule 403 and 404, since the case was only remanded for reconsideration in light of *Golder*. "As such, the Supreme Court left, and we shall too, leave intact our prior analysis, regarding defendant's second argument of evidence of other wrongs."

Where trial court's ruling on a motion to suppress was remanded for entry of written findings resolving factual disputes but the presiding judge had retired, a new hearing was required.

State v. Swain, ___ N.C. App. ___, 2021-NCCOA-101 (Apr. 6, 2021). In a prior decision, *State v. Swain*, 259 N.C. App. 253 (2018) ("*Swain I*"), the defendant appealed the trial court's denial of his motion to suppress. The defendant argued that the cocaine discovered in this drug trafficking case was based on a search warrant affidavit that contained false statements in violation of *Franks v. Delaware*, 438 U.S. 154 (1978). The appellate court in *Swain I* concluded that it could not adequately review the defendant's arguments because the trial court had not entered a written order resolving factual disputes in the evidence presented at the suppression hearing, so the matter was remanded to the trial court for entry of a written order clarifying the court's findings. However, since the judge who conducted the hearing had retired, another superior court judge reviewed the hearing transcript and prepared a written order denying the defendant's motion.

The appellate court found that this procedure was improper and a new hearing should have been held, for two reasons. First, pursuant to G.S. 15A-977 and *State v. Bartlett*, 368 N.C. 309 (2015), only the judge who presided over the hearing could make findings of fact concerning the evidence presented. Second, the appellate court pointed out that when it remanded this matter in *Swain I*, it had already concluded that the transcript alone provided an insufficient basis to resolve the conflicts in the evidence, and those disputes remained unresolved by the new order. Therefore, the court once again vacated the trial court's order and remanded with instructions to hold a new evidentiary hearing and enter a written order resolving any factual disputes and ruling on the motion.

Speedy Trial & Related Issues

The defendant's right to a speedy trial was not violated by a five-year delay between indictment and trial.

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State v. Farmer, 376 N.C. 407 (Dec. 18, 2020). In this case involving charges of first-degree sex offense with a child and indecent liberties, the court found that the procedural circumstances were “unsettling” but did not constitute an infringement upon the defendant’s constitutional right to a speedy trial. In May 2012, the defendant was indicted for offenses that allegedly occurred in March 2012. The defendant’s trial was not calendared for approximately five years and, at a July 2017 hearing on the defendant’s speedy trial motion to dismiss, an assistant clerk of court testified that there had been no trial activity in the defendant’s case from the date of indictment in May 2012 to January 2017. Applying the four-part test from *Barker v. Wingo*, the court found: (1) the length of delay between indictment and trial in this case was “striking and clearly raises a presumption” that the defendant’s speedy trial right may have been breached; (2) an assessment of the reason for the delay, largely attributed to a crowded docket and limited prosecutorial resources, “modestly [favored]” the defendant; (3) the defendant’s belated assertion of his right to a speedy trial, occurring nearly five years after his indictment, “weigh[ed] significantly against” the defendant; and (4) that the defendant did not suffer prejudice because of the delay. Engaging in a “difficult and sensitive balancing process” of the four *Barker* factors, the court held that the defendant’s right to a speedy trial was not violated.

(1) There was no speedy trial violation despite a seven-year delay between the defendant’s arrest and trial; (2) The trial court properly denied the defendant’s motion for a mistrial based on juror misconduct; (3) The defendant received ineffective assistance of counsel at his satellite-based monitoring determination hearing.

State v. Spinks, ___ N.C. App. ___, 2021-NCCOA-218 (May 18, 2021). In this Guilford County case, the defendant was convicted by a jury of indecent liberties with a child in May 2019 for a 2011 incident involving his daughter’s 6-year-old friend. He was sentenced to 28-43 months in prison and ordered to enroll in satellite-based monitoring for life. (1) The defendant argued on appeal that his right to a speedy trial was violated by the seven-year delay between his arrest and trial. Applying the four-factor test from *Barker v. Wingo*, 407 U.S. 514 (1972) (the length of delay; the reason for the delay; the defendant’s assertion of his right; and prejudice to the defendant), the Court of Appeals concluded that there was no speedy trial violation. The seven-year delay undoubtedly triggered the need to continue the *Barker* inquiry. As to the second factor, however, the record showed that the vast majority of the delay was attributable to the defendant’s motions to remove counsel—he had four lawyers before eventually proceeding pro se—or to a good faith delay on the part of the State resulting from the serious illness of the lead investigator. As to the third factor, the defendant did repeatedly, albeit improperly, assert his right to a speedy trial, but that alone, the Court of Appeals said, did not entitle him to relief. As to the fourth factor, the defendant asserted two ways he was prejudiced by the delay in his trial: that he hadn’t seen his daughter since his arrest, and that it was difficult to contact witnesses. The Court rejected the defendant’s assertion regarding his daughter, because the defendant was also incarcerated on other charges during the pendency of the charges at issue in this case, and he would therefore have been unable to see his daughter regardless. The Court likewise rejected the defendant’s assertion regarding witness availability, concluding that the

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defendant had merely asserted that the witnesses were “hard to get up with,” but not shown that they were actually unavailable. Weighing all the factors, the Court found no speedy trial violation.

(2) The defendant also argued that the trial court erred by denying his motion for a mistrial based on a juror’s contact with his mother during jury deliberations. The Court rejected that argument, concluding that the trial court properly determined through a thorough examination of the juror that the juror had not been improperly influenced by his conversation with his mother.

(3) Finally, the defendant argued that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM was a reasonable search under the Fourth Amendment. The Court of Appeals declined to invoke Rule 2 of the Rules of Appellate Procedure to consider the merits of the argument, which was not raised in the trial court. As to the defendant’s alternative argument that his lawyer provided ineffective assistance by failing to object to SBM in the trial court, the Court of Appeals concluded that a *constitutional* claim of ineffective assistance was unavailable under earlier precedent, but a *statutory* claim was available under G.S. 7A-451(a)(18), because the statutory right to counsel includes the right to effective counsel. Applying the requisite analytical framework, the Court held that the defendant’s lawyer’s performance was deficient, and that the deficiency prejudiced the defendant. The Court therefore reversed the SBM order and remanded the matter for a hearing on the reasonableness of SBM.

A six-year delay from the defendant’s arrest until his trial violated his right to a speedy trial when the State failed to present valid reasons for the delay.

State v. Farook, ___ N.C. App. ___, 850 S.E.2d 592 (Oct. 20, 2020), *review allowed*, ___ N.C. ___, 854 S.E.2d 584 (Mar. 10, 2021). In June 2012, the defendant was driving a vehicle that collided with a motorcycle, killing two victims. He was initially charged in 2012 with felony death by vehicle, reckless driving to endanger, driving left of center, driving while license revoked, and felony hit and run resulting in death. His first appointed lawyer withdrew in 2012, and his second appointed lawyer withdrew in 2017. Shortly thereafter in 2017, he was indicted for two counts of second-degree murder and attaining the status of violent habitual felon. In 2018, the defendant’s third lawyer filed a motion to dismiss on speedy trial grounds. The trial court denied the motion and in October 2018 the defendant was tried, convicted, and sentenced to life without parole. On appeal, the defendant argued that the six-year delay between his initial charge and his trial violated his right to a speedy trial under the federal and state constitutions. Analyzing his claim under the four-factor balancing test set forth in *Barker v. Wingo*, 407 U.S. 514 (1972), the Court of Appeals agreed. As to the first factor, the length of the delay, the Court held that the six-year delay here was clearly sufficient to create a presumption of prejudice to the defendant. As to the second factor, the reason for the delay, the Court first noted that the trial court did not properly recognize that in light of the presumption raised by the first factor, the burden shifted to the State to offer explanations for the delay. As to the

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substance of the information offered regarding the delay, the Court held that the trial judge plainly erred in allowing the defendant's second lawyer to testify on behalf of the State to explain the delay when the defendant had not waived attorney-client privilege regarding his communications with that lawyer. Disregarding the evidence from that lawyer, the State offered no explanation or excuse for the delay, and thus failed to meet its burden. The Court declined to rely on factual findings from an earlier appellate case, *State v. Farmer*, ___ N.C. App. ___, 822 S.E.2d 556 (2018), regarding a "crowded docket" in Rowan County to support the State's argument, as the record here lacked supporting evidence and in any event failed to account for more than two years of the six-year delay. As to the third factor, the defendant's assertion of his right to a speedy trial, the Court concluded that the factor carried little weight. And as to the final factor, prejudice, the Court concluded that the defendant's longtime imprisonment, lengthy delay before the most serious charges were even brought, and far greater sentence exposure supported his claim of prejudice, as he was unable to assist in his trial preparation and attempt to find potential witnesses and other information that would have been available earlier. Indeed, the court said, the delay was so substantial that its duration alone speaks to prejudice. The trial court erred in considering any alleged prejudice to the State due to the delay; the Sixth Amendment protects the defendant, not the State. Considering all of the *Barker* factors, the Court reversed the trial court's order denying the defendant's motion to dismiss and vacated the defendant's judgments due to a violation of his constitutional rights to a speedy trial.

Bond Forfeiture

The trial court abused its discretion when it ordered a bail agent to pay \$500 in sanctions for failing to attach sufficient documentation with its motion to set aside a bond forfeiture and prohibited the bail agent from becoming a surety on bonds until the judgment was satisfied.

State v. Doss, ___ N.C. App. ___, 851 S.E.2d 642 (Nov. 3, 2020). The defendant was arrested for impaired driving and posted bond on same day through the bail agent. The defendant subsequently failed to appear, and an order was issued for her arrest. The court subsequently mailed a bond forfeiture notice to the bail agent. The bail agent filed a motion to set aside the forfeiture using form AOC-CR-213, checking box two which provides that "[a]ll charges for which the defendant was bonded to appear have been finally disposed by the court other than by the State taking a dismissal with leave as evidenced by the attached copy of the official court record" and box four, which provides that "[t]he defendant has been served with an order for arrest for the failure to appear on the criminal charge in the case in question as evidenced by a copy of an official court record, including an electronic record." Slip. op. at 2-3. An ACIS printout showing that the defendant had been assigned a new court date was attached to the motion.

The local board of education opposed the motion and claimed the right to seek sanctions for reimbursement of all attorney fees and expenses incurred in objecting to this motion if the bail agent provided additional documentation after the date of the objection. Before the hearing on the board's objection to the motion to set aside, the bail agent provided the board's counsel

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with additional documentation that demonstrated the order for arrest had been served. At the hearing, the board's counsel conceded that the additional documentation was sufficient to set aside forfeiture, and the trial court granted the bail agent's motion to set aside. The trial court also ordered sanctions against bail agent in the amount of \$500 for failure to attach sufficient documentation to the motion to set aside. Further, the trial court prohibited the bail agent from becoming "surety on any bail bond in Jones County until" it satisfied the judgment. The court of appeals determined that a trial court may only impose sanctions under G.S. 15A-544.5(d)(8) when the motion to set aside is denied. A trial court cannot order both that the forfeiture be set aside and that sanctions be imposed. Thus, it held that the court abused its discretion when it granted the motion to set aside and imposed sanctions against the bail agent.

The court also held that the board failed to make a proper motion for sanctions as the record did not indicate that the board filed or served the bail agent with a motion for sanctions and notice of the hearing 10 days prior to the hearing.

Further, the court of appeals determined that the trial court exceed its authority by prohibiting the bail agent from becoming surety on any future bonds in Jones County until the judgment was satisfied. Lastly, the appellate court reasoned that the trial court erred in determining that the motion "contained insufficient documentation" as the ACIS printout that was attached to the motion is an official court document. For all of these reasons, the court of appeals determined that the trial court abused its discretion when it sanctioned the bail agent.

Sentencing

Miller and Montgomery do not require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole

Jones v. Mississippi, 593 U.S. ___, 141 S. Ct. 1307 (Apr. 22, 2021). In the case of a defendant who committed a homicide when he or she was under 18, Miller and Montgomery do not require the sentencer to make a separate factual finding of permanent incorrigibility before sentencing the defendant to life without parole. In such a case, a discretionary sentencing system is both constitutionally necessary and constitutionally sufficient.

Trial court lacked subject matter jurisdiction to revoke the defendant's probation when the violation reports were filed after the probation expired

State v. Hendricks, ___ N.C. App. ___, 2021-NCCOA-184 (May 4, 2021). The defendant pled guilty to aggravated felony serious injury by vehicle, driving while impaired, and injury to real property. The trial court sentenced the defendant to 29 – 47 months imprisonment and suspended the sentence, placing the defendant on 60 months of supervised probation. The trial

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court also ordered the defendant to serve 330 days of imprisonment as a condition of special probation.

Defendant began to serve his term of special probation on October 7, 2014, and then served a 26-day term of imprisonment in a separate case. The defendant was released from imprisonment to supervised probation on September 28, 2015. The probation officer filed violation reports on January 23, 2020, February 5, 2020, and February 25, 2020. The trial court determined in a March 10, 2020 hearing that the defendant willfully violated the terms of his probation and activated the defendant's suspended sentence. The defendant appealed. The Court of Appeals determined that the trial court lacked subject matter jurisdiction to revoke the defendant's probation. Pursuant to G.S. 15A-1351(a), the defendant's total probationary period included his 330-day imprisonment as a condition of special probation. The Court reasoned that, at the latest, the defendant's probationary period began on November 3, 2014, after he served his 26-day sentence in the other case. Thus, the defendant's 60-month probationary period would have ended, at the latest, on November 3, 2019. Because the violation reports were all filed after that date, the trial court lacked subject-matter jurisdiction to revoke the defendant's probation and activate his suspended sentence.

Trial court's order revoking defendant's probation after the probationary period had ended was adequately supported by findings of good cause.

State v. Geter, ___ N.C. App. ___, 2021-NCCOA-98 (Apr. 6, 2021). The defendant was placed on 18 months of supervised probation following his guilty pleas to possession of a firearm by a felon, possession of a stolen motor vehicle, fleeing to elude, and RDO. Shortly before his probationary term expired, the defendant's probation officer filed a violation report alleging that he had committed four new criminal offenses. Approximately a year later, after the defendant prevailed on a motion to suppress evidence in those cases, the new charges were dismissed. Nevertheless, the defendant's probation was revoked based on the allegations in the violation report, and the defendant appealed. In *State v. Geter*, 843 S.E.2d 489 (N.C. App. 2020) (unpublished), the appellate court remanded this matter because the revocation judgments failed to identify which of the four new offenses were the basis for the revocation, and also failed to make a finding that good cause existed to revoke the defendant's probation after the probationary period had expired (by 399 days), as required by G.S. 15A-1344(f). After a rehearing, the trial court found that good cause existed for the revocation because the new charges were not resolved before the probationary period had ended, and the disposition of those charges would have had a direct impact on the violation hearing. The defendant again appealed his revocation, arguing that the trial court's finding of good cause failed as a matter of law.

The appellate court disagreed and affirmed the revocation. Applying an abuse of discretion of standard, and distinguishing *State v. Sasek*, 844 S.E.2d 328 (N.C. App. 2020) in which no findings were made nor was there any evidence in the record that good cause existed, the trial court in this case did make findings and they were supported by facts in the record. The appellate court

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acknowledged that a revocation occurring 399 days after the probationary period had ended was “significant” and “unadvisable in the administration of justice,” but in this case the violation report was not filed until shortly before the end of the probationary period, there was only one session of hearings held each week in the county, and the trial court found that waiting for a disposition on the underlying new charges constituted good cause for the delay. The trial court did not abuse its discretion in so finding, and the revocation order was affirmed.

The trial court erred by entering a civil judgment for attorney’s fees without first providing the defendant notice and an opportunity to be heard.

State v. Corpening, ___ N.C. App. ___, 2021-NCCOA-18 (Feb. 16, 2021).

The defendant pled guilty to possession of cocaine and possession of methamphetamine pursuant to a plea agreement that required the State to dismiss other charges and to refrain from indicting him as a habitual felon. At the plea hearing, the trial court conducted a plea colloquy and asked defense counsel, “How much time do you have in this?” Counsel replied “9.5 hours.” Slip op. at ¶ 2. The trial court accepted the plea and sentenced the defendant to two consecutive active terms of seven to 18 months. The trial court also entered a civil judgment ordering the defendant to pay \$570 in attorney’s fees and a \$60 appointment fee.

The defendant appealed the civil judgment for attorney’s fees and petitioned for certiorari review. The Court dismissed the defendant’s *pro se* appeal based on his failure to specify the judgment from which he was appealing, but granted certiorari review.

The Court noted that while a trial court may enter a civil judgment against a convicted defendant for the amount of fees incurred by his or her court-appointed attorney, the defendant must be provided notice and an opportunity to be heard before such a judgment may be entered. Trial courts must ask defendants personally (not through counsel) whether they wish to be heard on the issue before imposing judgment. The record in the case below demonstrated that the defendant was not provided notice or an opportunity to be heard. Thus, the Court of Appeals held that the trial court erred by imposing the civil judgment for attorney’s fees, vacated the judgment, and remanded for further proceedings.

(1) The trial court erred in finding the out-of-state offenses were substantially similar to North Carolina misdemeanors without comparing the elements of each statute. (2) The trial court erred in assigning attorney’s fees without providing the defendant notice and the opportunity to be heard.

State v. Black, ___ N.C. App. ___, 2021-NCCOA-5 (Feb. 2, 2021). (1) In this Buncombe County case, the State prepared the defendant’s prior record level worksheet and calculated that the defendant had fourteen prior record points based on ten out-of-state felony and misdemeanor convictions. The defendant and her counsel stipulated to these prior convictions by signing the sentencing worksheet. At the plea hearing, the state provided “the trial court with copies of

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each out-of-state misdemeanor statute as evidence that the offenses were ‘substantially similar’ to a North Carolina offense to support their classification as Class 1 misdemeanors.” Slip op. at ¶ 5. Upon accepting the copies, the trial court did not review them further, and only asked the defendant’s counsel whether they objected to the trial court finding that the out-of-state misdemeanors were of similar status in North Carolina. The defendant’s counsel did not respond because of an interruption by the prosecutor, but following the interruption, the defendant and her counsel agreed to “14 prior record points and a prior record level, therefore, of five for felony sentencing purposes.” *Id.* at ¶ 5.

On appeal, the defendant claimed that the trial court erred by failing to consider whether each conviction was substantially similar to any North Carolina Class A1 or Class 1 misdemeanor, and thus miscalculated her prior sentencing points. The Court of Appeals agreed that the trial court may not accept a stipulation that an out-of-state conviction is “substantially similar” to a particular North Carolina felony or misdemeanor. Instead, the trial court must compare the elements of the out-of-state statute with the elements of the North Carolina statute to determine as a matter of law whether they are substantially similar. The Court of Appeals remanded the case for resentencing.

(2) Prior to sentencing, the defendant’s counsel told the trial court that they were appointed, their hours on the case, and that it totaled to \$990 in attorney’s fees. The trial court did not, however, ask the defendant herself about the attorney’s hours or fees. Under *State v. Friend*, 257 N.C. App. 516 (2018), indigent defendants have a right to notice and the opportunity to be heard before civil judgments are entered against them for court-appointed attorney’s fees. The trial court did not offer the defendant an opportunity to be heard and thus erred. The Court of Appeals vacated the imposed civil judgment for attorney’s fees.

Sentence of life with parole for a 15 year-old defendant, ordered to run consecutive to his sentence for rape, was not unconstitutional, but trial court erred by ordering lifetime SBM without conducting a hearing.

State v. Conner, ___ N.C. App. ___, 853 S.E.2d 824 (Dec. 31, 2020). The defendant pleaded guilty to raping and murdering his aunt, and received a sentence of 240-348 months for the rape followed by a consecutive sentence of life with parole for the murder. On appeal, the defendant argued that: (i) a consecutive sentence of life with parole was not permitted under G.S. 15A-1340.19A, et seq. (the “Miller-fix statutes”); (ii) his sentence was unconstitutional since it amounted to a *de facto* sentence of life without parole; and (iii) the trial court erred in ordering lifetime satellite-based monitoring (SBM) without holding a hearing.

The majority first held that consecutive sentences are permissible under the statutes, and trial courts have discretion to decide whether to order consecutive or concurrent sentences, so the defendant’s first argument was overruled. Next, the court held that the consecutive sentence imposed in this case was not unconstitutional. The majority acknowledged that an identical sentence was held unconstitutional in *State v. Kelliher*, ___ N.C. App. ___, 849 S.E.2d 333

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(2020), *temp. stay allowed*, __ N.C. __, 848 S.E.2d 493 (2020), but found that it was not binding precedent because the state Supreme Court stayed the decision and granted discretionary review. Assuming that a *de facto* life sentence without parole would be unconstitutional, that argument did not apply to this defendant since he will be eligible for parole at age 60, after serving 45 years. However, the trial court did err at the sentencing hearing by failing to conduct a hearing before ordering the defendant to enroll in lifetime SBM, so that order was vacated and remanded with instructions to conduct a hearing.

Chief Judge McGee concurred in part and dissented in part. Judge McGee agreed that the statutes themselves do not prohibit consecutive sentences and also agreed that the order for lifetime SBM should be vacated, but would have held that the consecutive sentence of life with parole constituted a *de facto* sentence of life without parole, and was therefore unconstitutional as held in *Kelliher*.

Two consecutive sentences of life with parole for a 17 year-old defendant were not unconstitutional, but trial court erred by failing to consider whether concurrent sentences might be appropriate.

State v. Anderson, __ N.C. App. __, 853 S.E.2d 797 (Dec. 31, 2020), *temp. stay allowed*, __ N.C. __, 852 S.E.2d 347 (Jan. 19, 2021). The defendant was sentenced to two consecutive sentences of life without parole for two murders he committed when he was 17 years old. The defendant filed an MAR requesting resentencing on the grounds that sentencing a juvenile to life without the possibility of parole was unconstitutional, pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) and G.S. 15A-1340.19A, et seq. The MAR was granted and the defendant was resentenced to two consecutive life sentences with parole.

On appeal, the defendant argued that his new sentence was unconstitutional since it amounted to a *de facto* sentence of life without parole. The majority opinion acknowledged that an identical sentence was held unconstitutional in *State v. Kelliher*, __ N.C. App. __, 849 S.E.2d 333 (2020), *temp. stay allowed*, __ N.C. __, 848 S.E.2d 493 (2020), but found that it was not binding precedent because the state Supreme Court stayed the decision and granted discretionary review. Turning to the case at hand, the appellate court held that “the sentences imposed by the trial court, though significant, are not unconstitutional.” Assuming that a *de facto* life sentence without parole would be unconstitutional, that argument did not apply to this defendant since he will be eligible for parole in 50 years. However, the appellate court did find that the trial court erred at the resentencing hearing by failing to consider whether concurrent sentences might be appropriate, due to a mistaken belief that concurrent sentences were not permissible under the statutes. The two sentences of life with parole were therefore affirmed, but the portion of the judgment ordering that the terms be consecutive was vacated and remanded for a new hearing to determine whether the sentences should be consecutive or concurrent.

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Chief Judge McGee concurred in part and dissented in part. Judge McGee agreed that the statutes themselves do not prohibit consecutive sentences and also agreed that the defendant must be resentenced, but would have held that two consecutive sentences of life with parole do constitute a *de facto* sentence of life without parole, and are therefore unconstitutional as held in *Kelliher*.

The trial court erred by accepting the defendant’s admission to an aggravating factor without confirming that the State either provided written notice or that the defendant waived the right to notice

State v. Dingess, ___ N.C. App. ___, 853 S.E.2d 295 (Dec. 15, 2020). In this Iredell County case, the defendant pled guilty to assault inflicting serious bodily injury for a crime in which the victim suffered a fractured skull and other injuries, leaving him partially paralyzed and suffering from dementia. At sentencing, the defendant admitted to an aggravating factor based on a prior violation of his federal probation and the trial court sentenced the defendant in the aggravated range. On appeal, the defendant argued that the court erred by accepting his admission to the aggravating factor without first confirming that the State either provided him with written notice at least 30 days before trial of its intent to prove the factor, or that the defendant waived his right to notice. Reviewing the trial transcript, the Court of Appeals concluded that the State did not provide notice and that the defendant did not clearly waive his right to notice. The trial court therefore erred. As to the remedy, because the defendant’s plea agreement was based on the possibility of a sentence in the aggravated range, and because that agreement was unfulfillable without the improperly found aggravating factor, the Court of Appeals set aside the entire plea agreement. The case was therefore remanded the case to superior court for disposition on the original charge.

The trial court did not err by applying the “great monetary value” aggravating factor when sentencing the defendant following her conviction of embezzlement where the defendant embezzled \$102,242.62 in excess of the \$100,000 threshold required for a conviction of Class C felony embezzlement under G.S. 14-90(c)

State v. Gamble, ___ N.C. App. ___, 852 S.E.2d 655 (Dec. 1, 2020). In July 2016, the defendant was the executive director of a nonprofit when she informed the board of directors that the nonprofit was out of money. Between 2012 and 2016, the balance of the nonprofit’s account had gone from \$400,000 to \$400. The SBI discovered \$410,203.41 in unauthorized expenditures in the form of checks and credit card charges, all of which benefited the defendant.

The defendant was charged with eight counts of embezzlement of property received by virtue of office or employment (G.S. 14-90); two of the counts alleged that the defendant embezzled property over \$100,000 in value. A jury found the defendant guilty of all charges and at sentencing the defendant plead guilty to two aggravating factors: “one of the offenses involving unauthorized credit card transactions and all three offenses involving unauthorized checks

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‘involved an . . . actual taking of property of great monetary value.’” Slip op. at 3. The trial court applied these aggravating factors to the defendant’s conviction of embezzling \$202,242.62 in the year 2015 and sentenced the defendant within the aggravated range of 92-123 months.

On appeal, the defendant argued that the trial court erred by imposing a sentence in the aggravated range because the “great monetary value” aggravating factor could not be applied because the value embezzled, \$202,242.62, was not *far greater* than the \$100,000 amount required to support a conviction of Class C felony embezzlement under G.S. 14-90(c). See slip op. at 4. The Court of Appeals rejected the defendant’s argument saying that it would not make determinations based on a rigid ratio. The Court of Appeals noted that the amount embezzled was more than twice the \$100,000 threshold and stated that “\$202,242.64 is, from the standpoint of an ordinary person, a great value of money.” Therefore, “the trial court did not err by applying the aggravating factor of ‘taking of property of great monetary value’ when sentencing [the] [d]efendant.” Slip op. at 6-7.

(1) Defendant’s constitutional challenges to consecutive terms of life with parole were preserved; (2a) De facto life sentences may violate *Miller* and its progeny; (2b) Consecutive sentences may aggregate to create a de facto life sentence; (2c) Defendant’s minimum sentence of 50 years constituted a de facto life sentence in violation of *Miller*

State v. Kelliher, ___ N.C. App. ___, 849 S.E.2d 333 (Oct. 6, 2020), *review allowed* ___ N.C. ___, 854 S.E.2d 586 (Mar. 10, 2021). The defendant was a participant in a double murder at the age of 17 and sentenced to consecutive terms of life without parole (“LWOP”) in Cumberland County in 2001. He moved for resentencing pursuant to *Miller v. Alabama*, 567 U.S. 460 (2012) (holding that mandatory life without parole sentences for juvenile offenders violates the 8th Amendment) and its progeny. The trial court determined at resentencing that the defendant did not present the rare case of an “irredeemable” or “incorrigible” juvenile, and therefore did not qualify for an LWOP sentence. The defendant’s evidence at resentencing showed an abusive childhood, early substance abuse, substantial educational and self-improvement while in prison. He also presented expert mental health testimony indicating he was at low-risk to reoffend and evidence of a near-perfect disciplinary record while in prison (among other evidence). The trial court resentenced the defendant to two consecutive terms of life with parole, which meant that the defendant would be parole-eligible after a term of at least 50 years. The defendant appealed, arguing that the sentence amounted to a de facto life sentence in violation of state and federal constitutional protections. The Court of Appeals unanimously agreed.

(1) The defendant’s challenge to his sentence was preserved. He raised *Miller*, the 8th Amendment, and comparable provisions of the state constitution in his MAR seeking resentencing, and specifically argued for concurrent life with parole sentences. The specific grounds of his objections to the sentence were thus clear from context and at least amounted to “an implied argument” that his sentence violated constitutional protections. Even if the argument was not preserved, the defendant asked the court to invoke Rule 2 of the Rules of

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Appellate Procedure to consider the argument, and the court found that invocation of the rule was appropriate here to review the constitutional issue.

(2) Conducting an extensive review of the *Miller* line of cases, the court made three rulings of first impression in the state. (2a) A “clear majority” of jurisdictions have held that a de facto life sentence is reviewable under *Miller*, and North Carolina joined that majority. To allow *Miller* protections to be circumvented by labeling a sentence a term of years as opposed to life without parole when the effect of the sentence would preclude a meaningful opportunity for release would render the constitutional protections hollow. “*Roper, Graham, and Miller* are all concerned with ‘imposing the harshest sentences on juvenile offenders, even when they commit terrible crimes.’ A *de jure* LWOP sentence is certainly as ‘harsh’ as its functional equivalent.” *Kelliher* Slip op. at 30. (2b) Concurrent sentences that aggregate to create a de facto life sentence for juveniles not otherwise eligible for LWOP violate the constitutional protections for the punishment of juveniles. The court recognized that courts around the country are “sharply divided” on this point. A majority of jurisdictions have determined that concurrent sentences may lead to an impermissible de facto life sentence, and North Carolina again joined that majority. “The applicability and scope of protection found in the Eighth Amendment . . . [turn] on the identity of the defendant, not on the crimes perpetrated.” *Id.* at 35. The court distinguished North Carolina law from that of other jurisdictions holding otherwise. (2c) The defendant’s sentence to consecutive life with parole terms was unconstitutional. The defendant would become eligible for parole at age 67 under his current sentence. This was long enough to constitute a de facto life sentence. In the words of the court:

To release an individual after their opportunity to directly contribute to society—both through a career and in other respects, like raising a family—does not provide a meaningful opportunity to demonstrate the ‘maturity and rehabilitation’ required to obtain release and reenter society as required by *Graham*. *Id.* at 40 (citation omitted) (cleaned up).

The court observed that the defendant would not necessarily be released from prison even after becoming parole eligible. However, to afford the defendant the constitutional protections established by the *Miller* line of cases, the defendant’s consecutive sentences could not stand. The sentences were therefore vacated, and the trial court was ordered to impose concurrent life with parole sentences on remand.

Sex Offenders

Defendant was properly ordered to register as a sex offender after felony secret peeping conviction; trial court’s finding that the defendant was a danger to the community was supported by the record

State v. Fuller, 376 N.C. 862 (Mar. 12, 2021). While living with family friends in Wake County, the defendant placed a secret camera in various rooms at different times to record an adult

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female occupant. He later pled guilty to one count of felony secret peeping. Under the peeping statute, G.S. 14-202(l), the defendant may be required to register as a sex offender for a qualifying conviction (or subsequent conviction) if the court determines the defendant is a danger to the community and that the purposes of the sex offender registration program would be served by requiring the defendant to register. Under G.S. 14-208.5, the purposes of the registration program are to provide law enforcement and the public with information about sex offenders and those who commit crimes against children in order to protect communities. The trial court found that the defendant was a danger to the community and ordered him to register as a sex offender for 30 years. The trial court did not order a Static-99 assessment of the defendant and no evidence was presented regarding the defendant's likelihood of recidivism. A divided Court of Appeals affirmed (that decision is summarized [here](#)) and the defendant appealed.

Reviewing G.S. 14-202(l) de novo, a majority of the court affirmed. It rejected the idea that a Static-99 or evidence of likely recidivism was required to support the finding of dangerousness: “[N]either a Static-99 assessment, nor considerations of likelihood of recidivism, are dispositive on the issue of whether a defendant ‘is a danger to the community.’” *Fuller* Slip op. at 8. The court looked to the involuntary commitment statutes for guidance on how to evaluate a defendant's “danger to the community.” Under those statutes, danger to self or others is determined by examining not only the respondent's current circumstances, but also the person's “conduct within the relevant past and [whether there is] a reasonable probability of similar conduct within the near future.” *Id.* at 9 (cleaned up). Thus, a finding that the defendant poses a danger to the community for purposes of G.S. 14-202(l) may be based on the defendant's current dangerousness or on conduct in the “relevant past” that reflects a “reasonable probability of similar conduct . . . in the near future.” *Id.* at 10. The trial court found (and the Court of Appeals agreed) that the defendant was a danger to the community based on numerous factors. These included his taking advantage of a personal relationship to commit the crime, the “sophisticated scheme” employed to accomplish the crime, the period of time over which the crime occurred, and the “ease with which the defendant could commit similar crimes in the future,” among other factors. *Id.* at 11. While the trial court's finding that the defendant lacked remorse was unsupported by the record, the remaining factors found by the trial court were sufficient to establish the defendant's dangerousness.

Justice Earls dissented. According to her opinion, the majority contravened precedent requiring the State to show a likelihood of reoffending and disregarded the legislative intent of the registration statutes. She would have found that the trial court reversibly erred by failing to determine the defendant's risk of recidivism. [Jamie Markham blogged in part about nonautomatic sex offender registration [here](#)]

(1) In light of overwhelming evidence of the defendant's guilt, the trial court did not plainly err in admitting prior act testimony; (2) Convictions under prior versions of the rape and sexual offense statutes were still reportable convictions; (3) The trial court erred by ordering satellite-based monitoring without a hearing.

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State v. Mack, ___ N.C. App. ___, 2021-NCCOA-215 (May 18, 2021). In this Cumberland County case, the defendant was convicted by a jury of second-degree rape and second-degree sexual offense against a victim named Tamara. The offenses were committed in 2011, but not successfully investigated until a DNA database match in 2017. During the trial, the trial judge allowed testimony by another woman, Kesha, who alleged that the defendant had previously raped her in 2009, for the purpose of proving the identity of the assailant in Tamara’s case. (1) The defendant argued on appeal that the trial court erred in admitting the prior act testimony from Kesha under N.C. R. Evid. 404(b). Reviewing for plain error, the Court of Appeals concluded that the overwhelming evidence of the defendant’s identity and guilt made it improbable that the jury would have reached a different result even if the evidence had been admitted in error—as it may have been given that the defendant’s identity was not necessarily in issue in the case (he did not claim an alibi), and the circumstances of the two rapes were not particularly similar.

(2) The defendant also argued that the trial court erred by finding that his convictions under G.S. 14-27.3 and G.S. 14-27.5, the former statutes for second-degree rape and second-degree sexual offense, required sex offender registration, because those former statutes are not specifically listed in the current list of reportable offenses. Notwithstanding the State’s lack of a compelling argument on appeal, the Court of Appeals on its own found the effective date provision in the 2015 recodification act, which said that prosecutions for offenses committed before December 1, 2015 remain subject to the laws that would otherwise be applicable to those offenses, including the list of reportable convictions in the former version of G.S. 14-208.6(5). The trial court therefore did not err in ordering the defendant to register.

(3) Finally, the defendant argued that the trial court erred by ordering him to enroll in satellite-based monitoring for life without conducting a full determination hearing. The Court of Appeals agreed. The State specifically elected not to proceed with the hearing during the sentencing phase, and the trial court thus erred by ordering SBM. The Court of Appeals vacated the SBM orders and remanded the issue for hearing.

(1) The state failed to meet its burden of establishing that lifetime satellite-based monitoring (SBM) of the defendant following the defendant’s release from prison is a reasonable search because the state did not present any evidence that a legitimate state interest would be served by requiring lifetime SBM of the defendant; (2) It was error for the trial court to assess duplicative court costs because all of the defendant’s charges arose from the same event.

State v. Perez, ___ N.C. App. ___, 854 S.E.2d 15 (Dec. 31, 2020). The defendant appealed from judgments entered upon his guilty pleas to second-degree rape and forcible sex offenses, second-degree kidnapping, assault on female, assault by strangulation, obstruction of justice, and intimidating a witness. The defendant appealed by writ of certiorari both the trial court’s imposition of lifetime SBM and the trial court’s imposition of duplicative court costs.

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First, the Court of Appeals had to decide whether the defendant's writs of certiorari properly conferred jurisdiction to the court. The defendant gave oral notice of appeal at his sex offender registration hearing, however he did not specifically raise the issue of court costs or later file a written notice of appeal. The court exercised its discretion to allow the defendant's petition for writ of certiorari to review the lifetime SBM order because they are "authorized to issue a writ of certiorari 'to permit review of the judgments and orders of trial tribunals when the right to prosecute an appeal has been lost by failure to take timely action[.]' N.C. R. App. P. 21(a)(1)." Slip op. at 8. Next, the court dismissed the defendant's oral notice of appeal and instead used its discretion under Rule 21(a)(1) to grant the defendant's writ of certiorari because it was not the defendant's fault because it was defendant's trial counsel who failed to give proper notice of appeal.

(1) The defendant's first argument on appeal was that the trial court erred in ordering the defendant to enroll in lifetime satellite-based monitoring (SBM) upon his release from prison and contends the state did not meet its burden of proving the imposition of lifetime SBM is a reasonable search under the Fourth Amendment. Slip op. at 7.

The Court of Appeals used *Gordon* and *Griffin II* as instructive in addressing *Grady III's* application to defendants convicted of an aggravated offense and outside the recidivist context. The court stated that "as this Court did in *Griffin II*, we employ *Grady III* as a roadmap, 'reviewing [d]efendant's privacy interests and the nature of SBM's intrusion into them before balancing those factors against the State's interests in monitoring [d]efendant and the effectiveness of SBM in addressing those concerns.' *Griffin II*, ___ N.C. App. at ___, 840 S.E.2d at 273." Slip op. at 10-11.

In evaluating the defendant's privacy interests, the court determined the defendant has a diminished expectation of privacy in some respects, such as the privacy of his address or matters material to his voluntary participation in certain activities, because the defendant must submit to lifetime sex offender registration and post-release supervision upon release from prison. However, the court found that the defendant's expectation of privacy would not always be so severely diminished and following the termination of post-release supervision, the defendant's constitutional privacy rights will be restored and that will occur at some point before the end of the lifetime SBM order. Therefore, the court found that the "[d]efendant will enjoy 'appreciable, recognizable privacy interests that weigh against the imposition of SBM for the remainder of' [d]efendant's lifetime. *Griffin II*, ___ N.C. App. at ___, 840 S.E.2d at 274."

The court next evaluated the intrusive nature of SBM and found that "SBM's ability to track Defendant's location is 'uniquely intrusive', and thus weighs against the imposition of SBM." Slip op. at 12 (citation omitted).

In considering the state's interest, the court determined that the state failed to produce evidence that the lifetime SBM, in this case, effectively served legitimate interests such as preventing recidivism. The court explained that the state did not put forth any evidence showing that SBM served those interests and only provided legal conclusions. Therefore, the

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court determined “the state’s interest in monitoring [d]efendant by SBM during post-release supervision is already accomplished by a mandatory condition of post-release supervision imposing that very thing.” Slip op. 14.

Finally, the court considered the reasonableness of SBM under the totality of the circumstances and balancing the previously mentioned factors. The court decided that in this case, a lifetime SBM order is an unreasonable warrantless search in violation of the Fourth Amendment and therefore unconstitutional. The court determined that the defendant’s privacy rights, although diminished during post-release supervision, were substantially infringed upon by the lifetime SBM order and the defendant’s interests were not outweighed by a legitimate state interest because the state failed to provide evidence that a legitimate interest would be served by requiring the defendant be subject to lifetime SBM.

(2) The defendant next argued that the trial court erred by entering duplicative court costs. The court determined the duplicative costs were error because, following *Rieger*, “when multiple criminal charges arise from the same underlying event or transaction and are adjudicated together in the same hearing or trial, they are part of a single ‘criminal case’ for the purposes of N.C. Gen. Stat. § 7A-304(a).” Slip op. at 15.

Judge Tyson dissented because he did not think the defendant’s petition for writ of certiorari concerning the lifetime SBM order should have been granted because it was meritless. Judge Tyson also dissented from the writ of certiorari concerning the imposition of duplicative court costs because the judgements were not part of a “single criminal case.”

On reconsideration in light of *Grady*, the appellate court affirmed its earlier ruling that the state failed to show that SBM was reasonable for this defendant.

State v. Harris, ___ N.C. App. ___, 854 S.E.2d 51 (Dec. 31, 2020). In a prior opinion, the Court of Appeals held that the state failed to meet its burden of showing the reasonableness of ordering the defendant to enroll in lifetime satellite-based monitoring (SBM) following his conviction for rape. The matter was before the court again for reconsideration in light of *State v. Grady*, ___ N.C. ___, 831 S.E.2d 542(2019). The appellate court first reviewed *Grady*’s holding that SBM was unconstitutional, but noted that “the decision was specific to those defendants enrolled in SBM exclusively on the basis of having attained the status of a recidivist, and for no other reason.” In the present case, the defendant was placed on SBM for committing an aggravated offense, not for being a recidivist, and the appellate court’s earlier decision to reverse the trial court’s order was “premised upon the State’s failure to meet its evidentiary burden” of showing that the “defendant posed a threat of reoffending, such that SBM would be reasonable.” Concluding that *Grady* was therefore inapplicable to the defendant’s case, the appellate court affirmed its earlier ruling to reverse the trial court’s order for the same reasons stated in its earlier opinion.

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Judge Stroud concurred in part and dissented in part, citing to *State v. Hilton*, ___ N.C. App. ___, 845 S.E.2d 81 (2020), and would have affirmed the portion of the trial court’s order that imposed SBM during the period of time when the defendant is on post-release supervision, while still reversing the imposition of SBM beyond that period.

When SBM enrollment would not occur for at least 30 years, the State could not demonstrate the reasonableness of the search; SBM order reversed

State v. Strudwick, ___ N.C. App. ___, 849 S.E.2d 891 (Oct. 6, 2020), *temp. stay allowed*, ___ N.C. ___, 848 S.E.2d 496 (Oct. 26, 2020). In this Mecklenburg County case, the defendant pled guilty to various sex offenses and was ordered to enroll in satellite-based monitoring (“SBM”) for life, following a contested hearing on that issue. The defendant appealed and the Court of Appeals reversed the order in an unpublished opinion. The State sought review in the North Carolina Supreme Court. That court granted the state’s petition for discretionary review and remanded the matter back to the Court of Appeals in light of *State v. Grady*, 372 N.C. 509 (2019) (“*Grady III*”). On remand, the Court of Appeals reached the same conclusion and reversed the trial court’s SBM order.

The defendant was sentenced to at least 30 years in prison for his crimes in this case. While *Grady III* dealt with recidivists specifically (a category of potential SBM registrants not at issue in this case), the Court of Appeals nonetheless determined that the *Grady III* analysis was a guidepost. The facts of this case were parallel to those in *State v. Gordon*, 840 S.E.2d 907 (2020). There, the SBM enrollment and Fourth Amendment search would not take effect until the defendant was released from prison—at least 15 years later. Here, the SBM search would not begin for at least 30 years. As in *Gordon*, that the defendant will not enroll in SBM for a matter of decades reduced the ability of the State to demonstrate the search is reasonable. Citing *Gordon*, the court observed that the State “is hampered by a lack of knowledge concerning the unknown future circumstances relevant to that analysis.” Slip op. at 7 (citation omitted). A concurring judge in the original Court of Appeals opinion in *Gordon* noted that this created “an impossible burden” for the State to meet. The court noted that if the SBM statutes were amended to provide for SBM hearings at the time of a defendant’s release from prison, that burden would be alleviated. “But until we receive further guidance from the Supreme Court or new options for addressing the SBM procedure from the General Assembly, under existing law, we are required to reverse defendant’s SBM order.” *Id.* at 9.

Judge Tyson dissented. He would have found that *Grady III* did not require this result and that the majority improperly extended the reach of that case. He would have affirmed the trial court’s SBM order.

Habeas

Criminal Procedure

The trial court did not err in summarily denying the defendant's petition for habeas corpus in which the petitioner alleged that his continued imprisonment during the COVID-19 pandemic was cruel and unusual punishment

State v. Daw, ___ N.C. App. ___, 2021-NCCOA-180 (May 4, 2021). The defendant, who was serving prison sentences for obtaining property by false pretenses, filed a petition for habeas corpus on June 15, 2020 alleging that his continued imprisonment during the COVID-19 pandemic violated the state and federal constitutional guarantees against cruel and unusual punishment. The trial court summarily denied the petition the same day on the basis that the defendant was held pursuant to a valid final judgment in a criminal case entered by a court with proper jurisdiction, citing G.S. 17-4(2).

The Court of Appeals granted certiorari review. Six days after oral argument, the defendant was released to serve the remainder of his sentence outside of prison. Notwithstanding the defendant's release, the Court addressed the merits of the petition pursuant to the public interest exception to the mootness doctrine.

Applying de novo review, the Court of Appeals determined that the trial court's summary denial of the petition was proper even though its reasons for doing so were legally incorrect. After reviewing the origins, evolution and limits of the writ of habeas corpus under state law, the Court concluded that the general rule in G.S. 17-4(2) is subject to the exception in G.S. 17-33(2), which provides that discharge of a lawful term of imprisonment may be based upon "some act, omission or event" that takes place after the judgment is entered.

The Court determined, however, that the defendant failed to make a threshold showing of evidence individualized to the circumstances of his case that such an act, omission or event had occurred. While the defendant averred that he had a "long history of respiratory illness" and submitted information about the risks of COVID-19 for prisoners, he did not submit materials that showed how his medical conditions put him at an elevated risk for serious illness or other medical complications from COVID-19. Affidavits submitted by defendant and his wife in which they opined about the risks COVID-19 posed to the defendant based on his medical history and diagnoses were insufficient to bridge the gap between the defendant's individual circumstances and the general information regarding the dangers of COVID-19 to people with respiratory conditions and confined in prison since neither defendant nor his wife had the requisite expert qualifications. In addition, the defendant's medical records, which showed that the Division of Public Safety first learned of the defendant's history of respiratory illness after news of the pandemic was widespread, did not provide a colorable basis for concluding that the defendant's claims had merit.

Evidence

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Alcohol Tests

(1) Trial court did not abuse its discretion by considering evidence from officer regarding the HGN test he administered to the defendant and his experience with HGN testing; (2) Competent evidence supported the trial court’s findings of fact, which supported its conclusion that the officer had probable cause to arrest the defendant for driving while impaired.

State v. Ezzell, ___ N.C. App. ___, 2021-NCCOA-182 (May 4, 2021).

The defendant was convicted of driving while impaired and appealed. He argued that the trial court erred by denying his motion to suppress evidence gathered following his arrest on the basis that his arrest was not supported by probable cause. The Court of Appeals found no error.

(1) The Highway Patrol trooper who arrested the defendant testified about his training in the administration of the horizontal gaze nystagmus test (HGN) for the detection of impairment and the interpretation of the results on the test. He testified about performing the HGN test on the defendant and his observation of all six indications of impairment.

The defendant argued on appeal that the rules of evidence applied to the suppression hearing and the trial court erred by permitting the trooper to testify as an expert witness on HGN because he was not qualified under Rule 702. The Court of Appeals rejected the defendant’s argument, citing Rules 104(a) and 1101(b)(1), which explicitly state that the evidence rules do not apply to the determination of preliminary questions concerning the admissibility of evidence—the very issues presented in a hearing on a motion to suppress. The Court further held that the trooper’s testimony regarding the HGN test was relevant to the determination of probable cause and the trial court did not abuse its discretion by considering this evidence.

(2) The defendant argued that several findings of fact were not supported by the evidence. The Court rejected the defendant’s argument, as to all but one objected-to finding. The trial court’s finding that the trooper noted a strong odor of alcohol on the defendant’s person was supported by the trooper’s testimony and the affidavit and revocation report he prepared. The finding that the defendant “deceptively denied” consuming alcohol was supported by the trooper’s testimony that the defendant denied having anything to drink as contrasted with the evidence that the defendant had consumed alcohol. The finding that the alcosensor was in proper working order and properly calibrated was supported by the trooper’s testimony. The finding that the trooper formed an opinion that the defendant was appreciably impaired was supported by the trooper’s testimony that the defendant was impaired; the trooper’s omission of the modifier “appreciably” was “a mere slip of the tongue.” (Slip op at ¶ 19.) And the trial court’s findings regarding the HGN test were supported by competent evidence.

The Court did not find evidentiary support for the finding that no other field tests were performed as a result of potential dangers from traffic.

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The Court determined that the findings supported the trial court's conclusion that the trooper had probable cause to arrest the defendant. Specifically, the Court pointed to the strong odor of alcohol, the positive alcosensor tests, and the HGN test revealing all six indications of impairment.

Authentication

(1) Sufficient evidence existed to establish white rocks were cocaine notwithstanding potential contamination issue; (2) Authentication and admission of cocaine was not plain error; (3) Instruction to deliberate "with a goal" of reaching unanimous verdicts did not improperly coerce the jury's verdict

State v. Jackson, ___ N.C. App. ___, 2021-NCCOA-144 (April 20, 2021). In this Buncombe County case, the defendant was convicted of possession with intent to sell or deliver cocaine. The defendant sold two white rocks to an undercover officer in a parking lot. When the defendant gave the drugs to the officer, he placed them in the officer's bare hands without any packaging. The rocks were later tested and found to contain cocaine. (1) At trial, the defendant moved to dismiss for insufficient evidence. He pointed out that the officer had handled other cocaine with his bare hands earlier in the day and had stored other cocaine in his car console where the cocaine obtained from the defendant was later stored. According to the defendant, this rendered the laboratory result unreliable and insufficient to prove possession of cocaine. The court rejected this argument, finding the handling and storing of the rocks was an issue going to the weight of the evidence and not its admissibility. While the jury was free to consider the contamination argument, there was sufficient evidence that the substance was cocaine when viewed in the light most favorable to the State.

(2) The defendant did not object to the authentication of the cocaine at trial but argued on appeal that the trial court plainly erred in admitting the evidence due to the potential contamination issue. The court again disagreed. "The possibility that physical evidence has been contaminated does not, by itself, bar that evidence from being authenticated and admitted." Slip op. at 6. Just as with the sufficiency issue, the question of the authentication of the cocaine here went to the weight of the evidence and not admissibility.

(3) After one day of deliberations, the jury sent a note to the trial court indicating it was deadlocked. The trial court instructed the jury pursuant to [G.S. 15A-1235](#) before dismissing the jury for the day. The next morning, the trial judge stated that the jury should resume deliberations "with a goal of reaching a unanimous decision as to each charge." The defendant complained that this language improperly coerced the jury to render a unanimous verdict. The court disagreed:

The trial court properly gave the required *Allen* instructions to ensure that jurors understood they were not compelled to reach a unanimous verdict. In light of those instructions, the trial court's decision, when deliberations resumed, to

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inform the jury that they should have the goal of reaching a unanimous verdict did not compel any juror to surrender his well-founded convictions or judgment to the views of the majority. It simply reinforced that the jury's charge was to deliberate and reach a unanimous verdict if possible. *Jackson Slip op.* at 9.

The case was therefore affirmed in all respects.

When screenshots of social media comments are used as evidence showing both the fact of the communication and its purported author, the screenshots must be authenticated both as photographs and written statements

State v. Clemons, ___ N.C. App. ___, 852 S.E.2d 671 (Dec. 1, 2020). In this violation of a DVPO case, screenshots of Facebook posts were authenticated by sufficient circumstantial evidence showing that the screenshots in fact depicted Facebook posts and that the comments in the post were made by the defendant such that the screenshots were properly admitted into evidence. Shortly before the defendant was scheduled to be released from prison, the victim renewed a DVPO prohibiting him from contacting her. Soon after his release, the victim began receiving phone calls from a blocked number and Facebook comments from her daughter's account that the victim believed were written by the defendant rather than her daughter. These communications were the basis for the DVPO violation at issue.

The court first reviewed precedent to determine that the question of whether evidence has been sufficiently authenticated is subject to de novo review on appeal. The court then held that when screenshots of social media comments are used as they were here – to show both the fact of the communication and its purported author, the screenshots must be authenticated both as photographs and written statements. The victim's testimony that she took the screenshots of her Facebook account was sufficient to authenticate the images as photographs. The victim's testimony of receiving letters from the defendant while he was in prison and distinctive phone calls from a blocked number after his release, together with evidence of the defendant's access to the daughter's Facebook account was sufficient to authenticate the comments as written statements potentially made by the defendant such that admission of the screenshots into evidence was proper.

Judges Bryant and Berger concurred in result only, without separate opinions.

Opinions

In the absence of any supporting physical evidence, testimony of DSS investigator that alleged sexual abuse had been substantiated was impermissible vouching and constituted plain error.

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State v. Warden, 376 N.C. 503 (Dec. 18, 2020). The defendant was indicted for three incidents of sexual abuse against his step-daughter and went to trial. The victim testified at trial about the abuse, and eight other witnesses testified regarding the investigation and corroboration of the victim's testimony. One of the state's witnesses was a DSS investigator who interviewed the victim and testified without objection that her agency had "substantiated sexual abuse naming [defendant] as the perpetrator," meaning that the agency believed the allegations of abuse to be true. The defendant was convicted and appealed. A majority in the Court of Appeals held that the testimony was plain error requiring a new trial.

The Supreme Court agreed and affirmed the appellate court's ruling. Pursuant to *State v. Stancil*, 355 N.C. 266 (2002), the state conceded on appeal that it was error to admit expert opinion testimony that the abuse had "in fact" occurred without physical evidence to support the diagnosis. The only question before the state Supreme Court was whether this testimony rose to the level of plain error, since there was no objection made at trial. Here, because there was no direct evidence of abuse and the other witnesses' testimony only served to corroborate the victim's account, "the jury's decision to find the complainant more credible than the defendant clearly formed the basis of its ultimate verdict." Therefore, consistent with its prior ruling on similar facts in *State v. Towe*, 366 N.C. 56 (2012), the majority held that "the trial court commits a fundamental error when it allows testimony which vouches for the complainant's credibility in a case where the verdict entirely depends upon the jurors' comparative assessment of the complainant's and the defendant's credibility."

Writing in dissent, Justice Newby would have held that the other evidence presented by the state distinguished this case from *Towe*, and the defendant did not meet his burden under the plain error standard of demonstrating that the outcome of trial likely would have been different without the improper testimony.

Even if it was error to allow the state's expert witness to testify that the victim's characteristics were consistent with being a victim of sexual abuse, it did not rise to the level of plain error since there was overwhelming other evidence of defendant's guilt.

State v. Waugh, __ N.C. App. __, 2021-NCCOA-102 (Apr. 6, 2021). The defendant was convicted by a jury of one count of rape of a child, one count of indecent liberties with a child, and eight counts of sexual offense with a child, and he received four consecutive sentences. The defendant did not object to the testimony of the state's expert witness at trial, but argued on appeal that it was plain error to allow the witness to testify that the victim's symptoms, characteristics, and history were consistent with those of children who have been sexually abused. Under plain error review, the defendant must show that there was a fundamental error at trial, and that error had a probable impact on the jury's determination that the defendant was guilty. The appellate court held that the defendant failed to make that showing in this case.

Assuming *arguendo* that allowing the expert's testimony was error, the defendant failed to show that it had a probable impact on the jury's findings. The court reviewed in detail the

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extensive trial testimony from both of the defendant's daughters describing multiple instances of sexual abuse inflicted on them over a period of many years. The victim's testimony was corroborated by several other witnesses who investigated the case, heard the victim disclose the abuse, or had an opportunity to counsel, examine, or treat the victim as a result of the abuse. "In light of the overwhelming evidence of Defendant's guilt," the court concluded that "even had the challenged testimony not been admitted, the jury probably would not have reached a different result."

(1) The trial court did not commit plain error by admitting the State's expert testimony that the minor victim's medical history was "consistent with" child sexual abuse. (2) The trial court acted within its statutory and inherent authority to control the courtroom when closing the courtroom and locking the doors during delivery of the jury instructions. (3) The defendant failed to show prejudice sufficient to constitute ineffective assistance of counsel at trial.

State v. Perdomo, ___ N.C. App. ___, 2021-NCCOA-45 (Mar. 2, 2021). The defendant was found guilty of taking indecent liberties with a child after his thirteen-year-old niece disclosed to several people that the defendant was behaving in a sexually inappropriate manner toward her.

On appeal, the defendant contended that the trial court committed plain error by permitting the State's expert to vouch for the minor's credibility. The defendant argued that the expert impermissibly testified that the minor's medical history "was consistent with child sexual abuse" and that her "physical exam would be consistent with a child who had disclosed child sexual abuse." Slip op. at ¶ 8. The Court of Appeals rejected the defendant's argument, noting that for expert testimony to amount to vouching for a witness's credibility, that expert testimony must present "a definitive diagnosis of sexual abuse" in the absence of "supporting physical evidence of the abuse." Slip op. at ¶ 13. The Court's review of the expert's full testimony in proper context showed that the expert appropriately provided the jury with an opinion, based on her expertise, that a lack of physical findings of sexual abuse does not generally correlate with an absence of sexual abuse.

The defendant next argued that by closing the courtroom immediately prior to the jury charge, the trial court committed structural error and violated his constitutional right to a public trial. The Court of Appeals noted that the defendant failed to object to this procedure at trial and declined to invoke Appellate Rule 2 to review the constitutional argument. The Court nonetheless concluded that the trial court's imposition of reasonable limitations of movement in and out of the courtroom to minimize jury distractions were within its statutory and inherent authority to control the courtroom.

The defendant also contended that he was prejudiced at trial by ineffective assistance of counsel, arguing that his counsel "failed in multiple instances to object to plainly impermissible testimony by numerous State's witnesses vouching for [the minor], or otherwise consented to such inadmissible evidence, when there could be no reasonable strategic basis for doing so." Slip op. at ¶ 29. The Court rejected this argument, determining that the defendant had not

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shown that any of the alleged errors gave rise to a “reasonable probability that, but for counsel’s unprofessional errors, the result of the proceeding would have been different.” Slip op. at ¶ 30.

(1) Admission of cell phone video that showed defendant kicking a dog was not plain error, where defendant failed to show prejudice given the other overwhelming evidence of his guilt; (2) Trial court’s decision to allow expert opinion testimony on ballistic testing was not an abuse of discretion under Rule 702; and (3) Jury instruction on flight was warranted.

State v. Miller, __ N.C. App. ___, 852 S.E.2d 704 (Dec. 31, 2020). After the defendant’s wife left him due to his drinking and violence, the defendant committed a number of threatening and destructive acts towards her that culminated in the defendant shooting his estranged wife twice in the head outside her work. The victim survived and called 911, and the defendant was arrested in the woods nearby a few hours later. The defendant was indicted for attempted first degree murder, assault with a deadly weapon with intent to kill, and possession of a firearm by a felon. The defendant was convicted of all charges, sentenced to consecutive terms of 207-261 months and 96-128 months in prison, and raised three arguments on appeal.

First, the defendant argued that the trial court committed plain error by admitting a cell phone video of him kicking a dog, claiming it was irrelevant, prejudicial, and improper character evidence. Since the defendant did not object to the video at trial, the appellate court only considered whether admission of the video rose to the level of plain error. Viewed in context, the video was insignificant when compared to the other overwhelming evidence of defendant’s guilt, such as witness testimony about his prior threats against the victim, his prior possession and use of a firearm that matched the one used to shoot his wife, his arrest nearby shortly after the shooting, matching ammunition found on his person when he was arrested, and the statements he made during his arrest. Therefore, the court held that it was not plain error to admit the video, since the defendant could not show that he was prejudiced by its admission even if it was error.

Next, the defendant argued that the trial court erred by allowing opinion testimony from the state’s firearms and ballistic expert, contending that it was not based on reliable principles or methods applied to the facts of the case. At trial and again on appeal, the defendant cited to studies and cases from other jurisdictions disputing the reliability of ballistics identification. The appellate court affirmed the trial court’s decision, and held that the evidence was properly admitted under Rule 702 based on the extensive voir dire of the witness which showed that her testimony was based on sufficient facts and data, was the product of reliable principles and methods, and those principles and methods were applied to the facts of the particular case. The appellate court stressed that its role was only to review the trial court’s decision under an abuse of discretion standard, and the record demonstrated that the lower court’s decision on this issue was reasoned and not arbitrary. Moreover, as in the first argument, even if it was error, the defendant could not show prejudice due to the overwhelming evidence of his guilt even without the challenged testimony.

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Finally, the defendant argued that it was error to give a jury instruction on flight under the facts of this case, but the appellate court again disagreed. The court acknowledged that mere evidence of leaving the scene is not enough to support the instruction; there must also be some evidence of taking steps to avoid apprehension, but that evidence was present in this case. After shooting his wife, the defendant did not go home but was instead found five hours later near a wooded area. When the defendant and officers saw each other, the defendant entered the woods twice and a K-9 unit had to search for the defendant, eventually finding him curled up in a ball behind a large tree. Viewed in the light most favorable to the state, there was at least some evidence reasonably supporting the theory that the defendant fled.

Judge Zachary concurred with two of the majority's conclusions, but dissented as to the admission of the forensic firearms expert testimony based on the dispute regarding the error rate and reliability of the analysis.

(1) The defendant failed to show that the use of the word “disclosure” by the expert witness was used to vouch for truthfulness and thus plain error; (2) Lifetime satellite-based monitoring (SBM) was unconstitutional.

State v. Robinson, ___ N.C. App. ___, 854 S.E.2d 407 (Dec. 31, 2020). The defendant appealed from his convictions for first degree rape, first degree sexual offense, and taking indecent liberties with a child. The defendant also challenged a civil order requiring lifetime SBM. Defendant was charged with first degree rape of a child, first degree sex offense with a child, and taking indecent liberties with a child that allegedly occurred in 2007 or 2008. The victim told no one about what had happened to her until June 2017, when she was asked if she had ever been raped during the intake process for juvenile justice. The defendant was found guilty of all charges and sentenced to 240-297 months. Following release, the defendant would be required to register as a sex offender for life and to enroll in SBM for life.

(1) The defendant first argued that the trial court committed plain error by allowing that state's expert witness, who conducted a forensic interview of the victim, to describe the victim's claim that she was raped as a “disclosure,” and if this vouching for truthfulness had not occurred, then the victim would have been a less credible witness. The court of appeals first noted that the defendant did not object to the use of the word “disclosure” at trial and therefore his argument is reviewed for plain error.

The court explained that North Carolina case law makes it clear that experts cannot vouch for a child sexual abuse victim's credibility when there is no evidence of physical abuse. The defendant argued the dictionary definition of disclose is “to make known (as information previously kept secret).” Slip op. at 4. The court acknowledged that the word may have that connotation at times, but its use must be considered in the specific context of the evidence in this case. After examining the testimony of the expert, the court determined that the use of the word “disclose” during the testimony “simply does not have the connotation of exposing a

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previously hidden truth as argued by [d]efendant.” Slip op. at 5. The court came to this conclusion because in this context the “use of the word ‘disclosure’ was simply as part of the description of the interview method and was not “vouching” for the truth of what an alleged victim reveals. Slip op. at 7.

(2) The court of appeals next noted that the defendant had waived his right to argue constitutional issues on appeal because no objection on constitutional grounds was made by defendant’s trial counsel and no notice of appeal was given from the SBM order. However, the court of appeals determined that because a substantial right of the defendant was affected, it was appropriate for the court to invoke Rule 2 to prevent a manifest injustice and thus review the constitutionality of the SBM order. *Id.* at 15.

The defendant argued that the trial court erred in ordering lifetime SBM because the state presented no evidence that lifetime SBM was a reasonable Fourth Amendment search of the defendant. The court reviewed the issue *de novo* and under the *Grady III* framework. The framework involves “reviewing Defendant’s privacy interests and the nature of SBM’s intrusion into them before balancing those factors against the State’s interests in monitoring Defendant and the effectiveness of SBM in addressing those concerns.” *Id.* at 16. The court of appeals found that the state presented no evidence showing how the lifetime SBM would reduce recidivism and therefore, the state “failed to meet its burden of establishing that lifetime satellite-based monitoring following [d]efendant’s eventual release from prison is a reasonable search in [d]efendant’s case.” Slip op. at 19.

(1) The evidence at trial sufficiently supported a finding that the defendant acted in concert with his co-defendant when committing the charged offenses; and (2) it was error to allow a lay witness’s opinion testimony where the witness was in no better position than the jury to know what a video showed

State v. Dove, ___ N.C. App. ___, 852 S.E.2d 681 (Dec. 1, 2020). (1) In this murder case, the trial court did not err by instructing the jury on the doctrine of acting in concert where there was evidence that the defendant and another man met together at a store, discussed with the defendant’s brother that the victim owed the brother money, received instructions from the brother to collect the money, traveled together to the scene of the murder, and fled together from the scene after the defendant shot the victim.

(2) The trial court erred in allowing the co-defendant’s aunt, who was present at the scene of the murder but did not witness it directly, to testify that she believed the defendant was holding a gun in surveillance video footage published to the jury. This lay opinion testimony, which was not based on any personal knowledge, invaded the role of the jury in violation of Rule 602 because the aunt was in no better position to know what the video showed than the jurors. The error did not prejudice the defendant.

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(1) Expert testimony of victim’s PTSD diagnosis was properly admitted for corroborative purposes; failure of trial court to give unrequested limiting instruction on the use of that evidence was not plain error; (2) Where the State raised and the court addressed Fourth Amendment concerns during SBM hearing, the issue was preserved for review despite defendant’s lack of constitutional objection; (2a) lifetime SBM order was unreasonable and reversed where defendant would not enroll in the program for at least 50 years; (2b) second SBM order for term of 10 years was reasonable and was affirmed

State v. Thompson, ___ N.C. App. ___, 852 S.E.2d 365 (Oct. 6, 2020). The defendant was convicted at trial of numerous sex offenses against minor children, including statutory sex offense, sexual activity by substitute parent, and sale of controlled substances to minors in Cleveland County. He was sentenced to a minimum of 600 months and ordered to enroll in satellite-based monitoring (“SBM”) for life upon release based on the convictions relating to one victim, with an additional 10 year term of SBM for the other victim. The defendant properly appealed his convictions but failed to give notice of appeal of the SBM orders. In its discretion, the Court of Appeals granted his petition for writ of certiorari to review that issue.

(1) A therapist for one of the minor victims testified as an expert in childhood and teen trauma for the State at trial. She testified that the child had post-traumatic stress disorder (“PTSD”) and major depression and relayed to the jury disclosures by the victim of instances of sexual abuse by the defendant. This testimony was offered for corroborative purposes. The defendant did not object, and no limiting instruction about the testimony was given to the jury. The court therefore reviewed for plain error only. The North Carolina Supreme Court has held that it is improper to admit evidence of a PTSD diagnosis for substantive purposes. *See State v. Hall*, 330 N.C. 808, 821 (1992). However, such testimony may be admitted to corroborate substantive evidence, to rebut defense evidence of consent, or to explain why disclosure of the crime was delayed. When such evidence is admitted, the trial court should provide a limiting instruction to the jury regarding the use of the testimony. Failure to give the limiting instruction is not error, however, if the defendant fails to request one. Here, the testimony was properly admitted for corroborative purposes. Further, “even if a limiting instruction were required in the absence of a specific request by defendant, defendant was not prejudiced by the omission such that it would amount to fundamental error.” *Thompson* Slip op. at 8. There was therefore no plain error in the admission of the therapist’s diagnosis of PTSD.

(2) The defendant failed to raise a Fourth Amendment objection during the SBM hearing. However, because the State raised the constitutional issue and it was considered by the trial court in its ruling, the issue was preserved for appellate review. (2a) Here, the defendant’s enrollment in SBM would not occur until at least the expiration of his minimum term of imprisonment, at least 50 years from the time of judgment. As in *State v. Gordon*, 840 S.E.2d 907 (2020), “it is therefore difficult to assess the reasonableness of subjecting him to SBM given the unknown future circumstances of the program.” *Thompson* Slip op. at 16. Finding that the State failed to meet its burden to show that the lifetime SBM search was reasonable under the Fourth Amendment, the trial court’s order of lifetime SBM was reversed.

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(2b) The second SBM order requiring the defendant to enroll in SBM for a term of 10 years was proper. The evidence supported the finding that the offenses involved the sexual abuse of a minor child, and the trial court properly considered the relationship between the victim and defendant, the offenses, and the age of the victims. The defendant's risk assessment indicated he was "low-risk," but the trial judge was free to make its own determination of the defendant's risk based on the totality of evidence, as it did here. Furthermore, "ten years is not 'significantly burdensome and lengthy,' especially given that the defendant will be subject to post-release supervision for half of that time period." *Id.* at 20. The trial court committed a mere clerical error in failing to make a finding that the defendant required the highest possible level of supervision. This SBM order was therefore affirmed and remanded for correction of the clerical error.

Judge Berger concurred with the majority opinion as to the criminal judgment and concurred in result with the SBM portion of the opinion, joined by Judge Dietz. These judges would have found that the precedent by which the majority found the defendant's Fourth Amendment challenge preserved (based on the State's act of raising the constitutional issue) was inconsistent with the preservation requirements under the Rules of Appellate Procedure. However, given the uncertain and evolving nature of SBM case law in the State, as well as the fact that the SBM order here was issued before *Gordon* was decided, the concurring judges would have found that the defendant could not have preserved his constitutional arguments [and presumably would have found the issue preserved on that basis, rather than the precedent relied upon by the majority.]

(1) Rule 702 governs the admission of expert evidence, including experimental evidence, which is reviewed for abuse of discretion (and not de novo, as pre-Rules of Evidence cases held); no abuse of discretion in admitting results of experiment to show pattern of bullet shell ejections; (2) No abuse of discretion to qualify expert to testify in field of bullet shell ejection patterns despite expert's lack of training or experience in that specific field

State v. Turner, ___ N.C. App. ___, 849 S.E.2d 327 (Oct. 6, 2020). The defendant was convicted of first-degree murder in Person County. The victim was a neighbor with whom the defendant had long-running disputes. According to the defendant, he shot the neighbor in self-defense. The victim was shot 11 or 12 times, with the vast majority of the bullets having entered the victim from the back and side of his body. The State presented evidence from an experiment performed by a forensic firearms examiner attempting to replicate the production of the layout of bullet shell casings found at the scene in order to demonstrate the shooter's location and to rebut the defendant's self-defense claim. The expert only reported the results of the experiment and did not specifically opine about the shooter's location.

(1) Relying on cases pre-dating the adoption of the Rules of Evidence, the defendant argued this evidence was improperly admitted in violation of the "substantial similarity" test. These older cases imposed stricter requirements for the admission of "experimental evidence" – that is,

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evidence “about an experiment that is used to prove something about the actual events that occurred in the case.” Slip op. at 8. The defendant argued that these rules controlled, rather than Rule of Evidence 702. Under those cases, the standard of review on appeal of this issue would have been de novo, rather than the abuse of discretion standard applied to Rule 702 challenges. The defendant did not argue or cite to Rule 702 or to any cases applying the rule since the 2011 amendments adopting the *Daubert* standard for expert testimony. Rejecting this argument, the court found that later cases, even those pre-dating the 2011 amendment to Rule 702, had in fact adopted an abuse of discretion standard of review for experimental evidence. The court also rejected the notion that the substantial similarity test stood apart from Rule 702. “The notion of ‘substantial similarity’ for experimental evidence is one of the many ‘particular factors articulated in previous cases’ that is now baked into the third prong of Rule 702’s reliability test.” *Id.* at 10. Thus, pursuant to Rule 702, the standard of review is abuse of discretion. Even if the defendant’s argument that the evidence was erroneously admitted was not forfeited by his failure to argue Rule 702 or abuse of discretion, the trial court did not err in admitting the testimony. In the words of the court: “Here, the trial court’s determination that the experiment met the Rule 702 criteria was a reasoned one and not manifestly arbitrary. Thus, we cannot hold that the trial court abused its discretion.” *Id.* at 12.

(2) The defendant also argued that the trial court erred in qualifying the expert to give an opinion about shell ejection patterns. Voir dire of the expert revealed that he had not received training on ejection patterns of bullet shells, that no certification for this subject exists, and that he had not previously performed this type of experiment. According to the court, the trial court did not abuse its discretion in so qualifying the expert: “[I]t is not necessary that an expert be experienced with the identical subject matter at issue or be a specialist’ as long as ‘the expert witness because of his expertise is in a better position to have an opinion on the subject than is the trier of fact.’” *Id.* at 14. Based on his extensive training and experience in the field of firearms, the trial court acted within its discretion and did not err in qualifying the expert.

The conviction was therefore unanimously affirmed with Judges Berger and Arrowood concurring.

Relevancy - Rule 401

State v. Lopez, ___ N.C. App. ___, 852 S.E.2d 658 (Dec. 1, 2020). In this sex offense with a child case, the trial court did not err by prohibiting the defendant from introducing evidence of the immigration status of the victim’s mother, a testifying witness, on the basis that the evidence was irrelevant under Rule 401. The mother’s immigration status did not have any tendency to make the existence of a fact of consequence to the determination of the action more probable or less probable. Further, the trial court did not err by overruling the defendant’s objection to the mother testifying that the defendant had refused to be tested for herpes after it was discovered that the child victim had herpes. This testimony was not unfairly prejudicial under Rule 403. Finally, the trial court did not err by denying the defendant’s motion to dismiss a charge of first degree statutory sexual offense for insufficient evidence. The victim testified

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that the defendant touched her with his fingers “in the inside” in “the place where [she] go[es] pee,” and this testimony was sufficient evidence of a sexual act for purposes of the offense.

Judge Murphy concurred in the result only, writing a separate opinion to discuss when a witness’s immigration status and knowledge of U-Visas may be relevant for cross-examination, as well as other issues in the case.

Prior Acts - Rule 404(b)

(1) Trial court did not commit plain error by admitting in defendant’s first-degree murder trial evidence of a break-in the day before the murder in which the murder weapon was stolen; (2) Defendant failed to show that the jury instruction on recent possession, even if erroneous, had a probable impact on the jury’s verdict.

State v. Washington, ___ N.C. App. ___, 2021-NCCOA-219 (May 18, 2021). In this Mecklenburg County case, the defendant was convicted of first-degree murder and possession of a firearm by a felon for shooting and killing Oren Reed. Reed’s aunt found his body in a pool of blood inside the backdoor of his home around 5 p.m. on November 21, 2013. The doorframe for the backdoor was splintered, and glass and bullet shells were on the ground. The State introduced evidence at trial that the previous day someone had kicked in the side door to Chris Townsend’s house, breaking the door frame, and had stolen a revolver and bullets. Other evidence showed that the stolen gun, found in defendant’s possession when he was arrested, was used to fire 22 of the 23 spent cartridges at Reed’s residence. An expert testified that two of the bullets recovered from Reed’s body shared similar class and characteristics as bullets fired from this gun.

(1) On appeal, the defendant argued that the trial court committed plain error by admitting evidence of the break-in at the Townsend residence. The Court of Appeals rejected that argument, reasoning that the evidence was relevant because it tended to show how the defendant gained possession of the murder weapon. The evidence also was admissible under N.C. R. Evid. 404(b) as it showed the natural development of the facts and completed the story of the murder and because there were substantial similarities between the two incidents.

(2) The defendant also argued on appeal that the trial court committed plain error by instructing the jury on the doctrine of recent possession, which allows a jury to infer that the possessor of recently stolen property stole the property. The defendant argued that this inference was not relevant to whether he broke into Reed’s house and killed him and that it likely caused the jury to convict the defendant of felony-murder based on the break-in to Townsend’s home. The Court of Appeals determined that, even presuming the trial court erred in instructing the jury that it could consider the doctrine of recent possession in deciding whether the defendant was guilty of first-degree murder, the defendant failed to show the instruction had a probable impact on the verdict. The Court reasoned that even if the recent possession instruction could have caused the jury to improperly convict the defendant of

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felony-murder, the instruction did not have a probable impact on first-degree murder verdict because the jury also found the defendant guilty based on malice, premeditation and deliberation.

Evidence that the defendant was the perpetrator of a different breaking and entering on the same day as the break-in at issue was properly admitted under Rule 404(b)

State v. Grady, ___ N.C. App. ___, 852 S.E.2d 631 (Dec. 1, 2020). In this felony breaking and entering, larceny, and felon in possession case, evidence that the defendant committed a similar breaking and entering was properly admitted under Rule 404(b). In addition, certain statements made by the victim of the similar breaking and entering were admissible as a present sense impression, and there was sufficient evidence of the felon in possession offense. Regarding the 404(b) issue, the court determined that evidence of the other similar breaking and entering being committed by a person wearing a red and black hoody was properly admitted as circumstantially establishing that the defendant, who was wearing a red and black hoody when arrested on the same day as the break-ins, was the perpetrator in both incidents. An officer's testimony about the statements made by the victim of the other break-in were admissible under the present sense impression exception to the hearsay rule because the statements were made within minutes of the victim perceiving the break-in and described or explained the event. Finally, the evidence of the felon in possession offense was sufficient to withstand a motion to dismiss as it showed that three guns were stolen during the break-in and that the defendant was the perpetrator.

(1) Sufficiency of evidence argument as to rape was waived on appeal; convictions for rape and first-degree kidnapping did not violate double jeopardy where a separate sexual assault was used to enhance the kidnapping to first-degree; (2) Sufficient evidence supported aggravating factor of occupying a position of trust over victim; (3) Evidence of prior sexual assaults on the sisters of the victim were properly admitted under Rule 404(b); (4) Substitute analyst testimony was properly admitted and did not violate defendant's confrontation rights; (5a) Rape indictment identifying victim only by her initials was not fatally flawed; (5b) First-degree kidnapping indictment was not defective for failure to specify sexual assault; (6) Jury instructions on aggravating factor were erroneous but not prejudicial and did not constitute plain error; (7) Defendant's challenge to SBM order was not argued on appeal and was deemed waived

State v. Pabon, ___ N.C. App ___, 850 S.E.2d 512 (Oct. 6, 2020), *review allowed*, 376 N.C. 527 (Dec. 15, 2020). In this Cabarrus County case, the defendant was convicted of first-degree kidnapping and second-degree rape. After developing a friendship with the victim, he drugged her without her knowledge, took her to a friend's house and raped her. The defendant appealed, raising numerous challenges.

(1) The defendant argued there was insufficient evidence to support his convictions and that his motion to dismiss should have been granted. He did not raise an argument about the rape

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conviction on appeal. Any argument as to the sufficiency of evidence for that offense was therefore deemed abandoned and waived. As to the kidnapping conviction, the defendant argued he could not be sentenced for both kidnapping and the rape as a matter of double jeopardy, since the rape was used to elevate the kidnapping to first degree. "The proper remedy in the event of conviction of first-degree kidnapping and the sexual assault that constitutes an element of first-degree kidnapping is to arrest judgement on the first-degree kidnapping and resentence the defendant for second-degree kidnapping." Slip op. at 10-11 (citation omitted). While the defendant correctly noted this rule, the court found it inapplicable to the defendant's case. The State's evidence showed at least two distinct sexual assaults. In addition to the rape, the defendant also committed a separate sexual battery, and that offense was used to elevate the kidnapping offense to first-degree (and not the rape). Following the sexual battery in one room, the defendant moved the victim to another room to commit the rape. This showed separate and distinct offenses. The trial court also correctly instructed the jury on these principles and its instructions required the jury to find a separate and distinct sexual battery in support of the first-degree kidnapping. Because the defendant was not convicted of the underlying sexual battery used to support the first-degree kidnapping, double jeopardy did not preclude separate punishments for the distinct rape and kidnapping.

(2) There was also sufficient evidence to support the aggravating factor that the defendant took advantage of a position of trust to accomplish the crimes. The Court of Appeals noted it "has upheld a finding of the 'trust or confidence' factor in very limited factual circumstances." *Id.* at 18 (citation omitted). Here, the State presented sufficient evidence of the factor in aggravation. The defendant was a family friend and was close with the victim. Evidence showed the defendant gave the victim's family Christmas gifts, checked on family members, frequently spent time with the victim and advised her on various matters, among other connections. This was sufficient to demonstrate a position of trust over the victim which the defendant exploited in order to commit the crimes.

(3) The two sisters of the victim testified to prior instances of sexual assault by the defendant towards each of them. The trial court admitted this evidence pursuant to Rule 404(b) of the Rules of Evidence as proof of a common plan or scheme by the defendant. The defendant raped one of the sisters in a nearly identical manner as the victim and committed sexual battery upon the other sister "in a manner indicating an intent to go further." *Id.* at 21. Like with the victim, the defendant developed a position of trust with each of the sisters before committing sexual assaults on them. The trial court therefore correctly determined the prior bad acts were substantially similar to the circumstances of the current offense. The assaults occurred 10 and 8 years before the events of the current case. The court agreed with the trial judge that this evidence was not too remote in time to satisfy the requirements of Rule 404(b):

Our Supreme Court has held that "[w]hen similar acts have been performed continuously over a period of years, the passage of time serves to prove, *rather than disprove*, the existence of a plan' rendering the prior bad acts 'not too remote to be considered as evidence of defendant's common scheme to abuse the victim sexually.' *Id.* at 22 (citation omitted) (emphasis in original).

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The evidence showed the defendant's acts were continuous over the course of time and therefore not too remote in time to be admitted under Rule 404(b). The trial court also conducted the necessary balancing under Rule 403 of the Rules of Evidence to determine the testimony was not more prejudicial than probative and instructed the jury about the limited purpose of the evidence. The admission of this evidence was therefore not error or an abuse of discretion.

(4) The defendant argued that the admission of toxicology results by way of a substitute analyst violated his Sixth Amendment rights to confrontation. The court disagreed, noting the rule on substitute analyst testimony:

[A]n expert witness may testify as to the testing or analysis conducted by another expert if: (i) that information is reasonably relied on by experts in the field in forming their opinions; and (ii) the testifying expert witness independently reviewed the information and reached his or her own conclusion in this case. *Id.* at 26 (citation omitted).

The evidence showed that the substitute analyst reviewed the results of the testing done by the non-testifying analysts and formed his own opinion about the results. "Thus, [the analyst's] opinion was based on his own analysis and not merely surrogate testimony for an otherwise inadmissible lab report . . ." *Id.* at 31. Under these circumstances, the defendant was not entitled to cross-examine the analysts who actually performed the testing. According to the court, "when an expert gives an opinion, the opinion is the substantive evidence, and the expert is the witness whom the defendant has the right to confront." *Id.* Because the expert opinion was properly admitted and the defendant was able to cross-examine that expert, there was no violation of the defendant's confrontation rights.

(5a) The indictment for second-degree rape identified the victim only by reference to her initials, and the defendant argued this constituted a fatal indictment defect for failure to identify the victim. He pointed to a recent case holding that "Victim #1" was insufficient to identify the victim. *State v. McKoy*, 196 N.C. App. 650, 654 (2009), foreclosed this argument. Citing from that case, the court observed:

[W]here the statutes defining second-degree rape and second-degree sexual offense require the offenses to be against 'another person,' the indictments charging these offenses do not need to state the victim's full name, nor do they need to add periods after each letter in initials in order to accomplish the common sense understanding that initials represent a person. *Id.*

Unlike the situation where the indictment names only a "victim," the use of initials sufficed to identify the victim and did not constitute a fatal defect. [Jeff Welty blogged about the use of initials in charging documents [here](#).]

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(5b) The first-degree kidnapping indictment was also not defective. The defendant claimed a fatal flaw based on the indictment's failure to identify the specific crime constituting the sexual assault for purposes of first-degree kidnapping. There is no requirement that an indictment for first-degree kidnapping identify the felony used to enhance the offense to first-degree. The indictment was otherwise sufficient to put the defendant on notice and was valid in all respects.

(6) The trial court's instructions to the jury on the existence of the aggravating factor violated G.S. § 15A-1340.16(d). That statute provides in pertinent part that evidence used at trial to support the existence of an element of the offense may not thereafter be used to prove a factor in aggravation. The jury instructions permitted the jury to consider "all of the evidence," rather than limiting its consideration to evidence not used to support the intent requirements for the two crimes. The defendant did not object to the instructions at the time and alleged plain error on appeal. Plain error requires that the defendant demonstrate "a reasonable possibility that, had the instruction been given, the jury would have failed to find the existence of the aggravating factor." *Id.* at 36. The court noted that occupying a position of trust is not an element of either of the crimes at issue and rejected the contention that the same evidence was used to prove both the intent to commit the crimes and the aggravating factor. The defendant could not demonstrate the possibility of a different result absent the instructions on the aggravating factor, and accordingly could not demonstrate prejudice for plain error.

(7) The defendant's argument that his objections to an order requiring him to enroll in satellite-based monitoring ("SBM") were improperly overruled were abandoned on appeal, because the defendant failed to raise any argument for this issue.

A majority of the court determined there were no reversible error in the trial and the convictions were affirmed.

Judge Murphy dissented in part. He wrote separately to note his disagreement with the majority's analysis of the Confrontation Clause issue. Judge Murphy would have granted a new trial based on the Sixth Amendment violation and would have held the plain error jury instruction issue in (5) above, as well as the SBM issue in (6), were therefore moot. He otherwise concurred in the majority's judgment.

Hearsay

(1) Children's statements to social worker were admissible under Rules 804(3) and 804(24) and their exclusion was prejudicial error; (2) Objections to blood-splatter evidence were preserved; (3) Evidence that defendant Martens overheard his daughter yell, "don't hurt my dad" was alternatively not hearsay or admissible as an excited utterance and the trial court erred in striking that testimony

State v. Corbett & Martens, ___ N.C. ___, 2021-NCSC-18 (Mar. 12, 2021). The defendant Molly Corbett was the daughter of the co-defendant, Thomas Marten. The two were charged with

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second-degree murder and voluntary manslaughter following an altercation with Molly's husband in Davidson County. The altercation occurred at the couple's home while Molly's mother and father were visiting overnight. The defendants were jointly tried, and both were convicted of second-degree murder. A divided Court of Appeals granted a new trial based on three evidentiary errors, as well as errors relating to the jury instructions (that decision is summarized [here](#)). Based on a partial dissent at the Court of Appeals, the State sought review at the North Carolina Supreme Court. A divided court affirmed.

(1) Following the incident, the children of the deceased husband (from an earlier marriage) made statements to a social worker at a child abuse advocacy and treatment center. They both indicated their father had been abusive towards Molly. One child provided an explanation for the presence of a brick paver (apparently used in the altercation) found in Molly's room on the night of the incident. The other child explained that her father originally got angry that evening when she awakened her parents following a nightmare. The children were living out of the country at the time of trial and the defendants sought to admit the hearsay statements as statements made for purposes of medical diagnosis or treatment and under the residual exception (803(4) and 803(24), respectively). The trial court excluded the testimony.

Rule 803(4) objections are reviewed de novo, while Rule 803(24) objections are reviewed for abuse of discretion. The statements of the children to the social worker were made for purposes of treatment and were reasonably pertinent to their treatment, satisfying Rule 803(4). When determining whether a child had the requisite intent to make a statement for purposes of treatment, North Carolina courts look to the objective circumstances surrounding the statement, including:

(1) whether 'some adult explained to the child the need for treatment and the importance of truthfulness'; (2) 'with whom, and under what circumstances, the declarant was speaking'; and (3) 'the surrounding circumstances, including the setting of the interview and the nature of the questioning'. Corbett Slip op. at 21 (citation omitted).

All of those factors "strongly supported" admission of the children's statement on the facts of the case.

The statements were also admissible under the residual hearsay exception. The trial court excluded the statements as lacking trustworthiness. No evidence in the record supported this finding, and the evidence otherwise met the requirements for admission under the residual exception. The majority therefore agreed with the Court of Appeals that the children's statements were improperly excluded and that the defendants' self-defense claims were undermined as a result. This was prejudicial error requiring a new trial under both rules.

(2) At trial, the State presented expert testimony regarding blood splatter patterns on the defendants' clothes. On voir dire, the witness acknowledged that the purported blood splatter at issue was not tested for the presence of blood. He further testified that failing to test the

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material for blood violated the procedures for blood splatter analysis laid out in his own treatise on the subject. The trial court allowed the testimony over objection. A majority of the Court of Appeals determined the evidence was inadmissible under Rule 702, as it was not based on sufficient data and therefore could not have been the product of reliable application of the method to the facts of the case. The dissenting judge at the Court of Appeals only challenged preservation of this claim and did not discuss the merits of the Rule 702 issue in her opinion. The State also did not seek discretionary review of the Rule 702 ruling on the merits. The Supreme Court therefore examined only the preservation argument.

The majority found that the defendants' preserved the objection by immediately objecting when the evidence was presented (after having also objected during voir dire of the witness), and by renewing the objection the next day. Further, the court determined the issue was preserved by operation of the law. Under G.S. § 15A-1446(d)(10):

[N]otwithstanding a party's failure to object to the admission of evidence at some point at trial, a party may challenge '[s]ubsequent admission of evidence involving a specified line of questioning when there has been an improperly overruled objection to the admission of evidence involving that line of questioning.' Corbett Slip op. at 44-45 (citing the statute).

While some subsections of G.S. § 15A-1446 have been found to be unconstitutional, the court has never disavowed this one and found that it applied here. Because the Court of Appeals determined this evidence was improperly admitted and that finding was not at issue on appeal to the Supreme Court, the law of the case dictated that the evidence had been improperly admitted. Thus, the defendants' objections at trial were improperly overruled and the issue was preserved as matter of law, in addition to the grounds relied upon by the Court of Appeals.

(3) Thomas Marten testified in his defense at trial that he heard his daughter yell, "don't hurt my dad" during the altercation. The trial court sustained the objection as hearsay. The Supreme Court again agreed with the Court of Appeals that this was error. The statement was not hearsay, as it went the Thomas's subjective belief of fear at the time and was not offered for the truth of the statement. It was alternatively admissible as an excited utterance under N.C. R. Evid. 803(2). In isolation, this error was not prejudicial because the defendant was otherwise given wide latitude to describe his state of mind at the time. It did however contribute to the cumulative prejudice:

[T]hese errors together imposed a significant constraint on defendants' efforts to establish a crucial fact: namely, their state of mind at the time of the events in question based on all of the circumstances known to them. Corbett Slip op. at 53.

Because the majority agreed with the decision below regarding these evidentiary issues and their prejudicial impact, the court did not reach the other issues addressed by the Court of Appeals.

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Justice Berger, joined by Justices Newby and Barringer, dissented. The dissenting justices believed that the majority improperly re-weighed the evidence on appeal and would have found that Rule 803(4) issues were subject to abuse of discretion review, rather than the de novo review applied by the majority. They also faulted the majority for raising G.S. 15A-1446 when no party argued the applicability of that statute.

Privileges

The trial court did not err in compelling the wife to testify as to the statements the defendant made and in not striking her testimony where the defendant was on trial for attempted murder of a spouse and assault with a deadly weapon with intent to kill inflicting serious injury upon a spouse.

State v. Harris, ___ N.C. App. ___, 2021-NCCOA-44 (Mar. 2, 2021). On the first day of the defendant’s jury trial, the defendant’s wife, Leah, testified that one day she and defendant got into an argument, and the defendant stabbed her multiple times in her back, arms, leg, stomach, face, and neck. Leah further testified that the defendant stopped stabbing her after he cut himself, and he requested to have sex. Leah told the defendant that she would have sex with him if he put the knife down.

At some point, Leah gained control of the knife, and testified that the defendant told her “it’s over for him now and he knows the police is coming and he just wanted me to let the knife go so he could kill himself[.]” Slip op. at ¶ 3. The defendant took Leah’s phone into another room, and Leah ran out of the house and drove to a nearby store for help. During the first day of trial, when this testimony was presented, the defendant did not object to Leah’s testimony about the defendant’s statements.

On the second day of the defendant’s trial, Leah informed the trial court she did not want to testify against her husband. Defense counsel argued Leah was attempting to assert marital privilege and moved to strike her testimony from the previous day. The trial court denied the defendant’s motion to strike and compelled Leah to testify because she was under subpoena.

On appeal, the defendant argued that the trial court erred when it allowed privileged marital communications into evidence, specifically (1) requests to have sex; (2) confessions of suicidal thoughts; and (3) admissions by the defendant of guilt to crimes against his wife. The Court of Appeals rejected this argument, holding that the portions of testimony challenged by the defendant were not confidential communications. The Court cited G.S. 8-57(b)(2), which specifically provides that a spouse of a defendant “shall be both competent and compellable to testify” in a prosecution for assaulting or communicating a threat to the other spouse. Slip op. at ¶ 12. Because the defendant was on trial for attempted murder of a spouse and assault with a deadly weapon with intent to kill inflicting serious injury upon a spouse, there was no marital privilege available.

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Additionally, the Court determined that the defendant's statements to his wife while he was attacking her with a knife and while she was attempting to escape were not prompted by the affection, confidence, and loyalty of marital relations and were thus not confidential communications.

Arrest Search, and Investigation

Arrest, Search, and Investigation

Arrests & Investigatory Stops

The application of physical force with intent to restrain a suspect, even if unsuccessful, is a Fourth Amendment seizure

Torres v. Madrid, ___ U.S. ___, 141 S. Ct. 989 (Mar. 25, 2021) (Roberts, C.J.). Law enforcement officers were attempting to serve an arrest warrant early in the morning at an apartment complex in New Mexico. They noticed the plaintiff in the parking lot and realized she was not the subject of the warrant but wished to speak with her. As they approached, the plaintiff entered her car. According to the plaintiff, she did not immediately notice the police approaching (and was admittedly under the influence of methamphetamine). When an officer tried to open her car door to speak with her, she noticed armed men surrounding her car for the first time and drove off, fearing a carjacking. Although not in the path of the vehicle, the officers fired 13 rounds at the car as it drove away. The plaintiff was struck twice in her back but escaped, only to be apprehended the next day. She sued under 42 U.S.C. § 1983 for excessive force, alleging that the shooting was an unreasonable Fourth Amendment seizure. The district court granted summary judgment to the officers and the Tenth Circuit affirmed. Circuit precedent held that no seizure occurs when an officer's use of force fails to obtain control of the suspect. The Supreme Court granted certiorari and reversed 5-3.

Under the Fourth Amendment, a seizure of a person occurs when law enforcement applies physical force or when a person submits to an officer's show of authority. In *Hodari D. v. California*, 499 U.S. 621 (1991), the Court noted that the application of any physical force to a suspect constituted an arrest (and therefore a seizure) under the common law, even if the use of force was unsuccessful in gaining control of the suspect. "An officer's application of physical force to the body of a person 'for the purpose of arresting him' was itself an arrest—not an attempted arrest—even if the person did not yield." *Torres* Slip op. at 4 (citations omitted). This is distinct from seizure by show of authority, where the seizure is not complete until the suspect submits to the authority. *See Hodari D.* The rule that physical force completes an arrest as a constructive detention is widely acknowledged in the common law.

That the use of force by law enforcement here involved the application of force from a distance (by way of the bullets) did not meaningfully alter the analysis. The Court observed: "The required 'corporal sei[z]ing or touching the defendant's body' can be as readily accomplished by a bullet as by the end of a finger." *Torres* Slip op. at 11 (citation omitted). But not all applications of force or touches will constitute a seizure. For Fourth Amendment purposes, only where an officer applies force with an "intent to restrain" the suspect does the use of force rise to the level of a seizure. An accidental or incidental touching would not qualify, nor would the use of force for a purpose other than with the intent to restrain. Intent to restrain is analyzed under an objective standard. The question is not what the officer intended (or what the suspect perceived), but rather whether the circumstances objectively indicate an intent by officers to restrain the suspect. The level of force used by officers remains relevant in that inquiry. A seizure by application of force lasts no longer than the application of force, and the length of

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the seizure may be relevant to the question of damages or suppression of evidence. Taking the facts in the light most favorable to the plaintiff, the officers here seized the plaintiff by using force with an intent to restrain her.

The defendant-officers sought a rule that no seizure would occur until there is “intentional acquisition of control” by police of a suspect. They contended that the common law rule from *Hodari D.* was meant to apply only to arrests for civil debt matters, not criminal cases. The majority rejected this argument, finding no distinction at common law between civil or criminal arrests. The common law tort of false imprisonment provides support for the seizure principle at issue—even a moment of wrongful confinement creates liability for false imprisonment, just as a mere touching accomplishes an arrest. The approach proposed by the defendants would eliminate the distinction between arrest by show of authority and arrest by use of force. This would create confusion about when a suspect is considered to be under an officer’s control, and how long a suspect would need to be under the officer’s control.

The dissent faulted the majority’s definition of seizure as “schizophrenic” and inconsistent with the law of property seizures and the Fourth Amendment. The majority responded:

[O]ur cases demonstrate the unremarkable proposition that the nature of a seizure can depend on the nature of the object being seized. It is not surprising that the concept of constructive detention or the mere-touch rule developed in the context of seizures of a person—capable of fleeing and with an interest in doing so—rather than seizures of ‘houses, papers, and effects.’ *Id.* at 19-20.

The majority also rejected accusations by the dissent that its decision was result-oriented or designed to appear so. The Court noted its holding was narrow. The decision does not determine the reasonableness of the seizure, the question of potential damages, or the issue of qualified immunity for the officers. In the words of the Court:

[A] seizure is just the first step in the analysis. The Fourth Amendment does not forbid all or even most seizures—only unreasonable ones. All we decide today is that the officers seized Torres by shooting her with intent to restrain her movement. *Id.* at 20.

Justice Gorsuch dissented, joined by Justices Alito and Thomas. They disagreed that a mere touching with intent to restrain constitutes a Fourth Amendment seizure where the officer fails to obtain control of the suspect and would have affirmed the Tenth Circuit. Justice Barrett did not participate in the case

Totality of circumstances showed defendant was seized by officer’s show of authority despite not blocking defendant’s path or using blue lights; remand to determine if seizure was supported by reasonable suspicion

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State v. Steele, ___ N.C. App. ___, 2021-NCCOA-148 (April 20, 2021). An East Carolina University police officer was responding to a traffic accident call at 2:50 a.m. in Pitt County. He noticed a vehicle on the road and followed it, suspecting it had been involved in the accident. The officer testified that the vehicle did not have its rear lights on. There were no other cars on the road at the time. The vehicle pulled into a parking lot and circled around to exit. The officer entered the parking lot and pulled alongside the defendant's car as it was exiting the lot. The officer gestured with his hand for the other vehicle to stop but did not activate his blue lights or siren and did not obstruct the defendant's path. The defendant's vehicle stopped, and the officer engaged the driver in conversation. He quickly suspected the driver was impaired and ultimately arrested the defendant for impaired driving. The defendant moved to suppress. The trial court denied the motion, finding that the defendant was not seized and that the encounter was voluntary. The defendant pled guilty, reserving his right to appeal the denial of the suppression motion. A majority of the Court of Appeals reversed.

The trial court made a finding of fact that the officer's intention was to conduct a voluntary encounter. While the officer did so testify, this finding did not resolve the conflict between the State's evidence that the encounter was voluntary and consensual and the defendant's evidence that the encounter amounted to a traffic stop. "[W]hen there is a material conflict in the evidence regarding a certain issue, it is improper for the trial court to make findings which 'do not resolve conflicts in the evidence but are merely statements of what a particular witness said.'" *Steele* Slip op. at 8-9. This finding therefore failed to support the trial court's conclusions of law. Additionally, the defendant challenged two other findings of fact relating to the defendant's rear lights. According to the defendant, the officer's testimony about the rear lights was plainly contradicted by the officer's dash cam video. The Court of Appeals, though "inclined to agree" with the defendant, found that these findings were not relevant to the issue at hand:

The issue of whether Defendant's taillights were illuminated is irrelevant because the trial court's ruling did not turn on whether [the officer] had reasonable suspicion to pull over Defendant for a traffic stop. Instead . . . the dispositive issue is whether this encounter qualified as a traffic stop at all (as opposed to a voluntary encounter which did not implicate the Fourth Amendment). *Id.* at 11-12.

The state argued that the defendant was not stopped and that the encounter was consensual. A seizure occurs when an officer uses physical force with intent to seize a suspect or when a suspect submits to an officer's show of authority. *See Terry v. Ohio*, 392 U.S. 1 (1968). An officer's show of authority amounts to a seizure when a reasonable person would not feel free to terminate the encounter and leave. The court noted that this case was unusual, as most seizure cases involve pedestrian stops. The trial court (and the dissent) erred by relying on pedestrian stop cases to find that no seizure occurred. Unlike when an officer approaches a person or parked car on foot, this case involved the officer following the defendant with each party in moving vehicles and the officer gesturing for the defendant to stop. According to the court:

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There is an important legal distinction between an officer who tails and waves down a moving vehicle in his patrol car; and an officer who walks up to a stationary vehicle on foot. In the latter scenario, the officer has taken no actions to impede the movement of the defendant—whereas in the former scenario, the officer’s show of authority has obligated the defendant to halt the movement of his vehicle in order to converse with the officer. *Steele* Slip op. at 18.

Given the criminal penalties for failure to follow traffic control commands and resisting a public officer, a reasonable driver would likely feel obligated to stop an officer gesturing for the driver to stop. “[W]hen a person would likely face criminal charges for failing to comply with an officer’s ‘request,’ then that person has been seized within the meaning of the Fourth Amendment and Article I, § 20 of our state Constitution.” *Id.* at 20. Further, the trial court failed to properly weigh the time and location of the encounter. Given the late hour and deserted parking lot, the environment was more “intimidating” than a public, daytime encounter, and a reasonable person would be “more susceptible to police pressure” in these circumstances. *Id.* at 21. Finally, the trial court also failed to properly weigh the effect of the officer’s hand gestures. The “authoritative” gestures by the uniformed officer in a marked patrol car (and presumably armed) supported the defendant’s argument that he was seized. Had the officer not been in a marked police vehicle, it was unlikely that a reasonable person would have voluntarily stopped under these circumstances. The majority of the court therefore agreed that the defendant was seized and reversed the denial of the suppression motion. The matter was remanded for the trial court to determine whether the seizure was supported by reasonable suspicion.

Judge Hampson dissented and would have affirmed the trial court’s order.

(1) Stop and search was supported by reasonable suspicion and probable cause; (2) Offer of proof was not improperly limited; (3) No error in finding canine reliable despite gaps in training and certification of canine and handler

State v. Walton, ___ N.C. App. ___, 2021-NCCOA-149 (April 20, 2021). In this case from Burke County, an officer observed the defendant driving ten miles over the speed limit and believed that the vehicle’s window tint was illegal. When the officer approached, he smelled a slight odor of marijuana and a strong odor of cologne. He also observed that the car windows were not tinted but rather had “shades” covering them. While running license and background checks of the defendant, the officer called for a canine unit and a backup officer. When he returned to the defendant’s vehicle, the odor of marijuana was stronger. The defendant denied having drugs in the car and gave no indications of impairment during field sobriety testing. While the officer was writing a warning ticket, a canine unit arrived. The dog alerted on the car, and the defendant ultimately admitted that a gun was inside. A search revealed the gun, cash, digital scales, cocaine, and synthetic opioids. The defendant moved to suppress. He also sought to admit evidence of a relationship between the backup officer on scene and a woman whose house the defendant had been at immediately before the stop and challenged the reliability of

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the canine sniff. The trial court denied the motion to suppress, allowed a limited offer of proof regarding the relationship between the woman and the officer (but excluded the evidence as irrelevant), and found the canine was reliable. The defendant pled guilty to trafficking opium and appealed.

(1) The stop of the defendant's car was supported by reasonable suspicion based on the officer's observation of speeding (which was confirmed by radar), as well as the suspected window tint violation. The officer developed additional reasonable suspicion of a drug offense based on the odor of marijuana emanating from the defendant's car. The canine unit arrived on scene 12 minutes into the traffic stop and conducted its sniff of the defendant's car within one minute while the stopping officer was writing a warning ticket. The officer therefore acted within the mission of the stop throughout the encounter and the stop was not improperly extended. The search of the defendant's car was also supported by probable cause based on the odor of marijuana and the positive canine alert.

(2) The defendant complained that his offer of proof regarding the relationship between one officer on the scene and a woman whose house the defendant had traveled from prior to the stop was improperly limited. The Court of Appeals noted that "a trial court may limit an offer of proof by allowing counsel to articulate what a defendant's showing would have been by identifying witnesses and presenting a detailed forecast of evidence for the record." *Walton* Slip op. at 11. Here, the fact of the relationship was established before the trial court and that was a sufficient offer of proof on the issue. The court also found that because this officer was not the stopping officer and had limited involvement in the case, the trial court did not commit prejudicial error in limiting or excluding this evidence.

(3) The defendant also argued that the trial court incorrectly found the canine was properly trained and reliable. Under *Florida v. Harris*, 568 U.S. 237 (2013), a certified or well-trained canine's alert can supply probable cause to search under the totality of circumstances. A defendant is permitted to demonstrate that the animal was not properly trained or reliable in arguing against probable cause based on the alert. The defendant pointed to the fact that one of the dog's certifications was expired at the time of the sniff. The court rejected this a determinative factor, finding the dog had been repeatedly certified by two different organizations and had at least one unexpired certification at the time. This was sufficient evidence of the dog's reliability, absent any showing by the defendant that its training or performance was deficient. The fact that the officer handling the canine had gaps in his training inconsistent with departmental policies was similarly not determinative. While the officer's training is a relevant consideration in the analysis, this alone was insufficient to overcome the showing that the dog was properly trained and reliable.

The case was therefore affirmed in all respects.

A traffic checkpoint had a valid programmatic purpose regardless of the fact that the location of the checkpoint moved throughout the evening

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State v. Macke, ___ N.C. App. ___, 2021-NCCOA-70 (Mar. 16, 2021). In this DWI case, the court held that a traffic checkpoint had a valid programmatic purpose and that G.S. 20-16.3A is constitutional. Troopers testified that the primary purpose of the checkpoint, which was conducted with prior approval from a supervisor, with an established plan, and without narcotics officers or drug dogs, was to check for driver's licenses and evidence of impairment. The defendant's primary challenge to the programmatic purpose of the checkpoint was that its location changed throughout the evening. Given that changing the location was planned prior to establishing the checkpoint and was authorized by the supervisor, the trial court properly determined that the checkpoint had a valid programmatic purpose. The court went on to hold G.S. 20-16.3A constitutional, specifically finding that the statute does not violate the right to free travel and does not impermissibly foreclose equal protection challenges arising from the placement of checkpoints.

Trial court did not adequately weigh factors necessary to determine whether the public interest in the checkpoint at which defendant was stopped outweighed its infringement on the defendant's Fourth Amendment privacy interest.

State v. Cobb, ___ N.C. App. ___, 853 S.E.2d 803 (Dec. 31, 2020), *temp. stay allowed*, ___ N.C. ___, 852 S.E.2d 347 (Jan. 19, 2021). The defendant was charged with driving while impaired after being stopped at a checkpoint on Highway 27 in Harnett County. She moved to suppress the evidence on the basis that the checkpoint violated her Fourth Amendment rights. The trial court denied the motion, and the defendant pled guilty preserving her right to appeal the denial of the motion to suppress. She then appealed.

The Court of Appeals, over a dissent, determined that the trial court did not adequately weigh the factors necessary to judge the reasonableness and hence, the constitutionality, of the checkpoint. Those factors are: (1) the gravity of the public concern served by the seizure; (2) the degree to which the seizure advances the public interest; and (3) the severity of the interference with individual liberty. If, on balance, these factors weigh in favor of the public interest, the checkpoint is reasonable and therefore constitutional.

As for the first factor, the Court of Appeals determined that the trial court failed to make findings that assessed the importance of this particular checkpoint stop to the public. While the trial court made ample findings, in the Court's view, that the checkpoint's primary purpose (detecting violations of the state's motor vehicle laws) was lawful, those findings did not substitute for findings that the checkpoint furthered the public concern.

As for the second factor, the Court of Appeals noted that while the trial court made pertinent findings regarding the location of the checkpoint, the time it occurred and its duration, it failed to consider other relevant factors such as whether it "was set up on a whim," had a predetermined start and end time, why the time was chosen, and why its location was chosen (beyond the finding that it was a major thoroughfare that was heavily traveled at times).

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The Court of Appeals determined that the trial court thoroughly considered the final factor; nevertheless, the deficiencies related to the findings on the first two factors prevented it from meaningfully applying the three-prong test.

Finally, the appellate court declined to consider whether the trial court erred in concluding that the checkpoint complied with statutory requirements as that issue was not preserved for review.

Judge Stroud dissented from the majority's resolution of the constitutional issue, expressing her view that the trial court made findings of fact sufficient to permit appellate review and that it correctly addressed the three prongs of the balancing test. The dissent would have held that the trial court's findings supported the conclusion that the checkpoint was reasonable.

(1) Based on the facts of this case, an officer had reasonable suspicion to believe the defendant was using a cell phone while driving in a manner proscribed by law. (2) The defendant was sentenced at the incorrect prior record level.

State v. Dalton, ___ N.C. App. ___, 850 S.E.2d 560 (Oct. 20, 2020). A police officer stopped the defendant for suspected texting while driving. When the officer returned to his vehicle to check on the defendant's identity, the defendant fled. (1) Before his trial on charges of texting while driving and felony fleeing to elude, the defendant moved to suppress the evidence obtained during the stop. At the suppression hearing, the officer testified that he did not stop the defendant for merely using the phone, but rather for using it in a manner that he reasonably believed ran afoul of G.S. 20-137.4A(a), North Carolina's prohibition on texting and emailing while driving. The officer testified that the defendant was using and handling the phone in a manner more consistent with texting or reading text messages than with using a mapping system. The trial court denied the defendant's motion and the defendant was convicted of felonious fleeing to elude. On appeal, the defendant argued that the trial court committed plain error by concluding that the officer was justified in stopping his car solely based on his observation that the operator was using a cell phone while driving. The Court of Appeals disagreed, holding that under the specific facts of this case, which included additional indicia of criminal activity beyond mere phone use, the trial court did not err by finding that the officer had reasonable, articulable suspicion to believe that the defendant was using the phone in a manner proscribed by law. The Court emphasized that its holding should not be viewed as establishing a test for meeting the reasonable suspicion requirement in other texting while driving cases. (2) The Court remanded the case for the defendant to be sentenced at prior record level two instead of level three, as his prior record level worksheet improperly counted a point for a prior misdemeanor. The Court rejected the State's argument that the improperly counted point could be offset by adding for the first time an additional point under G.S. 15A-1340-14(b)(7) for the defendant being on probation at the time of the offense, as the State did not comply with the statutory notice procedures for that point.

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The defendant was not seized by the activation of an officer's blue lights.

State v. Nunez, ___ N.C. App. ___, 849 S.E.2d 573 (Oct. 20, 2020). The defendant was charged with impaired driving after being involved in a single car accident in a Biscuitville parking lot. The trial court denied the defendant's motion to suppress the evidence obtained by the arresting officer, who was actually the second officer to arrive on the scene. The defendant argued that the first officer who arrived on the scene and activated the blue lights on her patrol vehicle lacked reasonable suspicion to seize him. The Court of Appeals held that the defendant was not seized by the mere activation of the first officer's blue lights, and that the trial court therefore did not err by denying the motion to suppress. Activation of an officer's blue lights is a factor in determining whether a seizure has occurred, but where, as here, there was no other action on the part of the officer to stop the vehicle or otherwise impede the defendant, he was not seized.

Searches

(1) Trial court properly denied motion to suppress evidence because officer had probable cause to search car based on the odor of burnt marijuana, the passenger's admission that he had smoked marijuana, and the passenger's producing of a partially smoked marijuana cigarette from his sock; (2) The trial court did not err in instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances; (3) The trial court did not err by refusing to provide a special jury instruction on knowing possession of a controlled substance as the defendant denied knowing that the vehicle he was driving contained drugs.

State v. Parker, ___ N.C. App. ___, 2021-NCCOA-217 (May 18, 2021). In this Cabarrus County case, the defendant was convicted of two counts of felony possession of Schedule I controlled substance and having attained habitual felon status. The charges arose from substances recovered from the vehicle defendant was driving when he was stopped for failing to wear his seatbelt. The officer who approached the car smelled the odor of burnt marijuana emanating from the car. The officer told the defendant and his passenger that if they handed over everything they had, he would simply cite them for possession of marijuana. The passenger in the car then admitted that he had smoked a marijuana joint earlier and retrieved a partially smoked marijuana cigarette from his sock. The officer then searched the car and discovered gray rock-like substances that when tested proved to be Cyclopropylfentanyl (a fentanyl derivative compound) and a pill that was N-ethylpentylone (a chemical compound similar to bath salts).

(1) At trial, the defendant moved to suppress evidence of the drugs recovered from his car. The trial court denied the motion. The defendant appealed, arguing that the trial court erred by failing to issue a written order and in finding that the search was supported by probable cause. The Court of Appeals determined that the trial court did not err by failing to enter a written order denying the defendant's motion to suppress as there was no material conflict in the

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evidence and the trial court's oral ruling explained its rationale. The Court further held that regardless of whether the scent of marijuana emanating from a vehicle continues to be sufficient to establish probable cause (now that hemp is legal and the smell of the two is indistinguishable), the officer in this case had probable cause based on additional factors, which included the passenger's admission that he had just smoked marijuana and the partially smoked marijuana cigarette he produced from his sock. The Court also considered the officer's subjective belief that the substance he smelled was marijuana to be additional evidence supporting probable cause, even if the officer's belief might have been mistaken. The Court rejected the defendant's contention that the probable cause had to be particularized to him, citing precedent establishing that if probable cause justifies the search of a vehicle, an officer may search every part of the vehicle and its contents that may conceal the object of the search.

(2) The defendant argued on appeal that the trial court erred by instructing the jury that Cyclopropylfentanyl and N-ethylpentylone were controlled substances since those substances are not specifically listed as named controlled substances under Schedule I in G.S. 90-89. The Court rejected the defendant's argument on the basis that the classification of these substances was a legal issue within the province of the trial court. Furthermore, the Court determined that even if the classification was a factual issue, the defendant was not prejudiced because the undisputed evidence demonstrated that the substances were controlled substances fitting within the catch-all provision of Schedule I.

(3) The defendant argued on appeal that because he denied knowing the identity of the substances found in his vehicle the trial court erred in denying his request to instruct the jury that he must have known that what he possessed was a controlled substance. The Court of Appeals found no error. The Court characterized the defendant's statements to the arresting officer as "amount[ing] to a denial of any knowledge whatsoever that the vehicle he was driving contained drugs" and noted that the defendant never specifically denied knowledge of the contents of the cloth in which the Cyclopropylfentanyl was wrapped, nor did he admit that the substances belonged to him while claiming not to know what they were. The Court concluded that these facts failed to establish the prerequisite circumstance for giving the instruction requested, namely that the defendant did not know the true identity of what he possessed. The Court further noted that defense counsel was allowed to explain to the jury during closing argument that knowing possession was a required element of the offense and the jury instructions required the State to prove that the defendant knowingly possessed the controlled substance and was aware of its presence.

The trial court erred by denying the defendant's motion to suppress evidence obtained pursuant to a warrantless search of his residence as part of his post-release supervision.

State v. McCants, ___ N.C. App. ___, 854 S.E.2d 415 (Dec. 31, 2020). In this Guilford County case, the defendant was on post-release supervision (PRS) for a previous felony. The Department of Public Safety deemed him to be a "high-risk offender" and a "validated gang

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member,” and thus included him in a May 2017 search operation conducted jointly with other state and federal law enforcement agencies. During that operation, officers searched the defendant’s residence and found a firearm in his bedside table, which led to a new criminal charge for possession of firearm by a felon. In response to the new criminal charge the defendant moved to suppress the handgun as the fruit of an illegal warrantless search, arguing that a warrantless search of his residence was unconstitutional under the federal and state constitutions in that it was not authorized by statute or as a matter of consent.

The trial court denied the motion to suppress, but the Court of Appeals reversed, agreeing that a warrantless search of the defendant’s home violated both the federal and state constitutions. The court distinguished *Samson v. California*, 547 U.S. 843 (2006), a case in which the Supreme Court upheld a warrantless search of a California parolee, limiting the reach of that case to situations in which the supervisee *chooses* supervision in the community (and its attendant conditions) over imprisonment. In North Carolina, defendants do not choose post-release supervision; to the contrary, by statute they may not refuse it. G.S. 15A-1368.2(b). Moreover, the statutory search condition applicable to post-release supervisees, G.S. 15A-1368.4(e)(10), allows searches only of the supervisee’s person, not of his or her premises. The Court of Appeals next rejected the State’s argument that the search was valid under the “catch-all” provision of G.S. 15A-1368.4(c), which allows the Post-Release Supervision and Parole Commission (the Commission) to impose conditions it believes reasonably necessary to ensure a supervisee will lead a law-abiding life. Applying the rule of statutory construction that the specific controls the general, the court took the existence of a specific statutory search condition for PRS limited to searches of the *person* as an indication that the General Assembly did not intend to grant the Commission general authority to allow other searches by way of the catch-all provision. The court also noted that related statutes applicable to searches of post-release supervisees who are sex offenders (G.S. 15A-1368.4(b1)), probationers (G.S. 15A-1343(b)(13)), and parolees (G.S. 15A-1374(b)(11)), expressly authorize searches of a defendant’s *premises* in addition to his or her person. The court viewed the omission of any similar language related to the defendant’s premises in the PRS condition as a demonstration of the General Assembly’s intent to limit the scope of the PRS search condition to searches of a defendant’s person.

Finally, the Court of Appeals agreed with the defendant that he did not voluntarily consent to the search of his residence. The officers who conducted the search informed the defendant that the search was permitted pursuant to the terms of his post-release supervision. However, as noted above, the Commission actually lacked the statutory authority to impose that condition. Under the logic of *Bumper v. North Carolina*, 391 U.S. 543 (1968), if “consent” to a search is based upon an officer’s belief that the officer has legal authority to conduct the search, but that belief turns out to be mistaken, then the purported consent is not valid. Moreover, as also noted above, the defendant had no statutory right to refuse PRS. The Court of Appeals concluded that the law could not “prejudice Defendant for agreeing to something he had no legal right to refuse.” Slip op. at 64.

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In the absence of valid consent or an authorizing statute, the warrantless search was presumptively unreasonable and unconstitutional, and the trial court thus erred by denying the defendant's motion to suppress the firearm and other evidence found during the search. The Court of Appeals reversed the trial court's order denying the motion suppress, vacated the judgment entered pursuant to the defendant's plea, and remanded the matter for additional proceedings.

Search Warrants

***Cady v. Dombrowski*, 413 U.S. 433 (1973), upholding as reasonable a “caretaking search” of an impounded vehicle for a firearm, did not create a standalone doctrine that justifies warrantless searches and seizures in the home**

Caniglia v. Strom, 593 U.S. ___, ___ S. Ct. ___ (May 17, 2021). In this case involving a welfare check that resulted in officers entering petitioner Caniglia's home without a warrant and seizing his firearms, the court held that its decision in *Cady v. Dombrowski*, 413 U.S. 433 (1973) upholding as reasonable a “caretaking search” of an impounded vehicle for a firearm did not create a standalone doctrine that justifies warrantless searches and seizures in the home. Following an argument where Caniglia put a gun on a table and told his wife to shoot him, officers accompanied his wife to their shared home to assess his welfare. During that visit, Caniglia agreed to be taken for a mental health evaluation and officers entered his home to confiscate two pistols against his expressly stated wishes. Caniglia later sued, alleging that officers violated his Fourth Amendment rights by the warrantless seizure of him and his pistols. The First Circuit affirmed summary judgment for the officers solely on the basis that the seizures fell within a freestanding “community caretaking exception” to the warrant requirement it extrapolated from *Cady*. Writing for a unanimous court, Justice Thomas noted *Cady's* “unmistakable distinction between vehicles and homes” and the Court's repeated refusal to expand the scope of exceptions to the warrant requirement in the context of searches and seizures in homes. Finding that the First Circuit's recognition of a freestanding community caretaking exception to the warrant requirement went “beyond anything this Court has recognized,” the Court vacated the judgment below and remanded for further proceedings.

Chief Justice Roberts, joined by Justice Breyer, concurred by noting that the Court's opinion was not contrary to the exigent circumstances doctrine. Justice Alito concurred by noting his view that the Court correctly had rejected a special Fourth Amendment rule for a broad category of cases involving “community caretaking” but had not settled difficult questions about the parameters of all searches and seizures conducted for “non-law-enforcement purposes.” Justice Kavanaugh concurred and elaborated on his observations of the applicability of the exigent circumstances doctrine in cases where officers enter homes without warrants to assist persons in need of aid.

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The trial court erred by denying the defendant’s motion to suppress evidence seized during a search of his person that occurred while the defendant was not an “occupant” of premises subject to a search warrant.

State v. Tripp, __ N.C. App. ___, 853 S.E.2d 848 (Dec. 31, 2020), *temp. stay allowed*, 852 S.E.2d 348 (Jan. 20, 2021). The defendant in this drug case moved to suppress evidence discovered on his person by a law enforcement officer who was part of a team of officers executing a search warrant at the defendant’s residence. At the time of the execution of the warrant, the defendant, who the day before had sold heroin to a confidential informant at the subject premises, was standing outside his grandfather’s home situated roughly 60 yards away. Upon arriving to execute the search warrant, the officer noticed the defendant outside his grandfather’s home, approached him, and ordered him to submit to a pat-down where the officer discovered fentanyl in his pants pocket. Analyzing the propriety of the seizure of the defendant under both *Michigan v. Summers* and *Terry v. Ohio*, the court determined that the seizure was illegal.

The court explained that under *Michigan v. Summers* and related North Carolina cases including *State v. Wilson*, 371 N.C. 920 (2018), “a warrant to search for contraband founded on probable cause implicitly carries with it the limited authority to detain (1) the occupants, (2) who are within the immediate vicinity of the premises to be searched, and (3) who are present during the execution of a search warrant.” Relying on reasoning from *State v. Thompson*, 267 N.C. App. 101 (2019) that a person is an “occupant” of premises for purposes of *Summers* when he or she poses a real threat to the safe and efficient execution of the search, the court concluded that the defendant, who was “simply leaning up against the rail” outside his grandfather’s house and “did not take any action to raise any suspicion of criminal activity on his part” did not pose such a threat and therefore was not at that time an “occupant” of the premises subject to the search warrant.

The court then determined, largely because the particular officer who seized the defendant was unaware of the defendant’s sale of heroin to the confidential informant, that there was no basis for the officer to seize the defendant under *Terry v. Ohio* and that the inevitable discovery doctrine was inapplicable. Finally, the court remanded the case to the trial court to correct clerical errors arising from judgment forms that were inconsistent with the sentence rendered orally in open court.

Judge Stroud dissented, expressing the view that the trial court correctly denied the defendant’s motion to dismiss because the defendant, due to his proximity to the premises and criminal history which involved possession of firearms, posed a real threat to the safe and efficient execution of the search warrant and thus was an “occupant” of the premises within the meaning of *Summers*. Judge Stroud also would have found the frisk of the defendant to be valid under *Terry* and the confiscation of the drugs on his person to be supported by the plain view doctrine.

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Search warrant affidavit was misleading and remaining portions of affidavit failed to establish probable cause; denial of motion to suppress reversed

State v. Moore, ___ N.C. App. ___, 853 S.E.2d 282 (Dec. 15, 2020). A Jones County deputy applied for a search warrant of defendant's residence. In his affidavit in support, the deputy represented that he had observed drug transactions at the defendant's residence. In fact, all the drug transactions had taken place away from the defendant's home. The defendant was charged with marijuana offenses following execution of the search warrant and moved to suppress. He alleged the warrant lacked probable cause and sought a *Franks* hearing to establish false and misleading statements in the affidavit. The trial court first held a hearing on probable cause and determined it existed based on the allegations in the affidavit that a drug transaction had been observed on the defendant's property. It then turned to the *Franks* issue and granted the defendant a hearing on the matter. The deputy-affiant testified that none of the buys occurred on the defendant's property and that he was aware of this at the time he wrote the affidavit. The trial court denied the *Franks* motion as well, finding that the deputy's statements were not false or misleading. The defendant pled guilty and appealed.

Where the defendant shows by a preponderance of evidence that false or misleading statements were intentionally made, or that such statements were made in reckless disregard of the truth, those portions of the affidavit must be excised from the affidavit. The affidavit will then be examined to determine whether the remaining portions establish probable cause. *Franks v. Delaware*, 438 U.S. 154 (1978). Here, the trial court's findings at the *Franks* hearing were not supported by the evidence. In its initial ruling on the probable cause issue, "the trial court itself was misled by the statements in the affidavit." *Moore* Slip op. at 16. In the words of the court:

Contrary to the trial court's conclusion, [the officer's] statements in his affidavit indicating that the alleged controlled drug buys and meetings between 'Matt' and the informant took place at 133 Harriet Ln. were false and his material omissions regarding the actual locations of the drug buys and meetings were misleading. *Id.* at 17.

Striking the false statements from the affidavit, the remainder of the allegations were insufficient to establish a nexus to the defendant's residence supporting a finding of probable cause. They failed to establish that drugs were sold on or from the defendant's residence and failed to allege any basis to believe the informant was reliable, among other deficiencies. The trial court's order denying the motion to suppress was therefore reversed, the defendant's plea vacated, and the matter remanded for further proceedings.

Judge Tyson dissented and would have affirmed the trial court.

Knock & Talk

Arrest Search, and Investigation

Law enforcement officers exceeded the scope of the implied license to conduct a knock and talk in violation of the Fourth Amendment and the defendant's motion to suppress should have been granted

State v. Falls, ___ N.C. App. ___, 853 S.E.2d 227 (Dec. 15, 2020). The trial court erred in denying the defendant's motion to suppress because the officers did not lawfully have a right of access to the contraband seized. The Court of Appeals considered the following factors to distinguish a knock and talk from a search: "how law enforcement approach[ed] the home, the hour at which they did so, and whether there were any indications that the occupant of the home welcomed uninvited guests on his or her property." Slip op. at 13. In short, the Court asks whether the behavior of law enforcement is in line with something a "reasonably respectful citizen" (or a Girl Scout) would do. *Id.* at 12, 16.

After receiving an anonymous drug complaint and obtaining information that the defendant was a felon in possession of a firearm, Gaston County law enforcement decided to conduct a knock and talk at the defendant's residence to investigate. After considering the factors mentioned above, the Court held that the officers did not act like reasonable, respectful citizens. The officers here carried out the knock and talk at night, a time when members of society do not expect to be called upon at their homes unexpectedly and a practice not customary for the officers. Additionally, the officers parked their vehicles in an adjacent lot, approached the defendant's home in the dark, dressed in dark clothing, and cut through trees, rather than parking in the driveway or street and proceeding towards the home along the paved path. The officers also passed directly by a "plainly visible no trespassing sign" which indicated the defendant's yard was not open to public visitors. *Id.* at 20. Based on these factors, the Court of Appeals determined that the conduct of the officers implicated the Fourth Amendment because they "strayed beyond the bounds of a knock and talk; therefore, the seizure of evidence based on their trespassory invasion cannot be justified under the plain view doctrine." The motion to suppress therefore should have been granted.

Justice Berger dissented and would have affirmed the trial court's ruling on the basis that the officers acted within the scope of their implied license to approach the defendant's home.

Identification of Defendant

(1) The trial court did not err by denying the defendant's motions to dismiss where there was sufficient evidence of the defendant's identity as the perpetrator and that the defendant conspired to commit robbery with a dangerous weapon; (2) The trial court did not err by sustaining the State's objection to a question asked on cross-examination concerning a civil lawsuit filed by a witness; and (3) The trial court did not commit plain error by failing to strike the victim's in-court identification of the defendant as the perpetrator.

State v. Glenn, ___ N.C. App. ___, 852 S.E.2d 436 (Nov. 17, 2020).

Arrest Search, and Investigation

The defendant was indicted for attempted first-degree murder, robbery with a dangerous weapon, conspiracy to commit robbery with a dangerous weapon, and other offenses. The State alleged that the defendant shot a man and his wife, Bruce and Joanne Parker, as they were getting into their car in a darkened Charlotte parking lot. After shooting Mr. Parker, the defendant, who was accompanied by a male and female companion, took Mr. Parker's wallet and cell phone.

Off-duty officers arrived on the scene shortly after the couple was shot and saw the defendant and his two companions leaving the scene in the defendant's car. Mr. Parker identified the defendant as the person who shot him. The officers gave chase, and the defendant's male companion, who was driving, crashed the car. The defendant and his companions ran from the car. The driver was apprehended. The defendant and his female companion ran into a parking garage, where they were captured on surveillance footage, but were not apprehended by officers. On the driver's seat floorboard of the crashed car, officers found the gun used to shoot the couple, the husband's cell phone and wallet, and a purse and driver's license belonging to the defendant's female companion. Forty-five minutes later, the defendant called law enforcement officers to report that he had been carjacked earlier in the evening.

A few days after the shooting, an officer came to Mr. Parker's hospital room and showed him a photographic lineup. The defendant's picture was in the lineup, but Mr. Parker identified another person as the shooter. During trial, Mr. Parker testified that he was able to make out the shooter's face during the attack. He then, without objection, identified the defendant in the courtroom, stating that the defendant was "pretty much the same man as he was that night," only that he "appeared a little bit thinner."

(1) On appeal, the defendant argued that the trial court erred by denying his motion to dismiss because there was insufficient evidence both that he was the perpetrator of the offenses and that there was a conspiracy to commit robbery with a dangerous weapon. The Court of Appeals rejected this argument, noting that Mr. Parker identified the car and the defendant as the shooter at the scene; that the officers saw the defendant leaving the scene and the car he was in; that Mr. Parker gave a description of the defendant that same night; that the description matched a person seen on surveillance after the car crashed; that the defendant was the owner of the car; and that Mr. Parker identified the defendant as the shooter in court. The Court also rejected the defendant's insufficiency of the evidence argument regarding the conspiracy. The Court relied on *State v. Lamb*, 342 N.C. 151 (1995), and *State v. Miles*, 267 N.C. App. 78 (2019), in concluding that there was sufficient evidence from which a reasonable juror could conclude that the defendant acted in coordination with the other occupants of the vehicle to rob the Parkers with a dangerous weapon.

(2) The defendant next argued that the trial court erred by sustaining the State's objection to the defendant's question concerning a civil lawsuit filed by the Parkers against the owner of the parking lot alleging inadequate security. The defendant contended that the civil lawsuit was relevant because it showed that the Parkers had an interest in the outcome of the criminal prosecution. The Court has previously held that "where a witness for the prosecution has filed a

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civil suit for damages against the criminal defendant himself, the pendency of the suit is admissible to impeach the witness by showing the witness's interest in the outcome of the criminal prosecution." *State v. Dixon*, 77 N.C. App. 27, 31–32 (1985); *State v. Grant*, 57 N.C. App. 589, 591 (1982). The Court concluded that because the civil suit was not filed against the defendant and because it was not necessary for the Parkers to prove in the civil suit that the defendant was the assailant, the pendency of the civil suit did not show Mr. Parker's interest in the outcome of the criminal prosecution and was therefore not admissible to impeach the witness.

(3) The defendant's final argument was that the trial court plainly erred by failing to exclude Mr. Parker's in-court identification, which the defendant did not object to at trial. The defendant contended that the in-court identification was tainted by Mr. Parker's exposure to media coverage of the case, his filing of a civil lawsuit that named the defendant as the assailant, the lapse of time, and his identification of someone other than the defendant in the photo lineup. The Court of Appeals concluded that these factors alone did not trigger due process concerns and that the alleged defects of the in-court identification were issues of credibility for the jury to resolve. The Court explained that absent any indication that the in-court identification was tainted by an impermissibly suggestive pre-trial identification procedure, there was no error, let alone plain error, in admitting Mr. Parker's in-court identification.

Criminal Offenses

Criminal Offenses

Participants in Crime

There was insufficient evidence of second-degree sexual exploitation of a minor under an acting in concert theory; there was insufficient evidence of penetration to support an adjudication for first-degree forcible sexual offense.

In re J.D., 376 N.C. 148 (Dec. 18, 2020). In this juvenile case, the trial court erred by denying the respondent's motions to dismiss charges of second-degree sexual exploitation of a minor and first-degree forcible sexual offense but did not err by accepting his admission of attempted larceny in an incident unrelated to the alleged sex crimes.

The State relied on an acting in concert theory in proceeding against the respondent on the second-degree sexual exploitation of a minor charge because all testimony was that a person other than the respondent made a video recording of the respondent apparently engaging in non-consensual sexual contact with the victim. The court reviewed the evidence presented at trial and found it insufficient to show that the respondent and the person who recorded the video acted with a common plan or scheme to make the recording. The court stated that the evidence showed that the respondent "did not wish to be recorded and that [the other person's] decision to record the incident was of his own volition."

The evidence of penetration was insufficient to support the first-degree forcible sexual offense charge allegedly based on anal intercourse as the victim unambiguously and explicitly denied that anal penetration occurred and the State did not present sufficient other evidence corroborating the allegation of penetration. The court rejected the State's argument that a witness's description of the incident as the respondent and the victim "doing it" was sufficient evidence of penetration and noted that at the adjudicatory hearing the State had conceded "that there was not evidence of penetration."

There was a sufficient factual basis to support the respondent's admission to an unrelated charge of attempted misdemeanor larceny of a bicycle where the respondent was found near the crime scene with two people fitting a witness's description of the suspects, had bolt cutters in his backpack, and denied committing but expressed some knowledge of the larceny to an investigating officer. Though the trial court did not err by accepting the respondent's admission to attempted misdemeanor larceny, the court could not remand the matter for a new disposition hearing to account for its rulings related to the sufficiency of the evidence of the sex crimes because the trial court's juvenile jurisdiction terminated when the respondent turned eighteen years old while the appeal was pending.

Justice Newby concurred in part and dissented in part, expressing the view that the evidence was sufficient to support the lesser included offense of attempted first-degree forcible sexual offense and that the matter should be remanded for entry of an amended adjudication for that offense.

Criminal Offenses

(1) Evidence was insufficient to support trial court’s instruction on theory of acting in concert on drug possession charges; (2) Given potential for confusion on the part of the jury between the theories of acting in concert and constructive possession as bases for the guilty verdicts on drug charges against the defendant, the erroneous instruction was not harmless.

State v. Glover, 376 N.C. 420 (December 18, 2020). Officers investigating complaints of drug activity at a home where the defendant lived with several others discovered methamphetamine, heroin, and cocaine in a small yellow tin in a dresser in the alcove near defendant’s bedroom, an area that the defendant claimed as his personal space. The defendant had allowed officers to search the area, acknowledging that he had used methamphetamine and prescription pills, and that his bedroom likely contained needles and pipes (which were in fact found by the officers), but telling the officers that he did not think they would find any illegal substances. Without the defendant’s knowledge, another resident of the home, Autumn Stepp, had placed the yellow tin, which she referred to as her “hard time stash,” in the dresser before leaving the home earlier that day.

The defendant was charged with possession with intent to sell and deliver methamphetamine, heroin, and cocaine and with maintaining a dwelling house for the sale of controlled substances. He also was indicted for having attained the status of an habitual felon. At the close of the State’s evidence, the trial court dismissed all charges except for simple possession of heroin, methamphetamine, and cocaine. The State requested, and the judge delivered over the defendant’s objection, a jury instruction on the theory of acting in concert in addition to constructive possession. The jury convicted the defendant of simple possession of heroin, methamphetamine, and cocaine and determined that he had attained the status of an habitual felon. The trial court imposed two consecutive sentences of 50 to 72 months of imprisonment. Defendant appealed.

In a divided opinion, the court of appeals determined that the instruction was proper as it was supported by the evidence. The defendant appealed to the North Carolina Supreme Court.

The state supreme court noted that to support a jury instruction on the theory of acting in concert, the State must produce evidence that the defendant acted together with another who did the acts necessary to constitute the crime pursuant to a common plan or purpose to commit the crime. Mere presence at the scene of the crime is insufficient to support such an instruction. The supreme court agreed with the dissent below that there was no evidence that the defendant acted together with Stepp pursuant to a common plan or purpose; therefore, the supreme court concluded that the trial court erred by giving the instruction. The court reasoned that the discovery of the tin in the defendant’s personal area could indicate his capability to maintain dominion and control over it, thereby supporting a theory of constructive possession, but did not show a common plan or purpose in which the defendant acted in concert with Stepp to protect her “hard time stash.” Likewise, defendant’s admission that he had used illegal drugs on the day of the search and with Stepp in the past could support a theory of constructive possession, but did not demonstrate a common plan or purpose between defendant and Stepp as to the substances in the yellow tin.

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Because the State's evidence supporting the theory of constructive possession was controverted and not exceedingly strong and given the prospect of confusion presented by proceeding on a theory of possession by acting in concert and constructive possession, the court concluded there was a reasonable possibility that had the trial court not instructed on acting in concert a different result would have been reached. The state supreme court thus reversed the decision of the court of appeals, vacated the defendant's convictions and ordered a new trial.

Justice Newby dissented based on his view that the majority failed to consider the evidence in the light most favorable to the State. Through that lens, he would have found sufficient evidence to support the theory of acting in concert.

Trial court did not err in denying defendant's motion to dismiss; the state presented sufficient evidence that the defendant acted in concert with another shooter to murder one victim, and they conspired and attempted to murder a second victim.

State v. Baldwin, __ N.C. App. __, 2021-NCCOA-97 (Apr. 6, 2021). A longstanding feud and several prior altercations culminated in the defendant and an accomplice ambushing two victims as they were driving away from the home of a woman who helped set the victims up. As the victims' vehicle left the woman's home and approached an intersection, the accomplice was standing in the middle of the road and began shooting at the driver's side of the victims' car. The defendant was also present and shot at the passenger side of the car. The driver of the vehicle was killed, but the passenger survived unharmed. The defendant was identified as a suspect, interviewed, and arrested. In the defendant's first interview with police, he claimed that he had been at home all day when the murder occurred. In his second interview, the defendant admitted he lied in his first interview and admitted that he was present at the scene and fired at the car, but maintained that he was firing in self-defense and not aiming at the vehicle.

The defendant was charged with first-degree murder of the driver, attempted murder of the passenger, conspiracy to commit first-degree murder of the passenger, and discharging a firearm into an occupied vehicle in operation. Following a jury trial, the defendant was convicted of all charges. The jury found the defendant guilty of murder based on both lying in wait and felony murder, but acquitted as to malice, premeditation, and deliberation. Judgment on the discharging a firearm offense was arrested, and the defendant was sentenced to life in prison.

On appeal, the defendant argued that the evidence at trial was insufficient to support his convictions for murder, attempted murder, or conspiracy. The Court of Appeals disagreed, and held that there was sufficient evidence to support all the charges. Even though the state offered the defendant's initial exculpatory statement into evidence, that statement was inconsistent with other evidence of the defendant's guilt, such as his admissions to being at the

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scene and firing a gun, and forensic evidence that showed he fired 13 shots at the passenger side of the vehicle. The bullet that killed the driver came from the other side of the car, but there was sufficient evidence to show that the defendant and the other shooter were acting in concert and engaged in the felony of discharging a firearm into an occupied vehicle. Evidence cited by the court included the longstanding feud that led to the murder, the close friendship between the defendant and the other shooter, incriminating text messages regarding their plan, the coordinated nature of both the set-up to bring the victims to a specific location and the resulting ambush, and the assailants' joint flight afterward. Based on all the evidence, a reasonable juror could conclude that the two shooters were lying in wait for the victims, and they were acting in concert when they opened fire on the occupied vehicle. Although the passenger in the vehicle survived, the court held that the evidence was likewise sufficient to find that the defendant and his accomplice intended to murder the passenger, made an agreement to do so, and performed an overt act to carry out that intent, thus supporting the convictions for both attempted murder and conspiracy.

(1) Where the defendant was not actively or constructively present at the time of the underlying offense, there was insufficient evidence to show the defendant acted in concert to obtain property by false pretenses; (2) Where defendant's false statement to investigators did not actually impede the investigation, there was insufficient evidence of felony obstruction of justice; (3) Argument that an email sent to AOC at defendant's direction was a command and therefore not hearsay was not presented to the trial court and was waived on appeal; (4) The trial court did not plainly err in failing to instruct the jury on the specific misrepresentations for the obtaining property by false pretense offenses

State v. Bradsher, ___ N.C. App. ___, 850 S.E.2d 533 (Oct. 6, 2020) [*editor's note: The Oct. 6, 2020 opinion in this case was withdrawn and superseded by a Dec. 31, 2020 opinion summarized earlier in this document. The summary presented here discusses issues that were not re-summarized in the Dec. 31, 2020 summary*]. The defendant, the former District Attorney for Person and Caldwell Counties, was tried for obtaining property by false pretenses, conspiracy to obtain property by false pretenses, aiding and abetting obtaining property by false pretenses, three counts of obstruction of justice, and failure to discharge the duties of his office. The jury acquitted on one count of felony obstruction and the conspiracy count but convicted on the remaining charges (with the exception that the jury returned a verdict of guilty of misdemeanor obstruction on one of the remaining felony obstruction counts). The trial court subsequently arrested judgment on the aiding and abetting obtaining property conviction. The charges stemmed from a scheme whereby the defendant and another elected District Attorney hired each other's wives to work in each other's offices. Under this arrangement, both wives were wrongfully paid for working hours that they had not actually worked.

(1) There was insufficient evidence to support the conviction for obtaining property by false pretenses. The State alleged that the defendant acted in concert with the employee who improperly submitted work hours. Acting in concert requires the actual or constructive

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presence of the defendant at the scene of the crime. “A person is constructively present during the commission of a crime if he is close enough to provide assistance if needed and to encourage the actual execution of the crime.” Slip op. at 15 (citation omitted). Although the employee at issue worked for the defendant, she was allowed to work at her husband’s office in another district. The defendant was therefore not physically present when the fraud of reporting unworked hours occurred. The State argued that the defendant was constructively present, pointing out that the fraudulent hours were approved by a supervisor at the defendant’s direction. The court rejected this argument, noting that the approval of hours occurred at a much later time than when the hours were submitted. While “actual distance is not determinative, . . . the accused must be near enough to render assistance if need be and to encourage the actual perpetration of the crime.” *Id.* at 19 (citation omitted). Here, the defendant was not in the same county as the employee who submitted the fraudulent hours at the time they were submitted. The fact that the employee could have called the defendant for help with the crime at the time was not enough to satisfy the constructive presence element. “To hold the theory of acting in concert would be satisfied merely where ‘remote assistance’ is possible would broadly expand the universe of criminal conduct under this theory.” *Id.* at 22. Thus, the defendant’s conviction for acting in concert to obtain property by false pretenses was vacated for insufficient evidence [although the trial court was instructed on remand to reinstate the judgment previously arrested for aiding and abetting obtaining property].

(2) There was also insufficient evidence of felony obstruction of justice. That offense requires the State to prove that the defendant actually impeded the administration of justice. The indictment alleged that the defendant made false statements to an SBI investigator concerning the employee. One of the defendant’s statements at issue was “at most misleading, and not false,” as it was a misrepresentation by omission and not affirmatively a false statement as the indictment charged. There was sufficient evidence that another of the defendant’s statements to the investigator was false, but there was no evidence that this statement actually obstructed the course of the investigation. The defendant responded truthfully to some of the investigator’s questions about the employee, which actually facilitated the investigation. The defendant was never directly asked whether the employee was in fact performing work for the defendant. “To support a conviction for obstruction of justice, the State must establish substantial evidence for every element of the crime, including that the act in question ‘obstructed justice[.]’” *Id.* at 27 (citation omitted). The motion to dismiss for felony obstruction of justice therefore should have been granted, and that conviction was vacated.

(3) The defendant argued that the trial court improperly excluded testimony regarding an email sent by an assistant to the Administrative Office of the Courts at the defendant’s direction. At trial, the defendant argued that the email fell within the business records exception to the prohibition on hearsay, that the email was simply not hearsay, and that the State opened the door to the admission of the email through its questions of the witness. On appeal, the defendant argued that the email should have been admitted because it was a directive to his employee, pointing to cases holding that commands are not hearsay because they are not offered for the truth of the matter (rather, they are offered to show that the command was given). It was not apparent from context that the defendant was arguing for the email’s

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admission as a command, and the parties and trial court did not address that argument. Since this argument was not made at the trial level, it was not preserved and was waived on appeal.

(4) The trial court did not commit plain error by failing to instruct the jury on the specific misrepresentations for the obtaining property by false pretenses offenses. “[A] jury instruction that is not specific to the misrepresentation in the indictment is acceptable so long as the court finds ‘no variance between the indictment, the proof presented at trial, and the instructions to the jury.’” *Id.* at 34 (citation omitted). The defendant argued that the evidence showed alternative false representations that the jury could have improperly relied on in rendering its verdict of guilty for the two offenses. Reviewing the evidence, the court rejected this argument. “We hold the trial court did not err, nor plainly err, in failing to give an instruction about the misrepresentation alleged in the indictment.” *Id.* at 37.

Assaults

The decision of the Court of Appeals that the defendant’s acts constituted a single assault was left undisturbed by a divided Supreme Court

State v. Prince, ___ N.C. ___, 2021-NCSC-40 (Apr. 16, 2021). With one justice not participating in the case and the remaining six justices divided equally, the decision of the Court of Appeals was left undisturbed and stands without precedential value. The decision of the Court of Appeals, ___ N.C. App. ___, 843 S.E.2d 700 (2020), was previously summarized as follows:

The defendant was convicted of assault with a deadly weapon with intent to kill inflicting serious injury (Class C felony) and assault by strangulation (Class H felony) based on his assault of his wife. The defendant’s wife was rendered unconscious during the assault and was hospitalized for three days as a result of her injuries, which include bruises around her neck, brain bleed, multiple contusions, and burst blood vessels in her eyes.

The trial court consolidated the offense for judgment and sentenced the defendant to a minimum of 73 and a maximum of 100 months imprisonment.

The assault by strangulation statute, G.S. 14-32.4(b), provides that “[u]nless the conduct is covered under some other provision of law providing greater punishment, any person who assaults another person and inflicts physical injury by strangulation is guilty of a Class H felony.” *Id.* (emphasis added).

The defendant argued that on appeal that because his assaultive conduct was covered by a statute providing greater punishment—namely, the offense of assault with a deadly weapon with intent to kill inflicting serious injury, for which he was convicted—the trial court violated the statutory mandate in G.S. 14-32.4(b) when it sentenced him for assault by strangulation.

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The State argued that there were two separate assaults supporting each of the charges. The assault leading to the more serious offense was with fists. The other assault was by strangulation.

Over a dissent, the Court of Appeals agreed with the defendant. It rejected the State's argument on the basis that there was no evidence of a distinct interruption between the assaultive conduct. Instead, the evidence showed that the victim's injuries resulted from a single, if prolonged, assaultive act. The appellate court held that because the two offenses arose from the same conduct, the trial court erred in sentencing the defendant for assault by strangulation. The court vacated the defendant's conviction for assault by strangulation and remanded the case to the trial court for resentencing.

A dissenting judge would have found no error on the basis that an assault by intentionally strangling the victim is not the same conduct as intentionally striking the victim with fists or hands.

The defendant could be sentenced for only one assault when the factual basis for his plea gave no indication of a distinct interruption between incidents

State v. Robinson, ___ N.C. App. ___, 852 S.E.2d 915 (Dec. 15, 2020), *temp. stay allowed*, ___ N.C. ___, 852 S.E.2d 215 (Dec. 31, 2020). In this Buncombe County case, the defendant pled guilty to assault on a female, violation of a domestic violence protective order, assault inflicting serious bodily injury, and assault by strangulation after an incident in which he held the victim captive and broke her jaw. The Court of Appeals granted the defendant's petition for writ of certiorari to review the sufficiency of the factual basis for his plea to the three assault charges. The appellate court concluded that the State's factual summary gave no indication of a distinct interruption between incidents that would support multiple assault convictions. To the contrary, the prosecutor's summary referred to "the assault" and "the altercation" in the singular. Moreover, in light of the prefatory language in the relevant assault statutes indicating that they apply "[u]nless the conduct is covered under some other provision of law providing greater punishment," the Court of Appeals concluded that the trial court was only authorized to enter judgment and sentence the defendant for the most serious assault—in this case the Class F assault inflicting serious bodily injury. The court remanded the matter to superior court with instructions to arrest judgment on the lesser assaults and to resentence the defendant on the remaining charges.

Judge Berger dissented, finding that under an analysis of the facts guided by *State v. Rembert*, 341 N.C. 173 (1995), the defendant's conduct consisted of at least three separate and distinct assaults.

Disorderly Conduct

Criminal Offenses

(1) Trial court erred in denying defendant’s motion to dismiss charge of disorderly conduct when the only evidence of defendant’s interference with the operation of a school and its students was a group of students hearing her use profanity on the way to class; (2) Trial court erred in denying defendant’s motion to dismiss the charge of resisting a public officer as the State failed to present substantial evidence that the defendant did anything more than merely remonstrate or that she acted willfully in purposeful or deliberate violation of the law.

State v. Humphreys, ___ N.C. App. ___, 853 S.E.2d 789 (Dec. 31, 2020). The defendant was charged with disorderly conduct and resisting a public officer based on events that occurred in the parking lot outside her daughter’s high school. A drug sniffing dog alerted to the defendant’s car, which her daughter had driven to the school. The defendant came to the school to observe the search of her vehicle. She remained close to the officers who were conducting the search, used profanity throughout the encounter, and refused to comply with officers’ requests for her to back up and away. The defendant said to a class of students walking through the parking lot on the way to their weightlifting class, “[y]ou-all about to see a black woman – an unarmed black woman get shot.” Slip op. at 3.

While officers were searching the car, the defendant walked out of an officer’s view for about three seconds. She then refused to stand precisely where she was instructed to stand, telling officers, “you can keep an eye on me from right here.” Slip op. at 4. One of the officers asked her, “are you refusing to come back here?” *Id.* The defendant said, “I’m not breaking no law.” *Id.* The officer then arrested her. The defendant asked what she was being arrested for and told the officers she had broken no law.

At the close of the evidence in her trial for disorderly conduct and resisting an officer, the defendant moved to dismiss the charges for insufficient evidence. The trial court denied the motion, and the defendant was convicted. She appealed.

(1) The Court of Appeals determined that the defendant’s conduct, viewed in the light most favorable to the State, was not disorderly conduct in violation of G.S. 14-288.4(a)(6) as it did not constitute a substantial interference with and disruption and confusion of the operation of the school in its program of instruction and training of its students. Defendant’s behavior did not cause students to be directed around the area of the search — the search alone required that redirection. And the defendant did not disrupt classroom instruction when she spoke to students as they were walking through the parking lot on the way to class. Finally, her use of profanity did not interfere with students by drawing their attention to the commotion; that would have happened anyway given the presence of the police officer and the dog.

The only interference with a school function caused by defendant that the appellate court identified was the class of high school students hearing profanity during their normal walk to class. The Court held that alone did not constitute a substantial interference.

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(2) The Court of Appeals held that there was not substantial evidence to show that the defendant resisted, delayed, or obstructed a sheriff's deputy in discharging his official duties or that she acted willfully and unlawfully. First, the Court noted that merely remonstrating with an officer or criticizing or questioning (in an orderly manner) an officer who is performing his duty does not amount to obstructing or delaying an officer in the performance of his duties. The Court noted that the defendant's actions and words were not aggressive or suggestive of violence. Instead, she orderly (if loudly) remonstrated by remaining where she could see the officer executing the search. Moreover, the Court concluded that the evidence did not indicate that the defendant stood near her car with a purpose to do so without authority or careless of whether she had the right to stand there. In fact, on the scene, she stated, "I'm not breaking no law" when she was told she needed to return to the deputy and then was arrested. Slip op. at 4. The Court thought it clear that even after the officers asked the defendant to move several times, she believed she had the right to stand and observe the search, so long as the deputy could see her and she was not obstructing the other officer's search of the vehicle. The Court held that a reasonable mind would not conclude that the evidence supported a finding that the defendant acted purposely and deliberately, indicating a purpose to act whether she had the right or not.

Fraud & Forgery

(1) State presented substantial evidence of forgery of an endorsement and uttering a forged check; (2) Photocopy of check was properly admitted to illustrate the testimony of a witness.

State v. McSwain, ___ N.C. App. ___, 2021-NCCOA-216 (May 18, 2021). In this Cleveland County case, the defendant was convicted of forgery of an endorsement pursuant to G.S. 14-120, uttering a forged check pursuant to G.S. 14-120 and attaining habitual felon status pursuant to G.S. 14-7.1. (1) The defendant argued on appeal that the State failed to prove the falsity of the instrument. The Court of Appeals determined that the State presented substantial evidence to show that the defendant wrote and signed a check on the account of John McGinnis without McGinnis's authority. The State's evidence tended to show that the defendant wrote a check on McGinnis's account weeks after his house and car were broken into. A driver's license and phone number handwritten on the check were similar to defendant's. The defendant falsely told the person to whom she wrote the check that McGinnis was her father and had given her permission to use the check. McGinnis was hospitalized when the check was written and had no children. Malcom Parker was the sole power of attorney for McGinnis and handled all of his financial matters.

(2) The trial court properly admitted a photocopy of the forged check pursuant to G.S. 8-97 to illustrate the testimony of the witness to whom the check had been provided. The Court found no indication that the photocopy was used as substantive evidence, and further concluded that the State put forth substantial evidence that the defendant had forged and uttered an instrument as defined by G.S. 14-119.

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Larceny & Related Offenses

1) Single taking rule precludes separate convictions for different items of property taken during a single transaction; (2) Miscalculation of prior record level based on erroneous paraphernalia classification and improper application of the “same elements” point to unrelated offenses was prejudicial error

State v. Posner, ___ N.C. App. ___, 2021-NCCOA-147 (April 20, 2021). (1) In this Franklin County case, the defendant was convicted of felony larceny pursuant to a breaking or entering, felony larceny of a firearm, firearm by felon, fleeing to elude, and armed robbery. The larceny pursuant to breaking or entering and larceny of a firearm occurred at the same time as a part of a continuous transaction and could not support separate convictions. Under the single taking rule, “a single larceny offense is committed when, as part of one continuous act or transaction, a perpetrator steals several items at the same time and place.” *Posner* Slip op. at 4. The State conceded this error, and the court remanded the for judgment to be arrested on one of the larceny counts. [Brittany Williams recently blogged about the single taking rule [here](#).]

(2) The defendant also challenged the trial court’s calculation of his prior record level. The trial court included a point based on a prior 2012 conviction for possession of drug paraphernalia. When determining record level points, prior convictions are classified by the law in effect at the time the present offense was committed. In 2014, the legislature created the class 3 misdemeanor offense of possession of marijuana paraphernalia. The State conceded that the defendant’s paraphernalia 2012 conviction was for marijuana paraphernalia. The conviction therefore should not have counted under current law and the trial court erred in including this point.

The trial court also erred in part in assigning the defendant an additional record level point for having been previously convicted of offenses with “all of the elements of the present offense.” G.S. 15A-1340.14(b)(6). This point applied to the defendant based on his prior convictions for possession of firearm by felon and felony breaking and entering. The defendant had not previously been convicted of larceny of a firearm, fleeing to elude arrest, or armed robbery, however, and it was error to assign this record level point in the judgments for those offenses. Both errors were prejudicial, as they raised the defendant’s prior record level from a level IV to a level V. The matter was therefore remanded for resentencing as well.

Attempted larceny does not qualify as a predicate offense for purposes of habitual larceny; habitual felon conviction resting on improper habitual larceny conviction dismissed

State v. Irvins, ___ N.C. App. ___, 2021-NCCOA-143 (April 20, 2021). The defendant was found guilty at trial in Mecklenburg County of habitual larceny and pled guilty to habitual felon status. On appeal, he argued that a prior conviction for attempted misdemeanor larceny did not

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qualify as a predicate offense for purposes of the habitual larceny statute. The Court of Appeals agreed.

Under G.S. 14-72(b)(6), a defendant is eligible to be punished for habitual larceny when the defendant commits a larceny after having been convicted of larceny on four previous occasions. Qualifying prior convictions include any larceny offense under G.S. 14-72, any offense “deemed or punishable as” larceny, and substantially similar offenses from other jurisdictions. Attempted larceny is not a larceny and is not deemed or punishable as larceny because it is not a completed larceny and is punished at a lower classification than the completed offense. See G.S. 14-72 and G.S. 14-2.5 (punishment for attempts not otherwise classified). The attempted larceny conviction was from North Carolina and did not therefore qualify as a substantially similar offense from another jurisdiction. Thus, the defendant’s conviction for attempted larceny did not qualify as a valid predicate offense supporting the habitual larceny conviction. That the defendant had previously been convicted of habitual larceny was not sufficient to overcome this defect, as an indictment for habitual larceny must state the four predicate offense relied upon to establish the habitual status. The court observed that a conviction for habitual larceny counts as one conviction for purpose of future habitual larceny prosecutions. Here, because the indictment failed to allege four valid predicate larceny convictions, it was fatally flawed and failed to confer jurisdiction on the trial court.

The normal remedy for a defective indictment is to vacate the conviction. However, the indictment here adequately charged the defendant with misdemeanor larceny and the jury, by convicting the defendant of the habitual offense, found that the defendant was responsible for the misdemeanor offense. Accordingly, the court remanded for entry of a judgment finding the defendant guilty of misdemeanor larceny and for resentencing on that offense. Because the defendant’s habitual felon conviction rested on the habitual larceny conviction, that conviction was reversed and remanded for dismissal.

Burglary & Related Offenses

The trial court erred in denying a motion to dismiss a first-degree burglary charge when it considered G.S. 14-54(a1) (breaking and entering with the intent to terrorize or injure an occupant) as the felony underlying the first-degree burglary charge and the evidence failed to support this theory, which was used as the sole basis for the conviction.

State v. McDaris, ___ N.C. App. ___, 852 S.E.2d 403 (Nov. 17, 2020).

At approximately 1:00 a.m. on January 1, 2018, the defendant woke Mr. and Mrs. Ridenhour by loudly banging on the front door of their residence. Mr. Ridenhour, thinking a neighbor was at the door, went to the front door and flipped the deadbolt. The defendant violently pushed the front door open, knocking Mr. Ridenhour backwards. The defendant entered the house and began beating Mr. Ridenhour, who shouted for his wife to call the police and grab his pistol. The defendant struck Mr. Ridenhour multiple times, causing him to fall down a flight of stairs and knocking him unconscious. Mrs. Ridenhour entered the hall, pointed a gun at the

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defendant, and told him to leave. The defendant then left the house, and Mr. Ridenhour regained consciousness and locked the door. The defendant briefly walked in the front yard but returned and began banging on the front door again. Caldwell County Sheriff's Deputies arrived at the scene and detained the defendant at the front door. The defendant was indicted for first-degree burglary and the lesser included offense of felonious breaking and entering.

During a bench trial, the defendant twice moved to dismiss, arguing that the State had not presented sufficient evidence of his intent to commit an underlying felony when he entered the Ridenhour house, as required for first-degree burglary. The trial court denied both motions. In a subsequent charge conference, the trial court stated it was considering larceny, attempted murder, and a violation of G.S. 14-54(a1) (breaking or entering a building with intent to terrorize or injure an occupant) as potential underlying felonies for the first-degree burglary charge. However, the trial court, as finder of fact, convicted the defendant of first-degree burglary solely on the basis of G.S. 14-54(a1), stating that "the defendant . . . committed first-degree burglary by committing the felony of [G.S. 14-54(a1)] when he broke and entered into the building with the intent to terrorize and injure the occupant, because that's what happened." Slip op. at 5.

On appeal, the defendant challenged the sufficiency of the evidence, specifically arguing that G.S. 14-54(a1) cannot be an underlying felony for first-degree burglary because "grammatically and logically, the initial breaking and entering must be distinct from the crime which a burglar subsequently intends to commit therein." Slip op. at 6. The Court of Appeals agreed with the defendant, reasoning that "for G.S. 14-54(a1) to satisfy the felonious intent element of first-degree burglary, a defendant must (1) break and enter a dwelling (2) with the intent to *therein* (3) break or enter a building (4) with the intent to terrorize or injure an occupant" Slip op. at 8–9. (emphasis in original). The Court held that sufficient evidence was not presented to support the inference that the defendant broke and entered the Ridenhours' residence with the intent to subsequently break or enter another building within the residence and therein terrorize the Ridenhours and as a result, the defendant's motion to dismiss should have been granted. Moreover, the Court explained that in determining that the first-degree burglary charge was *only* supported by the defendant's intent to violate G.S. 14-54(a1), the trial court acquitted the defendant of the other potential underlying felonies, including attempted murder, assault inflicting serious bodily injury, and larceny. The Court reversed the defendant's first-degree burglary conviction and remanded for entry of judgment for misdemeanor breaking or entering, a lesser included offense that does not require proof of intent to commit an underlying felony.

Kidnapping & Related Offenses

The trial court did not err by denying the defendant's motion to dismiss a charge of second-degree kidnapping and did not commit plain error by failing to instruct the jury on the confinement theory of kidnapping alleged in the indictment

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State v. Stokley, ___ N.C. App. ___, 2021-NCCOA-71 (Mar. 16, 2021). The trial court did not err by denying the defendant’s motion to dismiss a charge of second-degree kidnapping and did not commit plain error by failing to instruct the jury on the confinement theory of kidnapping alleged in the indictment. The second-degree kidnapping indictment alleged that the defendant unlawfully confined the victim without consent and for the purpose of facilitating felony armed robbery. In moving to dismiss the kidnapping charge, the defendant argued that the victim was not restrained to a degree over that inherent in the underlying robbery, which involved the defendant entering the victim’s bedroom while brandishing a gun and motioning for the victim to move from that room to another and ordering the victim to lie on the ground upon moving rooms. Noting the State’s acknowledgement that the question of whether confinement or restraint is of a degree beyond that inherent in robbery such that a kidnapping conviction also is proper involves “a very tangled area of the law,” the court reviewed relevant precedent on its way to determining that there was no error in the defendant’s kidnapping conviction. The court explained that the movement of the victim from his bedroom to the other room was not essential to complete the robbery, that the victim was held in the other room for some time, and was exposed to greater danger by being moved and held at gunpoint.

In response to the defendant’s argument that the trial court plainly erred by instructing the jury on kidnapping by restraint or removal but not confinement despite the indictment alleging kidnapping based solely on confinement, the court conducted a “highly fact sensitive” analysis and concluded that the defendant failed to show a possibility that a reasonable jury would have found that the victim in this case was removed or restrained but was not confined.

Judge Murphy concurred in result only, expressing the view that the majority improperly equated removal and confinement when analyzing the defendant’s motion to dismiss the kidnapping charge. Judge Murphy also expressed the view that the trial court erred in its jury instruction on kidnapping because the instruction did not track the indictment, but found that the error did not rise to the level of plain error.

(1) The evidence in a second-degree kidnapping case was sufficient to support a jury finding that the Defendant unlawfully removed the victim without the victim’s consent by means of fraud and trickery for the purpose of committing armed robbery; and (2) the record was insufficient to review the merits of a claim of ineffective assistance of counsel

State v. Parker, ___ N.C. App. ___, 852 S.E.2d 638 (Dec. 1, 2020).

(1) Evidence at trial tended to show that after the victim requested a ride to Walmart and the community college because his car was in the shop for repair, the defendant, who was the victim’s cousin, and the defendant’s girlfriend drove the victim to a secluded area where the defendant robbed him at gunpoint. Viewed in the light most favorable to the State, the victim’s testimony of the defendant’s claim of having to “make a quick stop somewhere” on the way to the community college from Walmart, where the victim had cashed a check for a significant amount of money, was sufficient evidence that the defendant unlawfully removed the victim by means of fraud and trickery, without the victim’s consent, for the purpose of committing armed

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robbery such that the trial court did not err by denying the defendant's motion to dismiss for insufficient evidence. As the court explained, the "[d]efendant's misrepresentations regarding the parties' ultimate destination enabled him to remove [the victim] to the secluded location, where [the] [d]efendant robbed him at gunpoint." Slip op. at 19.

(2) The record was insufficient to enable review of the merits of the defendant's ineffective assistance of counsel claim regarding his trial attorney's failure to stipulate to a prior conviction and the court dismissed the claim without prejudice so that the defendant could reassert it in a MAR.

(1) Child abduction is a general intent crime, and the State need only show that the defendant acted knowingly, not willfully; (2) There was sufficient evidence to support child abduction where the defendant continued fleeing in a stolen car after realizing a child was present in the vehicle; (3) Because child abduction is not a specific intent crime, the trial court did not plainly err in failing to instruct the jury that the defendant must have acted willfully; (4) Where the evidence supported each possible theory of first-degree kidnapping, the trial court did not plainly err in instructing the jury on each theory notwithstanding the single theory alleged in the indictment; (5) Where defendant was improperly convicted of larceny of a motor vehicle and possession of stolen goods for the same property, the possession of stolen goods conviction was vacated

State v. French, ___ N.C. App. ___, 849 S.E.2d 360 (Oct. 6, 2020). In this Lincoln County case, the defendant stole a car left running outside of a gas station. A three-year old child was in the backseat. Once officers attempted to stop the car, the defendant led police on a high-speed chase and ultimately crashed. The child was not harmed. During the chase, the defendant called 911 and attempted to bargain for the child's release. He was charged with first-degree kidnapping, abduction of a child, larceny of a motor vehicle, possession of stolen property, and habitual felon. The jury convicted on all counts. The defendant did not appeal, but later filed a petition for writ of certiorari seeking review of his convictions, which was granted.

(1) The child abduction statute includes language that the offense must occur "without legal justification or excuse." See G.S. § 14-41(a). The defendant contended that this language required the State to prove that the defendant acted willfully, and that the failure to instruct the jury on *mens rea* improperly treated the crime as a strict liability offense. The Court of Appeals disagreed. There is no requirement of "willfulness" in the language of the statute. While the offense is not a strict liability crime, it is also not a specific intent crime as defendant argued. Rather, the offense is a general intent crime, requiring a showing only that the defendant acted "knowingly." The "without justification or excuse" language in the statute allows the defendant to argue defenses like mistake of fact, necessity, or others, but does not create a specific intent requirement. This argument was therefore rejected.

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(2) There was sufficient evidence to support the conviction for child abduction. The evidence showed that the defendant continued driving the car at high speeds while fleeing police, even after realizing that a child was in the backseat. After the point at which the defendant called 911 and acknowledged the presence of the child in the car, he continued to disobey police and dispatch commands to stop and continued fleeing for at least 15 minutes. Though “[a] defendant may exculpate a mistake though subsequent conduct,” the defendant here made no such showing. Slip op. at 10.

(3) There was no error, much less plain error, in the trial court’s failure to instruct the jury that the defendant must have acted willfully in abducting the child, for the same reasons that the statute does not create a specific intent crime. There was therefore no error in the trial court’s instructions to the jury for that offense.

(4) During a pretrial conference, the parties agreed that the jury would be instructed only on removal as the State’s theory for first-degree kidnapping, which was the theory alleged in the indictment. At charge conference, the State requested and received jury instructions on all three possible theories (restraint, removal, or confinement). See G.S. § 14-39. Trial counsel for the defendant assented to those instructions and did not otherwise object. Despite trial counsel’s agreement, this argument was not waived and could be reviewed for plain error. However, the court found no plain error based on the evidence (which supported each theory), and the fact that there was no conflicting evidence as to the three theories. “Defendant cannot demonstrate plain error because it is undisputed that the evidence at trial supported the theory of kidnapping alleged in the indictment—removal—and also supported the two additional theories of kidnapping included in the instruction—restraint and confinement.” *French* Slip op. at 12.

(5) The trial court erred in sentencing the defendant for possession of stolen goods (the car) and larceny of a motor vehicle. “A defendant cannot be convicted of both [of these] offenses when the subject property is the same.” *Id.* at 14. The Court of Appeals therefore vacated the conviction for the possession of stolen goods conviction and found no error as to the defendant’s other convictions.

Strict Liability

(1) Violations of marine fisheries regulations are strict liability offenses. (2) The trial court did not err in failing to instruct the jury on willfulness, despite charging language alleging that the defendant acted willfully.

State v. Waterfield, ___ N.C. App. ___, 850 S.E.2d 609 (Oct. 20, 2020), *review allowed*, ___ N.C. ___, 856 S.E.2d 101 (Apr. 14, 2021). The defendant, a fisherman, was charged with violating marine fisheries regulations after he left gill nets and crab pots unattended for too long. The officer that cited Defendant for these violations used a form citation indicating that the Defendant was being charged with committing these regulatory violations “unlawfully and

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willfully.” The defendant was convicted by a jury of the unattended gill net offense in superior court. (1) On appeal, the defendant argued that the trial court committed plain error by failing to instruct the jury that the State must prove that his violation was willful, contending that the offense was not a strict liability offense. The Court of Appeals disagreed, concluding that G.S. 113-135(a), the statute that criminalizes the conduct at issue, did not establish a *mens rea* for the offense. The Court rejected the defendant’s argument that the General Assembly did not authorize the creation of strict liability regulatory offenses. In light of the language of the statutes governing these “public welfare” offenses, their relatively minor punishment, and the logistical difficulty of investigating the willfulness of every such violation, the Court held that they are strict liability offenses that do not require the State to prove intent. (2) The Court also held that the trial court did not err in failing to instruct the jury on willfulness, despite the language in the charging instrument alleging that the defendant acted “willfully.” That language went beyond the elements of the offense and was properly disregarded as surplusage.

Obstruction of Justice & Related Offenses

Court of Appeals correctly determined that felony obstruction of justice conviction was supported by sufficient evidence of deceit and intent to defraud

State v. Ditenhafer, 376 N.C. 846, 2021-NCSC-19 (Mar. 12, 2021). The defendant in this Wake County case was convicted at trial of accessory after the fact to sexual abuse by a substitute parent, felony obstruction of justice based on her failure to report the abuse, and an additional count of felony obstruction based on her interference with the attempts of investigators to interview her daughter (the victim). A divided Court of Appeals initially found the evidence insufficient to support the accessory after the fact conviction, as well as the felony obstruction based on the denial of access by law enforcement to the victim. A divided North Carolina Supreme Court affirmed as to the accessory conviction, but reversed as to the felony obstruction, finding the evidence sufficient (summarized [here](#)). The court remanded the matter to the Court of Appeals for it to consider whether the evidence was sufficient for felony or misdemeanor obstruction—specifically, whether the evidence supported a finding that the defendant acted with “deceit and intent to defraud” in denying investigators access to her daughter. An again-divided Court of Appeals determined the evidence supported felony obstruction (summarized [here](#)), and the defendant again appealed.

The record showed that the defendant actively obstructed multiple interviews of her daughter by investigators and affirmatively encouraged the daughter to lie to them. While these obstructive acts alone did not establish the element of deceit, there was evidence in the record tending to show that the defendant knew the allegations were true and acted to protect her husband. This evidence included an early admission to investigators acknowledging probable abuse of her daughter; the defendant’s knowledge of her husband’s practice of giving the victim full-body massages; continued acts of obstruction even after being made aware of inappropriate emails sent by her husband to her daughter; and statements by the defendant to her daughter that the allegations would destroy the family. Additionally, the defendant acted to

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protect her husband even after observing her husband in the act of abusing the child by destroying the bed sheets and by failing to report the abuse to a detective she met with later the same day. Finally, she also attempted flight and instructed her child to not go with police at the time of her arrest (among other circumstances indicating an intent to deceive). This was “more than sufficient” to show the defendant acted with a deceitful motive, and the Court of Appeals was unanimously affirmed.

Motor Vehicle Offenses

(1) The trial court did not err in denying the defendant’s motion to dismiss the charges of felony hit and run because there was sufficient evidence that the defendant knew or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result; (2) The trial court did not err in instructing the jury on flight because flight is not an essential element of felony hit and run and the evidence supported a flight instruction

State v. Gibson, ___ N.C. ___, 2021-NCCOA-69 (Mar. 16, 2021). The State’s evidence tended to show that the defendant was driving a van with a trailer attached behind it when he cut off two motorcycles, made rude gestures, and caused one of the motorcycles to crash. The driver of the motorcycle sustained serious injuries and a passenger died as a result of the accident. The defendant slowed down briefly and then fled the scene.

(1) The trial court did not err in denying the defendant’s motion to dismiss the charges of felony hit and run because there was sufficient evidence that the defendant knew or reasonably should have known, that the vehicle he was driving was involved in a crash and that someone was killed or seriously injured as a result. First, the defendant argued that there was insufficient evidence that he knew or reasonably should have known that the vehicle he was operating was involved in a crash or that the crash had resulted in serious bodily injury because the evidence could have shown that the defendant could not have seen behind his van and trailer or that there may not have been contact between the victim’s motorcycle and the defendant’s trailer. The Court of Appeals rejected this argument for multiple reasons, largely centering on evidence of the defendant’s awareness of the position of his vehicle relative to the motorcyclists and other traffic and evidence that the defendant slowed down immediately following the crash and then sped away at a high rate of speed.

(2) The defendant argued that the trial court erred in giving the jury an instruction on flight as evidence of the defendant’s consciousness of guilt because “leaving the scene of the offense, which could be considered flight under the challenged instruction, is an essential element of felony hit and run.” Slip op. at ¶ 37. The Court of Appeals disagreed with the defendant’s assertion that flight is an essential element of felony hit and run, explaining that flight requires some evidence of a defendant taking steps to avoid apprehension while a driver’s motive for leaving the scene of a crash for purposes of felony hit and run is immaterial. The court went on to find the instruction supported by evidence of the defendant speeding away, later lying about

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why his tire was blown out, and asking for directions to a destination that would allow him to arrive there without traveling on the interstate.

(1) Despite the State’s repeated use of “moped” to describe the defendant’s vehicle, sufficient evidence existed to establish that the defendant’s vehicle met the statutory definition of “motor vehicle”; (2) New trial required where trial court plainly erred in failing to instruct the jury on the definition of “motor vehicle”

State v. Boykin, ___ N.C. App. ___, 853 S.E.2d 781 (Dec. 15, 2020). In this Sampson County case, the defendant was convicted of felony fleeing to elude, habitual felon, and habitual impaired driving. The focus of the defendant’s arguments on appeal were on the definition of “motor vehicle” as used in G.S. 20-141.5(a) and G.S. 20-4.01(23) at the time of the offenses in 2015. This definition excluded “mopeds” from the definition of “motor vehicles.” Within that statutory framework, a “moped” was defined as “[a] vehicle that has two or three wheels, no external shifting device, and a motor that does not exceed 50 cubic centimeters piston displacement and cannot propel the vehicle at a speed greater than 30 miles per hour on a level surface.” G.S. 105-164.3(22) (2015).

(1) The defendant argued that the State did not prove that the defendant was operating a motor vehicle, an element of felony speeding to elude arrest, based on the State’s repeated references to defendant’s vehicle as a “moped” at trial. The Court of Appeals disagreed, finding that the statutory definition of a “moped” differs from the ordinary, vernacular use of “moped,” and determining that the State presented sufficient evidence that the defendant’s vehicle was a “motor vehicle” within the meaning of the statute. According to the court:

Ultimately, the State’s evidence met the elements of the statutory definition of a ‘motor vehicle,’ despite its repeated use of the term ‘moped,’ and defendant’s motion to dismiss the charge of felony speeding to elude arrest was properly denied. *Boykin* Slip op. at 11.

(2) The defendant also argued that the trial court erred by failing to instruct the jury on the definition of “motor vehicle.” Reviewing for plain error, the Court of Appeals agreed. Because the evidence, especially the State’s repeated use of the word “moped” rather than “motor vehicle,” could have led the jury to reach a different determination if they had known the statutory definition of “motor vehicle,” the defendant was entitled to a new trial on the felony fleeing to elude offense. Because the defendant was found to be a habitual felon based on the fleeing to elude, that conviction was also vacated.

Homicide

(1) A defendant’s hands and arms may qualify as a deadly weapon for purposes of the felony-murder provision defining as a predicate felony any “other felony committed or attempted

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with the use of a deadly weapon”; (2) The trial court’s erroneous instruction that the jury could find that the defendant attempted to murder his mother using a garden hoe as a deadly weapon when the evidence did not support that theory was prejudicial error.

State v. Steen, 376 N.C. 469 (December 18, 2020). The defendant appealed from his conviction for the first-degree murder of his grandfather based on the felony murder rule using the attempted murder of his mother with a deadly weapon as the predicate felony. The trial court instructed the jury that it could find the defendant guilty of first-degree murder if it found that he killed his grandfather as part of a continuous transaction during which he also attempted to murder his mother using either his hands or arms or a garden hoe as a deadly weapon. The defendant appealed, arguing that his hands and arms were not properly considered a deadly weapon for purposes of the felony murder rule and that the trial court’s erroneous instruction that the jury could find that he attempted to murder his mother using a garden hoe was prejudicial error.

The defendant was at the home of his mother and grandfather on November 5, 2013. He owed money to both and they had recently told him that they would lend him no more. As his mother went outside the defendant followed behind her, saying he was leaving to go to work. His mother walked into a storage shed behind the house, where she remained for five or 10 minutes. She did not hear the defendant get into his car or hear the vehicle leave. While she was in the shed, she thought she heard raised voices. She came out to check on her father. As she walked toward the house, she felt someone put an arm around her neck. Her attacker put a hand over her nose and mouth and she lost consciousness. The next thing she remembered was someone opening her eyelid as she lay on the ground. She saw defendant’s face and thought he was there to help her.

The defendant worked from 11 p.m. to 7 a.m., returning home the following morning. When he got home he saw that his mother had been attacked and called for emergency assistance. The defendant’s grandfather was dead when the paramedics arrived. He was face down near the back door, covered in blood, with a large pool of blood around his head. A garden hoe covered in blood was next to his body. The grandfather’s wallet was near his body and did not contain the money usually kept there.

The defendant denied his involvement in the assault and murder. He gave different explanations for the presence of scratches on his arm. DNA evidence from the scene did not connect him to the crime. The defendant’s mother (who experienced a traumatic brain injury) initially told investigators that the defendant left the home before she was attacked and said the person who attacked her was shorter than the defendant and was wearing a ski mask. She testified differently at trial, stating that it was the defendant who had choked her and that there had been no ski mask.

The trial court instructed the jury on multiple theories of first-degree murder, including the felony-murder rule using the attempted murder of the defendant’s mother as the predicate felony. As to the deadly weapon requirement, the court told the jury that the “State contends

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and the defendant denies that the defendant used his hands and/or arms, and or a garden hoe as a deadly weapon.” The jury convicted the defendant of first-degree murder based on this theory, and the defendant appealed.

The supreme court relied upon a “virtually uninterrupted line of appellate decisions from this Court and the Court of Appeals interpreting the reference to a ‘deadly weapon’ in N.C.G.S. § 14-17(a) to encompass the use of a defendant’s hands, arms, feet, or other appendages” and the “fact that the General Assembly has not taken any action tending to suggest that N.C.G.S. § 14-17(a) should be interpreted in a manner that differs from the interpretation deemed appropriate in this line of decisions” to establish that the General Assembly intended for the term “deadly weapon” to include a defendant’s hands, arms, feet or other appendages. The court rejected the defendant’s invitation to overrule or limit to child victims its holding in *State v. Pierce*, 346 N.C. 471 (1997) that the offense of felony child abuse could serve as the predicate felony for felony-murder when the defendant used his hands as a deadly weapon in the course of committing the abuse. The court also rejected the defendant’s invitation to rely on *State v. Hinton*, 361 N.C. 207 (2007) for the proposition that the term “deadly weapon” has different meanings in different contexts and should have a felony-murder specific definition.

The *Hinton* court held that the reference to “any firearms or other dangerous weapon, implement or means” as used in N.C.G.S. § 14-87(a) (defining robbery with a dangerous weapon) did not encompass the use of a defendant’s hands because the statute was intended to provide a “more severe punishment when the robbery is committed with the ‘use or threatened use of firearms or other dangerous weapons’” than when the defendant committed common law robbery, which did not involve the use of such implements. The court reasoned that the logic in *Hinton* had no application to its interpretation of the felony-murder statute as nothing in the language or legislative history of G.S. 14-17 suggested that its reference to “deadly weapon” should be defined in a way that differed from the traditional definition, which included a person’s appendages.

Finally, the court rejected the notion that its interpretation meant that every killing perpetrated with the use of a defendant’s hands, arm, legs, or other appendages could constitute felony murder, thus undermining the General Assembly’s attempt to limit the scope of the rule when it revised the statute in 1977. The court noted that the extent to which hands, arms, legs, and other appendages can be deemed deadly weapons depends upon the nature and circumstances of their use, including the extent to which there is a size and strength disparity between the perpetrator and his or her victim. Moreover, something more than a killing with hands, arms, legs, or other bodily appendages must be shown (a felony) to satisfy the rule.

The court then considered whether the trial court’s instructions to the jury that it could find that the defendant attempted to murder his mother using a garden hoe was prejudicial error, concluding that it was as there was a reasonable possibility that the jury would not have convicted the defendant of first-degree murder without the erroneous instruction. The court explained that to conclude otherwise, “[w]e would be required to hold that the State’s evidence that defendant killed his grandfather as part of a continuous transaction in which he also attempted to murder his mother using his hands and arms as a deadly weapon was so

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sufficiently strong that no reasonable possibility exists under which the jury would have done anything other than convict defendant of first-degree murder on the basis of that legal theory.” The sharply disputed evidence over whether the defendant was the perpetrator, including the lack of physical evidence, the defendant’s trial testimony, and the conflicting nature of the statements made by the defendant’s mother, prevented the court from concluding that the error was harmless. Even more central to the court’s analysis was the dispute over the extent to which the defendant’s hands and arms were a deadly weapon. The court noted that although the size and strength differential between defendant and his mother was sufficient to permit a determination that defendant’s hands and arms constituted a deadly weapon, the differences were not so stark as to preclude a reasonable jury from concluding that defendant’s hands and arms were not a deadly weapon. If the jury had reasonably concluded that the defendant’s hands and arms were not used as a deadly weapon, it could not have convicted the defendant of the first-degree murder of his grandfather on the basis of the felony-murder rule, contrary to the suggestion in the jury instruction. As a result, the Court held that the trial court’s instruction concerning the use of the garden hoe as a deadly weapon during defendant’s alleged attempt to murder his mother was prejudicial error necessitating a new trial for the murder of his grandfather.

Justice Newby, joined by Justice Morgan, concurred in part and dissented in part. He agreed with the majority that the defendant’s hands and arms were deadly weapons, but disagreed that the instruction regarding the garden hoe resulted in prejudicial error.

Justice Earls concurred in the result only in part and dissented in part. She agreed with the majority that the instruction regarding the garden hoe was error warranting a new trial. She dissented from the majority’s conclusion that a jury could properly consider a person’s hands, arms, feet, or other body parts to be deadly weapons for purposes of the felony murder statute, reasoning that the legislative history and spirit of the statute demonstrate that the deadly weapon requirement refers to an external instrument.

Defendant was properly convicted of felony-murder based on underlying felony of statutory rape; Verdicts of guilty for felony-murder and not guilty for statutory rape were merely inconsistent and not legally contradictory

State v. Watson, ___ N.C. App. ___, 2021-NCCOA-186 (May 4, 2021).

The defendant was convicted by a jury of first-degree murder under the felony-murder rule. The underlying felony was statutory rape of a child under 13. And yet the jury acquitted the defendant of the charge of statutory rape of a child under 13. The defendant appealed, arguing that statutory rape of a child under 13 could not support a felony-murder conviction because it lacks the necessary intent to support such a charge. He also argued that because the jury acquitted him of the predicate felony, his first-degree murder conviction must be vacated. The Court of Appeals rejected both arguments.

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(1) The Court of Appeals determined that while the offense of statutory rape does not require that the defendant intended to commit a sexual act with an underage person, it does require that the defendant intend to commit a sexual act with the victim. The Court held that this intent satisfies the intent required for a crime to serve as the basis for a felony-murder charge. The Court distinguished the sort of intent required to engage in vaginal intercourse with a victim from the culpable negligence required to commit the offense of assault with a deadly weapon inflicting serious injury based on driving a vehicle while impaired, which the court held in *State v. Jones*, 353 N.C. 159 (2000), was insufficient to support a felony-murder charge. Statutory rape requires that the person be purposely resolved to participate in the conduct that comprises the criminal offense.

(2) The Court of Appeals determined that the jury verdicts finding the defendant (a) guilty of felony murder with statutory rape as the underlying felony but (b) not guilty of statutory rape were inconsistent but were not legally contradictory or, in other words, mutually exclusive. The Court of Appeals reasoned that a jury could rely on the act of committing statutory rape to support a felony murder conviction without also having a conviction of statutory rape. Indeed, the State could proceed to trial on such a felony murder theory without also charging statutory rape.

The Court noted that a defendant is not entitled to relief for a merely inconsistent verdict as it is not clear in such circumstances ““whose ox has been gored.”” (Slip op. at ¶ 44 (quoting *United States v. Powell*, 469 U.S. 57, 65 (1984))). The jury may have thought the defendant was not guilty. Equally possibly, it may have reached an inconsistent verdict through mistake, compromise, or lenity. The defendant receives the benefit of the acquittal, but must accept the burden of conviction.

The trial court did not err by failing to intervene ex mero motu with respect to an alleged misstatement of law regarding the aggressor doctrine in the prosecutor’s closing argument; the trial court did not err by instructing the jury on murder by lying in wait

State v. Copley, ___ N.C. App. ___, 2021-NCCOA-68 (Mar 16, 2021). On remand from the North Carolina Supreme Court’s decision (summary [here](#)) that there was no prejudicial error in the prosecutor’s closing argument with respect to race in this murder trial, the Court of Appeals considered the defendant’s remaining arguments regarding jury argument and jury instructions. Largely based on its view that the prosecutor’s jury argument was made in the context of self-defense rather than, as the defendant maintained, the habitation defense, the court disagreed with the defendant’s argument that the trial court erred by failing to intervene to correct an alleged incorrect statement of law regarding the aggressor doctrine in the prosecutor’s closing argument to which the defendant did not object. The court went on to decline to reach the defendant’s argument that the trial court plainly erred with respect to jury instructions on the aggressor doctrine in the context of the defense of habitation, finding the argument waived by the defendant’s active participation in the formulation of the jury instructions during the charge conference and failure to object at trial. Finally, the court held

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that the trial court did not err by instructing the jury on murder by lying in wait because the instruction was supported by sufficient evidence even if it was assumed that the defendant offered evidence of a conflicting theory of defense of habitation. The court noted with respect to lying in wait that the State's evidence showed that the defendant concealed himself in his darkened garage with a suppressed shotgun and fired through a garage window, bewildering unwarned bystanders.

Judge Tyson dissented, expressing the view that the trial court erred with respect to instructing the jury on murder by lying in wait given that the defendant was wholly inside his home with his family as an armed intruder approached the home and given shortcomings in the trial court's instructions regarding the State's burden of disproving the defendant's assertion of self-defense and the jury's responsibility to evaluate evidence and inferences on that issue in the light most favorable to the defendant.

Drug Offenses

(1) The defendant preserved his sufficiency of the evidence argument on appeal; (2) The trial court erred by denying the defendant's motion to dismiss the charges of trafficking heroin by transportation and possession because the State's evidence was insufficient to show that the defendant constructively possessed two bags of heroin found on the side of the road

State v. Walters, ___ N.C. App. ___, 2021-NCCOA-72 (Mar. 16, 2021). In this drug trafficking by possession and transportation case, the defendant fled an attempted traffic stop, was chased by officers for 3-5 miles until the defendant crashed his car, and then was pursued on foot. When the defendant was apprehended, he was searched and officers recovered a backpack containing digital scales, syringes, and small plastic bags. After the defendant was in custody and roughly thirty to forty-five minutes after the chase ended, the officers found two small plastic bags containing a "black tar substance" on the side of the highway roughly one hundred yards from where the car chase began. Collectively, the bags contained 4.66 grams of heroin. Although the bags were found on the route the defendant took, they were located "completely off of the roadway" and no officers testified that they saw anything thrown from the defendant's vehicle. On appeal, the defendant challenged the sufficiency of the evidence.

(1) The Court of Appeals first addressed the State's argument that the defendant failed to preserve the sufficiency issue for appellate review when he moved to dismiss the charges based upon a defect in the chain of custody, rather than for insufficiency of the evidence. The Court explained that the N.C. Supreme Court recently ruled in *State v. Golder*, 374 N.C. 238 (2020) that N.C. R. App. P. 10(a)(3) "does not require a defendant to assert a specific ground for a motion to dismiss for insufficiency of evidence" and the issue is preserved so long as a motion to dismiss is made at the proper time. Slip op. at ¶ 16. Therefore, the defendant preserved the argument on appeal.

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(2) The trial court erred by denying the defendant's motion to dismiss the charges of trafficking heroin by transportation and possession because the State's evidence was insufficient to show that the defendant constructively possessed the two bags of heroin found on the side of the road. The court explained:

When the evidence is viewed in the light most favorable to the State, the bags of heroin were found on the driver's side of the road approximately one hundred yards from the area where the car chase started. Inside Defendant's vehicle, officers found scales, baggies, and syringes. Officers did not observe Defendant throw anything from the window while driving during the chase. Defendant was not in control of the area where the drugs were found, and there is no evidence connecting the bags of heroin to Defendant or to the vehicle he was driving. Without further incriminating circumstances to raise an inference of constructive possession, the State has failed to demonstrate substantial evidence that Defendant possessed the controlled substance

(1) The defendant had access to controlled substances by virtue of her employment such that she could be convicted of embezzlement of a controlled substance under G.S. 90-108(a)(14); (2) There was sufficient evidence that CVS was a "registrant" within the meaning of G.S. 90-87(25); (3) The trial court did not commit plain error by failing to instruct the jury on the statutory definition of "registrant"

State v. Woods, ___ N.C. App. ___, 853 S.E.2d 177 (Dec. 15, 2020), *temp stay allowed*, ___ N.C. ___, 852 S.E.2d 215 (Dec. 31, 2020). In this Mecklenburg County case, a jury found the defendant guilty of embezzlement of a controlled substance by an employee of a registrant or practitioner under G.S. 90-108(a)(14). While employed as a pharmacy technician at CVS, the defendant accepted \$100 in exchange for processing a fraudulent prescription for Oxycodone. (1) The defendant argued on appeal that the evidence did not show embezzlement because she never lawfully possessed the prescriptions, which were obtained by fraud. The Court of Appeals disagreed, concluding that under the statute under which the defendant was convicted, G.S. 90-108(a)(14), the defendant had the requisite "access to controlled substances by virtue of [her] employment" in that she was allowed to take prescriptions filled by the pharmacist from the pharmacy's waiting bins to the customers. (2) The court also rejected the defendant's argument that the trial court erred in denying her motion to dismiss based on the State's failure to establish that CVS was a "registrant" within the meaning of G.S. 90-87(25). Though the trial testimony did not clearly and specifically identify CVS as a registrant of the Commission for Mental Health, Developmental Disabilities, and Substance Abuse Services, it did indicate that CVS was "a registrant that is authorized by law to dispense medications," and therefore permitted a reasonable inference that the defendant committed the crime. (3) Finally, the Court of Appeals concluded that the trial court did not commit plain error by not instructing the jury on the statutory definition of "registrant." The defendant did not request the instruction at trial, the trial court's instruction mirrored the language of G.S. 90-108(a)(14), and the defendant failed to demonstrate any prejudice stemming from the alleged error. A dissenting judge would have concluded that the defendant did not embezzle the controlled substance as charged

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because she obtained it through fraudulent means, and therefore did not possess it lawfully as required by our courts' traditional understanding of embezzlement.

Weapons Offenses

Trial court did not err in denying defendant's motion to dismiss; there was substantial evidence that defendant was in constructive possession of a firearm found in a backpack in his vehicle.

State v. Kennedy, ___ N.C. App. ___, 2021-NCCOA-99 (Apr. 6, 2021). Officers responding to a report of a suspicious vehicle found the defendant and a female passenger parked in a white pickup truck on the side of the road. When an officer asked if there was anything illegal in the vehicle, the defendant replied "you know I like my pot." The passenger consented to a search of her handbag, which revealed marijuana, and officers began searching the truck. A backpack found in the back of the truck contained marijuana, paraphernalia, and a handgun in an unlocked box. The defendant stated that the drugs were his. The defendant's sister was called to come get the vehicle, and when she arrived she told the officers that the gun was hers and she had placed it in the backpack without the defendant's knowledge. The sister also testified to ownership of the gun at a court hearing. The case went to trial before a jury, and the defendant was convicted of possession of a firearm by a felon, possession of marijuana and drug paraphernalia, and attaining habitual felon status.

On appeal, the defendant argued that his motion to dismiss the felon in possession charge should have been granted because there was insufficient evidence that he was in possession of the firearm. The appellate court disagreed and held that the motion to dismiss was properly denied. At trial, the state proceeded on a theory of constructive possession, arguing that the defendant was not in actual possession of the gun but he was aware of its presence and had the power and intent to control its disposition and use. The appellate court agreed that there was sufficient evidence of constructive possession to survive a motion to dismiss in this case: defendant was the owner and driver of the truck; it was his backpack with his belongings inside of it; and he did not express surprise when the gun was found or disclaim ownership of it. "The State presented substantial evidence of constructive possession because Defendant's power to control the contents of his vehicle is sufficient to present an inference of knowledge and possession of the firearm found therein."

Where the defendant presented substantial evidence of lawful possession of weapons of mass destruction, the trial court plainly erred in failing to instruct on that exception to the offense

State v. Carey, ___ N.C. App. ___, 849 S.E.2d 111 (Oct. 6, 2020). The defendant was convicted at trial of impersonating an officer and possession of a weapon of mass destruction (flashbang grenades) in Onslow County. On appeal, the Court of Appeals determined that flashbang

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grenades did not qualify as a weapon of mass destruction and vacated that conviction. The N.C. Supreme Court reversed on that point and remanded for the Court of Appeals to consider the defendant's other arguments. The defendant filed a new brief with the court, arguing the trial court erred by failing to instruct the jury about the exception for lawful possession of weapons of mass destruction. See G.S. § 14-288.8(b)(3). The defendant contended that he presented evidence that he qualified for the exception as a person "under contract with the United States" and it was error to fail to instruct the jury on the exception. While the defendant challenged jury instructions in his original brief to the Court of Appeals, he did not raise this issue. He therefore asked the court to invoke Rule 2 of the Rules of Appellate Procedure to review this argument, and the court granted that request.

At trial, the defendant presented evidence that he was an active-duty U.S. Marine serving as a weapons technician, and that he came into possession of the grenades as part of his duties in that capacity. The State did not contest this evidence at trial, but argued on appeal that the defendant failed to promptly return the weapons to the Marine Corps and that the defendant was "on a detour" (and not acting in his capacity as a soldier) at the time of the offense. "Even if the State's argument is true, this would not overcome Defendant's properly admitted testimony and his right for the jury to resolve this issue." *Carey* Slip op. at 8. The trial court had a duty to instruct the jury on all substantial features of the case, including the defense of lawful possession raised by the defendant's evidence, and its failure to do so was plain error. The judgment of conviction for possession of a weapon of mass destruction was therefore vacated and the matter remanded for a new trial on that offense.

Judge Young dissented. According to his opinion, the N.C. Supreme Court's decision remanding the case was limited to "the defendant's remaining challenges" – those that were raised but not decided in the defendant's original appeal to the Court of Appeals. The mandate therefore did not include new arguments that had not previously been raised at all, and Judge Young would not have considered the lawful possession argument.

Sexual Assaults

The trial court did not err in denying the defendant's motion for an instruction on a lesser-included offense where the State's evidence showed each element of the offenses charged to support submission to the jury.

State v. Carpenter, ___ N.C. App. ___, 2021-NCCOA-43 (Mar. 2, 2021). The defendant became abusive and violent toward his romantic partner, D.C., after finding out that she had engaged in an intimate relationship while he was in prison for a year. The defendant forced D.C. to drive him to his cousin's house, while telling her that she would be having sex with both the defendant and his cousin. During the drive, the defendant repeatedly beat D.C. and threatened to hit her with grip pliers. Once the cousin got in the car, the defendant instructed D.C. to drive to the cousin's sister's house, where the three entered a shed behind the house.

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While in the shed, the defendant demanded D.C. to perform oral sex on him while the cousin watched and told the cousin to prepare to have sex with D.C. Throughout the incident, D.C. refused the defendant's demands several times, which resulted in him beating her with his hands, feet, and pliers. The defendant and the cousin forcibly removed D.C.'s shorts as she continued to object. At one point, and after several beatings, D.C. was able to escape and drive to the police station to report the crimes.

At trial, the jury found the defendant guilty of first-degree kidnapping and first-degree sex offense. On appeal, the defendant argued that the trial court should have given a jury instruction for the lesser included offense of second-degree forcible sex offense. Specifically, the defendant argued that the evidence of the element requiring that the perpetrator be "aided or abetted by one or more persons" supported the instruction on the lesser-included offense. Slip op. at ¶ 22.

The Court of Appeals disagreed, finding that the cousin willingly accompanied and rode in the car with the couple; the cousin followed instructions from the defendant and waited while the defendant forced D.C. to enter the shed; the cousin helped the defendant restrain and remove D.C.'s shorts; and the cousin stated to D.C. she "might as well get it over with," referring to submission to the sexual assault. The Court determined that the cousin was not a passive bystander and in fact assisted, promoted, and encouraged the defendant in the sexual offense. Thus, the Court held that no contradictory evidence was presented in relation to the element in question to justify an instruction on a lesser-included offense.

(1) The trial court did not err by denying the defendant's motion to dismiss the charges of indecent liberties with a child and first-degree kidnapping; (2) The trial court did not err when instructing the jury on first-degree kidnapping, but erred by entering judgment on sexual offense with a child by an adult after instructing the jury on the lesser offense of first-degree sex offense; (3) The trial court did not err by admitting expert witness testimony or evidence of the defendant's prior bad acts; (4) The trial court did not err by allowing cross-examination of the defendant's father on his warnings of the defendant's dangerousness

State v. Coffey, ___ N.C. App. ___, 853 S.E.2d 469 (Dec. 15, 2020). The defendant was convicted of two counts of sexual offense with a child by an adult, rape of a child, first-degree kidnapping, and two counts of taking indecent liberties with a child in Wake County, stemming from the assault of a six-year-old child at a church.

(1) In regard to one of the indecent liberties convictions, the defendant argued that the State did not present sufficient evidence that the defendant acted inappropriately when touching the victim's chest and that such evidence was only offered for corroborative purposes. The victim's testimony discussing the touching of her chest was only presented by way of her videotaped forensic interview and was not raised in the victim's trial testimony. The Court of Appeals disagreed, finding that the videotaped forensic interview of the victim "was properly admitted under Rule 803(4) as her statements were made for the purposes of medical diagnosis or

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treatment, and the statements were reasonably pertinent to diagnosis or treatment.” Slip op. at 8. Additionally, the trial court instructed the jury to consider the video as substantive evidence. The Court of Appeals therefore determined that “[t]he evidence was sufficient to support denial of the motion to dismiss the challenged charge of taking indecent liberties with a child.” *Id.*

The defendant also argued that there was insufficient evidence to support a finding that the defendant forcibly removed the victim to facilitate the offense, an essential element of the crime of kidnapping. Specifically, the defendant argues the evidence does not show that he used actual force, fraud, or trickery to remove the victim. The Court of Appeals rejected this argument as well, finding that the defendant’s act of taking the victim to a secluded place to continue the sexual assault was sufficient to support removal for purposes of kidnapping.

(2) Concerning the defendant’s convictions of first-degree kidnapping and sexual offense with a child, the defendant argued “that the trial court erred by instructing on first-degree kidnapping and by failing to instruct on sexual offense with a child by an adult.” *Id.* at 10. The Court of Appeals found no prejudicial error in the instruction given on first-degree kidnapping because “[t]he evidence at trial was consistent with the allegations in the indictment,” even though the language of the jury instruction varied from the indictment. *Id.* at 11. The kidnapping indictment stated that “[D]efendant also sexually assaulted [Maya]” while the jury was instructed “that the person was not released by the defendant in a safe place.” *Id.* at 11-12. The Court of Appeals noted that such variance is usually prejudicial error but determined that the evidence here supported both the theory of the indictment and that of the jury instructions. On plain error review, the court rejected the defendant’s argument and concluded “it is not probable that the jury would have reached a different result if given the correct instruction.” *Id.* at 12.

The defendant also argued that the trial court erred by entering judgment on sexual offense with a child by an adult after instructing the jury on first-degree sex offense, a lesser offense. The Court of Appeals agreed. Because “[t]he jury instruction clearly outlined the lesser included offense of first-degree sexual offense . . . it was improper for the trial court to enter judgment for two counts of sexual offense with a child.” *Id.* at 17. The trial court did not instruct on the essential element of age as to the sexual offense with a child by an adult charge. The defendant was therefore impermissibly sentenced beyond the presumptive range for the lesser included offense of conviction. The Court of Appeals determined this was prejudicial error and vacated the defendant’s conviction of sexual offense with a child by an adult, remanding for resentencing on the first-degree sexual offense charge.

(3) The defendant argued that the trial court erred in certain evidentiary rulings. First, the defendant alleged that expert testimony regarding the DNA profile from the victim’s underwear (matching to the defendant) should not have been admitted because there was an insufficient foundation to satisfy the requirements of Rule 702(a)(3) of the North Carolina Rules of Evidence. The Court of Appeals disagreed, finding that the witness was “a qualified expert in the field of forensics and an employee at the North Carolina State Crime Lab, [who] testified to

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her qualifications in the area of DNA analysis as well as her training and experience in gathering evidence for DNA profiles.” Slip op. at 19. Further, the Court explained:

[The witness] thoroughly explained the methods and procedures of performing autosomal testing and analyzed defendant’s DNA sample following those procedures. That particular method of testing has been accepted as valid within the scientific community and is a standard practice within the state crime lab. Thus, her testimony was sufficient to satisfy Rule 702(a)(3). *Id.* at 21.

The defendant also argued that it was plain error to allow prior bad acts evidence under Rule 404(b) of the North Carolina Rules of Evidence, claiming that the prior incident was unrelated to the current offense. The Court of Appeals determined that the trial court did not err because the facts in both cases were similar enough to be admitted for 404(b) purposes. The trial court’s findings that “both females were strangers to defendant; they were separated from a group and taken to a more secluded location; they were touched improperly beginning with the buttocks; and they were told to be quiet during the assault,” supported the admission of this evidence under Rule 404(b). *Id.* at 23.

(4) Finally, the defendant argued that the trial court erred by allowing cross-examination of his father and contends the State elicited irrelevant testimony from his father. Specifically, the defendant objected to the admission of questions and testimony about whether the defendant’s father warned members of the church about the defendant’s potential dangerousness. The Court of Appeals rejected this argument and determined “the questions on cross-examination elicited relevant testimony and were well within the scope of defendant’s father’s direct testimony that defendant needed frequent supervision for basic activities.” *Id.* at 27-28.

Judge Murphy authored a separate opinion concurring in part, concurring in result only in part, and dissenting in part. Concerning the sexual offense jury instruction, Judge Murphy believed “the trial court erred in instructing the jury, however, since the jury found beyond a reasonable doubt Defendant was at least 18 years old in another portion of its verdict and all the charges against Defendant occurred on the same date, there was no plain error.” Slip op. at 5 (Murphy, J., dissenting). Judge Murphy also pointed out that “[h]ad the jury been correctly instructed on the first-degree kidnapping indictment language and found Defendant guilty of first-degree kidnapping based on sexual assault the trial court could not have sentenced Defendant for all the sexual offenses and the first-degree kidnapping offense without violating double jeopardy.” *Id.* at 13. Following the guidance of *State v. Stinson*, 127 N.C. App. 252, Judge Murphy believed that the court should have arrested judgment on the first-degree kidnapping conviction and remanded for resentencing on second-degree kidnapping to avoid double jeopardy issues. Lastly, Judge Murphy did not believe the defendant preserved the issue of his father’s testimony for review and would have refused to consider that argument.

Threats & Related Offenses

Criminal Offenses

Denial of a domestic violence protective order for plaintiff, based solely on the fact that she and defendant were in a same-sex dating relationship and therefore excluded by the terms of G.S. 50B-1(b)(6), violated her due process and equal protection rights.

M.E. v. T.J., __ N.C. App. ___, 854 S.E.2d 74 (Dec. 31, 2020). The plaintiff and defendant were in a same-sex dating relationship, and when it ended M.E. sought a domestic violence protective order against T.J. The plaintiff alleged that the defendant had engaged in harassment and threatening conduct, and had access to firearms. At a hearing on the requested order, the trial court concluded that it could not enter a 50B protective order because the “allegations are significant but parties are in same sex relationship and have never lived together, therefore do not have relationship required” under the statute. The parties’ relationship fell outside the scope of the statute because “pursuant to the definitions in N.C.G.S. § 50B-1, violence against a person with whom the perpetrator either is, or has been, in a ‘dating relationship’ is not ‘domestic violence,’ no matter how severe the abuse, unless the perpetrator of the violence and the victim of the violence ‘[a]re persons of the opposite sex[.]’ N.C.G.S. § 50B-1(b)(6).” The trial court entered a civil no-contact order pursuant to Chapter 50C instead, and the plaintiff appealed.

The Attorney General’s office and several non-profit groups filed *amicus curiae* briefs in support of the petitioner, and neither the defendant nor any other parties filed a brief on defendant’s behalf, so the appellate court appointed an *amicus curiae* to file a brief in response to the plaintiff’s argument. Noting that the trial court would have held that the allegations supported the entry of a 50B order if not for the fact that petitioner and defendant were the same sex, the plaintiff argued that “the trial court’s denial of her request for a DVPO violated constitutional rights protected by the Due Process and Equal Protection Clauses of the Fourteenth Amendment, as well as the associated provisions of the North Carolina Constitution.” The plaintiff made an as-applied constitutional challenge, but the appellate court observed that its ruling would apply to any other similarly situated applicants. Noting the “ambiguity surrounding the appropriate test to apply in LGBTQ+ based Fourteenth Amendment cases” in the wake of recent cases including *Obergefell v. Hodges*, 576 U.S. 644 (2015), the Court of Appeals reviewed plaintiff’s claim under several alternative levels of review, but ultimately held that “no matter the review applied, N.C.G.S. § 50B-1(b)(6) does not survive Plaintiff’s due process and equal protection challenges under either the North Carolina Constitution or the Constitution of the United States.”

First, the appellate court applied the traditional scrutiny framework (rational basis, intermediate scrutiny, or strict scrutiny) to evaluate the plaintiff’s due process and equal protection claims under the state constitution and the Fourteenth Amendment. Pursuant to *Obergefell* and other precedent, “any member of the LGBTQ+ community has the same rights and freedoms to make personal decisions about dating, intimacy, and marriage as any non-LGBTQ+ individual.” A statute impinging on those liberties on the basis of sex or gender must pass a higher level of scrutiny (“at least” intermediate). Since excluding the plaintiff from the protections of the statute served no legitimate government interest, and was in fact contrary to the broader statutory purpose of protecting all victims of domestic violence,

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“N.C.G.S. § 50B-1(b)(6) is unconstitutional as-applied to Plaintiff and those similarly situated” under the state constitution, and “cannot survive even the lowest level of scrutiny.” Turning to the Fourteenth Amendment, the court likewise held that the statute did not pass constitutional muster. Plaintiff’s rights and interests were “were identical in every way to those of any other woman in an ‘opposite sex’ relationship” yet she and others similarly situated “are intentionally denied, *by the State*, the same protections against the domestic violence that may occur after a ‘break-up’” based solely upon sex or membership in a particular class. The court held that the opposite-sex requirement in G.S. 50B-1(b)(6) failed the higher scrutiny test because it was an arbitrary distinction that bore no reasonable or just relation to the classification of protected individuals. The court again noted that the statute would not pass even the lower level of rational basis scrutiny, since there was no cognizable government interest that such a restriction would serve.

Next, reviewing U.S. Supreme Court precedent that culminated in *Obergefell*, the appellate court found that the cases have “labored to determine the correct standards to apply in the face of government action that had a discriminatory effect on members of the LGBTQ+ community,” resulting in an alternative approach described as a “full Fourteenth Amendment review” that “does not readily fit within the ‘rational basis,’ ‘intermediate scrutiny,’ or ‘strict scrutiny’ triad.” This hybrid approach involves three considerations: (1) the government’s clear intent in passing the law; (2) the impact of majority opposition becoming law and policy, and the consequence it has on those whose liberty is denied; and (3) the particular harms inflicted on same-sex individuals, couples, or families. More specifically, courts must view laws that deny rights to LGBTQ+ individuals as initially suspect, and consider factors such as the state’s actual intent in passing the law, the particular harms suffered by affected individuals, the long history of disapproval of LGBTQ+ relationships, and the injury caused by state action which singles out and stigmatizes those individuals. Those factors are then weighed against any legitimate interest advanced by the law, considering the particular facts and context. Applying those factors and relevant precedent to the present case, the court held that “N.C.G.S. § 50B-1(b)(6) does not survive this balancing test” given the plain language of the statute denying protections to similarly situated people based on sex or gender.

The majority opinion closed by addressing issues related to its appointment of *amicus curiae* to brief a response to the plaintiff’s appeal. Due to public interest and the potential impact of the decision, as well as the fact that no brief was filed by or on behalf of the defendant, the court appointed an *amicus curiae* to “defend the ruling of the trial court” and provide the court with the benefit of an opposing view on the constitutionality of the statute. However, the court clarified that an appointed *amicus curiae* has a limited role under the appellate rules, and does not have the same standing as the original party. As a result, the additional arguments raised by the *amicus* on behalf of the defendant challenging the court’s jurisdiction and seeking to amend the record on appeal were dismissed as a nullity.

The trial court’s order denying the plaintiff a 50B protective order was reversed and remanded for entry of an appropriate order. The trial court was instructed to apply G.S. 50B-1(b)(6) as stating: “Are persons who are in a dating relationship or have been in a dating relationship.”

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The court's ruling applies to any other similarly situated person who seeks a 50B protective order, and the same-sex or opposite-sex nature of the relationship shall not be a factor in the decision to grant or deny the order.

Judge Tyson dissented, and would have held that the appellate court lacked jurisdiction to decide the matter based on the plaintiff's dismissal of the original 50B complaint, as well as her failure to argue and preserve the constitutional issues, join necessary parties, and comply with other procedural and appellate rules.

Defenses

Defenses

Self-Defense

The trial court erred by denying the defendant's request for a jury instruction on self-defense where, prior to an exchange of gunfire, the defendant brandished a pistol in response to the victim striking him with a piece of lumber.

State v. Stephens, __ N.C. App. ___, 853 S.E.2d 488 (Dec. 31, 2020). In this case where the defendant and his neighbor exchanged gunfire after an argument about the victim's dogs killing the defendant's cat, the trial court erred by denying the defendant's request for a jury instruction on self-defense. In the light most favorable to the defendant, the evidence at trial tended to show that the defendant confronted the victim at the victim's residence because the victim's dogs had killed the defendant's cat and were still at large. During this confrontation, the victim struck the defendant with a piece of lumber, causing the defendant to brandish a pistol he was carrying legally. The defendant did not threaten to use the pistol or point it at the victim. The victim then went inside his residence, retrieved his own pistol, and came back outside firing it at the defendant, who was at that time walking away. The defendant, who was grazed by a bullet, returned fire, striking the victim in the leg. The State argued that the defendant was not entitled to an instruction on self-defense because he was the aggressor by virtue of brandishing his firearm. The court held that a jury could have determined that the defendant was permitted to brandish his firearm, and did not thereby become the aggressor, because he had a reasonable belief it was necessary to protect himself from death or great bodily harm after the victim struck him with the lumber. Consequently, it was reversible error for the trial court to deny the defendant's request for a self-defense jury instruction.

The court went on to determine that even assuming for argument that the defendant was the initial aggressor by virtue of brandishing his firearm, he regained the right to use force in self-defense when the victim reemerged from the residence and fired on him as the defendant was in the process of walking away from the residence towards his vehicle to leave. The court explained that walking away and towards his vehicle clearly announced the defendant's intention to withdraw from the encounter.

Judge Tyson fully concurred with the majority opinion but wrote separately to address additional issues the defendant raised on appeal but that the majority did not reach. Those additional issues were: (1) whether the trial court erred by limiting the defendant's cross-examination about the victim's prior felony conviction and his possession of a firearm; (2) whether the trial court erred in preventing inquiry into an agreement between the State and the victim in exchange for his testimony; (3) whether the trial court erred by preventing the defendant from testifying about an after-the-fact reconciliation with the victim.

The trial court did not err when it declined to instruct the jury on the defense of habitation.

Defenses

State v. Dilworth, ___ N.C. App. ___, 851 S.E.2d 406 (Oct. 20, 2020). In this assault with a deadly weapon inflicting serious injury case, the trial court did not err by declining to instruct the jury on the defendant’s requested instruction on the defense of habitation. The victim was riding on his ATV when the defendant attacked him from behind and stabbed him with a steak knife, thinking the victim was on his (the defendant’s) property. During the attack, the victim said “I don’t know who you are.” After the victim identified himself and told the defendant he had permission to ride on the property, the defendant renewed his attack. The defendant testified that the purpose of the attack was get an intruder off his premises, although he also said that he was not aware of the property line. The trial court denied the defendant’s request to instruct the jury on self-defense and defense of habitation, based on the fact that the the victim was not operating the ATV in the curtilage of the defendant’s home and the defendant did not even know where the property line was. The Court affirmed the trial court’s denial of the defendant’s request for an instruction on defense of habitation when there was no evidence that the victim had entered or was in the process of entering his home as required by G.S. 14-51.2(b)(1). Though the definition of “home” includes the home’s curtilage, it does not include an area 200–250 feet away from the defendant’s residence, and apparently not on the defendant’s property at all.

Justification

(1) The trial court properly declined to instruct on the defense of justification because undisputed trial evidence showed that the defendant continued to possess the firearm well after any potential threat had ended, despite many options for relinquishing possession; (2) The trial court improperly imposed attorneys’ fees without providing notice and an opportunity to be heard.

State v. Crooks, ___ N.C. App. ___, 852 S.E.2d 409 (Nov. 17, 2020). (1) The State and the defendant’s version of events were inconsistent. For purposes of determining the sufficiency of the evidence supporting a jury instruction on justification, the Court of Appeals recounted the defendant’s version of events. The defendant was in David Harrison’s trailer drinking bourbon when Harrison suddenly stood up while only a few feet from the defendant, pulled a pistol out of his pocket, pointed it toward the wall near the defendant, and fired a shot at the wall. Before pulling out the gun, Harrison had not threatened the defendant in any way, nor did he appear angry or upset. As soon as Harrison fired the shot at the wall, the defendant grabbed the pistol from Harrison and left the trailer. The defendant went to look for Karen Tucker, who was dating his father, and who he believed would be sober and safely able to take the gun from him. When the defendant did not find Karen in her trailer, he waited with the gun in his possession, in the presence of Karen’s daughters, until Karen arrived. The defendant then gave Karen the gun.

Law enforcement officers who later arrived on the scene did not find bullet holes inside of Harrison’s trailer but did find a shell casing sitting on a coffee table. The defendant was charged with a number of offenses, including possession of a firearm by a felon. At trial, the defendant

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requested a jury instruction on the defense of justification. The trial court denied the request, and the jury found the defendant guilty.

On appeal, the defendant argued that the trial court erred by denying his request for a jury instruction on the defense of justification. Using the test outlined in *State v. Mercer*, 373 N.C. 459, 463 (2020), the Court of Appeals determined that the evidence at trial was insufficient to establish the first factor of the test, which requires “that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury.” The Court concluded that even assuming Harrison’s drunken act of firing his pistol into the wall or ceiling of his house represented an “impending threat of death or serious bodily injury” to the defendant, that threat was gone once the defendant left Harrison’s trailer with the gun, and the defendant did not take advantage of other opportunities, described in the opinion, to dispose of the gun.

(2) The State conceded that the trial court erred in imposing attorneys’ fees without providing the defendant with notice and an opportunity to be heard. At the time of sentencing, the defendant’s court-appointed counsel had not yet calculated the number of hours worked on the case. The trial court explained to the defendant that those would be calculated later and submitted to the court. The court advised the defendant that it would sign what it felt to be a reasonable fee. The court later entered a civil judgment for \$2,220 without first informing the defendant of the amount. The Court of Appeals held that the defendant was not provided sufficient opportunity to be heard before entry of that civil judgment. It thus vacated the civil judgment and remanded the matter to the trial court for further proceedings on that issue.

Voluntary Intoxication

The trial court did not err by declining to give an instruction on voluntary intoxication when the defendant’s behavior did not show her to be utterly incapable of forming the intent to commit the crime

State v Meader, ___ N.C. ___, 2021-NCSC-37 (Apr. 16, 2021). In 2018, the defendant was charged with felony breaking or entering a motor vehicle and other crimes for an incident involving the theft of several items from a car. Before trial, the defendant gave notice of her intent to raise a defense of voluntary intoxication. The trial court denied her request for an instruction on voluntary intoxication, concluding that the evidence showed that she spoke clearly, was responsive to questions, walked under her own power, and followed instructions from officers. The Court of Appeals held over a dissent that the trial court did not err in declining to give the instruction. *State v. Meader*, 269 N.C. App. 446 (2020). On appeal, the Supreme Court applied the standard that, to obtain a voluntary intoxication instruction, a defendant must produce substantial evidence supporting a conclusion that she was so intoxicated that she could not form the specific intent to commit the crime. Reviewing the evidence, the high court concluded that the defendant’s behavior, while periodically unusual, did not show her to be “utterly incapable” of forming specific intent. To the contrary, the

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evidence showed her to be aware of surroundings and in control of her faculties, both before and after the police arrived. The court thus held that the trial court did not err and affirmed the decision of the Court of Appeals.

Justice Hudson, joined by Justice Morgan and Justice Earls, dissented. She wrote that the evidence, when viewed in the light most favorable to the defendant, could lead a rational factfinder to conclude that she was unaware that she had taken another's property.

(1) The defendant's defense of voluntary intoxication did not apply to assault with a deadly weapon inflicting serious injury (AWDWISI), a general intent crime. (2) The trial court's *Harbison* inquiries were adequate where the defendant was present for both inquiries and consented to his counsel's actions. (3) The defendant did not receive ineffective assistance of counsel when his trial counsel admitted an element of the charged offense with the defendant's prior knowledge and consent.

State v. Arnett, ___ N.C. App. ___, 2021-NCCOA-42 (Mar. 2, 2021). The defendant's wife, Mrs. Arnett, came home from work on November 21 and found the defendant drinking. They got in the defendant's car and drove to grocery store, during which the defendant struck her, threatened her, and took her cellphone. Mrs. Arnett went inside the store and asked the manager to call law enforcement. The defendant was charged, and a court date was set for January 23.

On January 21, Mrs. Arnett again came home from work and found the defendant drinking. The defendant had ingested three beers prior to his wife arriving home and had consumed another after the couple returned from a trip to the grocery store. During dinner, the defendant drank another beer and started another. The defendant went to a neighbor's house for marijuana and received eight Xanax bars instead, two of which he ingested. After returning home to finish his dinner, the defendant assaulted his wife, slamming her face into the wall, busting her eyes, and cutting her arms and chin. The defendant also kicked her legs, cut her head, stabbed her in the side, and repeatedly punched her in the face. Mrs. Arnett went to the hospital the next morning and remained hospitalized until January 24.

The defendant was indicted on charges of AWDWISI, and the defendant's trial counsel filed a notice of voluntary intoxication defense, stating he would show that the defendant could not form the specific intent necessary for the crime charged. The trial court ruled AWDWISI was a general intent crime and that the defense of voluntary intoxication was not available to the defendant. At trial, the defendant's attorney stated he would admit an element of the physical act of the assault, but not the defendant's guilt because he lacked intent. The defendant told the court, on two separate occasions, that he understood his attorney would admit an element of the offense and that he had discussed the strategy with his attorney and agreed with the argument. The defendant was convicted of AWDWISI with two aggravating factors.

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On appeal, the defendant argued that the trial court erred in ruling that the voluntary intoxication defense was not available. The Court of Appeals rejected this argument, reasoning that voluntary intoxication is a defense only to a crime that requires a showing of specific intent, and AWDWISI is not a specific intent crime.

The defendant next argued that the trial court's *Harbison* inquiry was inadequate to confirm that he understood he was agreeing for counsel to admit the charged offense and present an invalid defense. The Court rejected this argument, noting that the defendant was present for two separate *Harbison* inquiries, the defendant was addressed personally by the trial court both times, the defendant confirmed he understood and consented to his counsel's actions prior to any admission by his counsel, and the defendant heard the trial court's ruling that voluntary intoxication would not be allowed as a defense to his general intent crime. The Court held that the *Harbison* inquiries as well as the conversations leading up to them were adequate to show that the defendant was thoroughly advised and knowingly consented to his attorney's admission to the jury.

The defendant contended that he was denied effective assistance of counsel. The Court rejected this argument, reasoning that the defendant testified, was cross examined, and clearly consented to trial counsel's acknowledgement of the defendant's actions against his wife to the jury during closing argument. The Court concluded that the record showed a deliberate, knowing, and consented-to trial strategy in the face of overwhelming and uncontradicted evidence of the defendant's guilt.

Capital Law

Capital Law

Racial Justice Act

The retroactivity provision of the Racial Justice Act repeal violates the double jeopardy protections of the North Carolina Constitution; The retroactive application of the RJA repeal violates the prohibitions against ex post facto laws contained in the United States Constitution and the North Carolina Constitution

State v. Augustine, 375 N.C. 376 (Sept. 25, 2020). The complex procedural history of this case, which involves motions for appropriate relief filed by three defendants under the Racial Justice Act and associated proceedings occurring over a years-long period of time when the RJA was amended and then repealed, is recounted in detail in the court's opinion which vacates the trial court's order ruling that the repeal of the RJA voided the defendant's RJA MAR and remands the case for the reinstatement of the defendant's sentence of life imprisonment without parole. For the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020), the retroactivity provision of the RJA repeal violates the double jeopardy protections of the North Carolina Constitution. For the reasons stated in *State v. Ramseur*, 374 N.C. 658 (2020), the retroactive application of the RJA repeal violates the prohibitions against ex post facto laws contained in the United States Constitution and the North Carolina Constitution.

Justice Davis concurred in the result for the reasons stated in Justice Ervin's concurring opinions in *State v. Golphin*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020) and *State v. Walters*, ___ N.C. ___, ___ S.E.2d ___ (Sept. 25, 2020).

Justice Newby dissented for the reasons stated in his dissenting opinions in *Robinson* and *Ramseur*.

For the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court's order dismissing the defendant's motion for appropriate relief filed pursuant to the Racial Justice Act

State v. Walters, 375 N.C. 484 (Sept. 25, 2020). In a per curiam opinion, for the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court's order dismissing the defendant's motion for appropriate relief filed pursuant to the Racial Justice Act and remanded the case for the reinstatement of the defendant's sentence of life imprisonment without parole.

Justice Ervin, joined by Justice Davis, concurred in the result because he was bound by the decision in *Robinson*, a case in which he dissented. Were he not bound by *Robinson*, Justice Ervin would have dissented for the reasons he stated in *Robinson*.

Justice Newby dissented for the reasons stated in his dissenting opinion in *Robinson*.

Capital Law

For the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court's order dismissing the defendant's motion for appropriate relief filed pursuant to the Racial Justice Act

***State v. Golphin*, 375 N.C. 432 (Sept. 25, 2020).** In a per curiam opinion, for the reasons stated in *State v. Robinson*, ___ N.C. ___, 846 S.E.2d 711 (2020) the court vacated the trial court's order dismissing the defendant's motion for appropriate relief filed pursuant to the Racial Justice Act and remanded the case for the reinstatement of the defendant's sentence of life imprisonment without parole.

Justice Ervin, joined by Justice Davis, concurred in the result because he was bound by the decision in *Robinson*, a case in which he dissented. Were he not bound by *Robinson*, Justice Ervin would have dissented for the reasons he stated in *Robinson*.

Justice Newby dissented for the reasons stated in his dissenting opinions in *Robinson* and *State v. Ramseur*, 374 N.C. 658 (2020).

Post-conviction Proceedings

Post-conviction Proceedings

MARs

State's right of direct appeal from the grant of a motion for appropriate relief is limited to questions of law on newly discovered evidence claims or claims "inextricably intertwined" with such a claim; where the State failed to seek certiorari review following the trial court's grant of a MAR on newly discovered evidence and an unrelated ineffective assistance of counsel claim, appellate court lacked jurisdiction to consider the State's appeal

State v. Carver, ___ N.C. App. ___, 2021-NCCOA-141 (April 20, 2021), *temp. stay allowed*, ___ N.C. ___, ___ S.E.2d ___ (May 11, 2021). The defendant was tried and convicted of first-degree murder in Gaston County. The evidence of the case largely consisted of mixtures of "touch" DNA profiles found on the victim's car along with circumstantial evidence based on the defendant's presence in the area at the time of the murder. The verdict was affirmed on direct appeal. The defendant later filed a motion for appropriate relief ("MAR") alleging his innocence based on new evidence, as well as claims for ineffective assistance of counsel and discovery violations. The MAR court conducted an extensive hearing on the motion. Evidence showed that the defendant's trial counsel was aware of the defendant's significant medical and psychological issues, some of which may have been relevant to the defendant's ability to commit the crime. Trial counsel obtained authorization and funding for a psychological evaluation that never occurred and failed to obtain the defendant's medical records. Trial counsel also obtained the services of a DNA expert for use at trial but failed to review the expert's professional background or previous testimony. The expert informed trial counsel that the State's science was "good" and advised counsel not to interview the prosecution's DNA expert. Defense counsel did not obtain a final report from the expert and failed to question the State's DNA expert with questions recommended by the defense expert.

At the MAR hearing, the defense presented a new DNA expert who testified that the SBI policies of interpreting mixture DNA at the time were "subjective," outdated, and inaccurate based on current accepted practices. According to this expert, the DNA mixture relied upon by the State at trial could not be used for "any reliable matching" and that the defendant's DNA profile was not a match. The trial court granted the MAR and ordered a new trial based on ineffective assistance of counsel stemming from trial counsel's failure to investigate the defendant's medical and psychological conditions, as well as trial counsel's failure to properly prepare to meet the state's DNA evidence. The post-conviction court also found that the defendant was entitled to a new trial based on new evidence stemming from the evolution of DNA science since the time of trial, finding that changes in the science rendered the State's DNA evidence at trial "doubtful at best." The State appealed.

The State generally does not have the right to appeal a defendant's successful MAR. An exception exists for an MAR granted based on new evidence. In that case, the State may directly appeal, "but only on questions of law." G.S. 15A-1445(a)(2). Where there is no appeal of right, the State may petition for writ of certiorari to obtain review of the trial court's grant of the MAR. G.S. 15A-1422(c)(3). Here, the State argued that it was entitled to appeal the entire

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MAR order, since the order was based in part on new evidence. The Court of Appeals disagreed. Where a right to appeal exists as to one ground of an order and not others, the appealing party is generally limited to arguing only the issue from which the appeal of right lies. “[A] right to appeal those other issues exists only if this Court finds those issues ‘inextricably intertwined with the issues before this Court as of right.’” *Carver* Slip op. at 9 (citation omitted). Here, the issues of new evidence and ineffective assistance were not “inextricably intertwined.” According to the court:

The newly discovered evidence claim is based on evidence that was unavailable to the defendant at the time of trial. The ineffective assistance claim is based on other, separate evidence that the trial court found to be available to the defendant had his counsel exercised due diligence. Thus, these two claims are based on entirely separate facts and legal issues. *Id.* at 10.

Further, the exception for a State’s direct appeal of the grant of an MAR based on newly discovered evidence is limited by the “only on questions of law” language in G.S. 15A-1445(a)(2). The State’s argument that it can appeal all issues in the order ignored this limitation.

Finally, even after the defendant moved to dismiss the appeal for lack of appellate jurisdiction, the State failed to file a petition for writ of certiorari. The State’s appeal of the ineffective assistance of counsel claim was therefore dismissed for lack of jurisdiction. The appeal of the new evidence claim was rendered moot as a result, leaving the trial court’s order intact.

(1) The trial court erred by granting the defendant’s motion for appropriate relief based on newly discovered evidence. (2) The trial court erred in concluding as an independent ground for decision that the defendant’s due process rights would be violated if he were not allowed to present evidence at a new trial.

State v. Reid, ___ N.C. App. ___, 850 S.E.2d 567 (Oct. 20, 2020), *review allowed*, ___ N.C. ___, 856 S.E.2d 100 (Apr. 14, 2021). The defendant, who was 14 years old at the time of the offense, was convicted of first-degree murder in 1997. In 2018, the trial court granted a motion for appropriate relief and vacated his conviction based on newly discovered evidence in the form of an affidavit from William McCormick indicating that other young men committed the crime. The Court of Appeals agreed with the State’s arguments that the trial court abused its discretion when it granted the defendant a new trial based on newly discovered evidence, and erred when it determined that the defendant’s due process rights would be violated if he were not allowed to present the evidence at a new trial. (1) As to the first argument, the Court held that the defendant failed to prove the purported newly discovered evidence as required under seven-factor analysis set out in *State v. Beaver*, 291 N.C. 137 (1976). Based on inconsistencies between McCormick’s testimony and his affidavit and internal inconsistencies in the affidavit itself, the Court could not agree with the trial court’s conclusion that the purported new evidence in it was “probably true.” Moreover, the information in McCormick’s testimony did

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not meet the requirement in G.S. 15A-1415(c) that newly discovered evidence “must be unknown or unavailable to the defendant at the time of trial in order to justify relief.” To the contrary, the defendant’s trial attorney had indications that McCormick may have had information about the crime but failed to use a subpoena or material witness order to secure his testimony for trial. Furthermore, despite McCormick’s known presence at the defendant’s trial, the defendant’s attorney never alerted the trial court, asked for a continuance or recess, or otherwise took steps to get information from him. As such, the evidence was not unknown or unavailable at the time of trial. The Court also concluded that McCormick’s testimony was not “competent, material, and relevant” as to the statements made by Robert Shaw about the purported true killers because that testimony was inadmissible hearsay. The Court held that the trial court abused its discretion by concluding that the evidence was admissible under the residual exception in Rule 803(24), as there was no indication in the record that the defendant satisfied the requirement to give the State notice of its intent to offer evidence pursuant to the rule. (2) As to the State’s second argument, the Court agreed that the trial court erred in concluding as an independent ground for decision that the defendant’s due process rights would be violated if he were not allowed to present McCormick’s testimony at a new trial. The Court concluded that the *Beaver* factors set out the test for determining whether the defendant is entitled to a new trial, and the defendant did not satisfy them. A concurring judge noted that the Court’s holding did not bar the defendant from seeking post-conviction relief through a claim for ineffective assistance of counsel.

DNA Testing

State v. Byers, 375 N.C. 386 (Sept. 25, 2020). Considering an issue of first impression, the court held that the pro se indigent defendant made an insufficient showing that post-conviction DNA testing “may be material to [his] claim of wrongful conviction” and consequently the trial court did not err by denying his motion for DNA testing under G.S. 15A-269 before appointing him counsel. The court explained that the showing a defendant must make to be entitled to appointment of counsel under G.S. 15A-269(c) is a lesser burden than that required to obtain DNA testing under G.S. 15A-269(a) because subsection (a) requires a showing that the testing “is material” to the defendant’s defense while subsection (c) requires a showing that testing “may be material” to the defense. The term “material,” the meaning of which the court discussed extensively in its opinion, maintains the same definition under both statutory provisions, but the showing differs due to the varying use of the modifiers “is” and “may be.” Here, in light of the overwhelming evidence at trial of the defendant’s guilt, the dearth of evidence at trial implicating a second perpetrator, and the unlikelihood that DNA testing would establish the involvement of a third party, the defendant failed to satisfy his burden of showing that DNA testing may be material to his claim of wrongful conviction.

Retroactivity

The holding in *Ramos v. Louisiana* does not apply retroactively and new procedural rules do not apply retroactively on federal collateral review

Post-conviction Proceedings

Edwards v. Vannoy, 593 U.S. ___, ___ S. Ct. ___ (May 17, 2021). Confronting the question in a habeas case of whether the holding in [Ramos v. Louisiana](#), 590 U.S. ___, ___ S. Ct. ___ (2020) that a state jury must be unanimous to convict a criminal defendant of a serious offenses applies retroactively under the framework of *Teague v. Lane*, 489 U.S. 288 (1989), the Court held that while *Ramos* announced a “new” procedural rule it was not a “watershed rule” that applies retroactively. The Court further held that the *Teague* exception for watershed rules is moribund as no new rules of criminal procedure can satisfy the “purported exception” for watershed rules. Writing for the majority, Justice Kavanaugh first conducted the traditional analysis of retroactivity under *Teague*, finding that while *Ramos* announced a new procedural rule that was “momentous and consequential” it was not a “watershed” rule and therefore did not apply retroactively to cases on collateral review. Characterizing the “purported exception” for watershed rules as an “empty promise,” the Court said that “[c]ontinuing to articulate a theoretical exception that never actually applies in practice offers false hope to defendants, distorts the law, misleads judges, and wastes the resources of defense counsel, prosecutors, and courts.” The Court said it was time to say explicitly what had been apparent for years: “New procedural rules do not apply retroactively on federal collateral review.”

Justice Thomas, joined by Justice Gorsuch, concurred in full but wrote separately to explain that the case could have been resolved under the AEDPA because a Louisiana state court had considered Edwards’s argument that he was entitled to a unanimous jury verdict and had reasonably relied on federal law as it was prior to *Ramos* in rejecting that claim. Thomas explained that in such circumstances the AEDPA directs that a writ of habeas corpus shall not be granted.

Justice Gorsuch, joined by Justice Thomas, concurred by canvassing the history of the writ of habeas corpus, explaining developments in the law in the middle of the twentieth century leading to *Teague*, and expressing his agreement with the decision to explicitly state that the “watershed rule” exception was illusory.

Justice Kagan, joined by Justices Breyer and Sotomayor, dissented, stating her view that the holding of *Ramos* “fits to a tee *Teague*’s description of a watershed procedural rule” and criticizing the majority’s overturning of the watershed exception as following “none of the usual rules of *stare decisis*.”

Fourth Circuit Cases

Judicial Administration

Contempt

Suspended sentence for criminal contempt, including conditions that defendant compose an essay on respect for the courts, post it on social media, and moderate the post for negative comments, affirmed per curiam

In Re: Eldridge, 376 N.C. 728 (Mar. 12, 2021). The defendant was found guilty of criminal contempt relating to his unauthorized Facebook livestreaming of Macon County criminal superior court proceedings. The trial judge sentenced the defendant to 30 days in jail but suspended the sentence on numerous conditions. One condition required the defendant to compose a 2,000-3,000-word essay on respect for the judicial system and to post it to his social media. He was further ordered to monitor the posts of the essay on social media and delete any negative or disparaging remarks made by third parties. The defendant was not allowed to return to court in the district until the essay was posted online. On appeal, the defendant argued that his sentence was illegal and not authorized by the contempt statutes.

As summarized [here](#), the Court of Appeals determined that the trial court had the discretion to suspend a contempt sentence and that the terms of probation were reasonably related to the nature of the offense (and therefore within the trial court's discretion). Judge Brook dissented in part, noting the potential First Amendment problems with compelling the defendant to delete the comments of third parties on social media. He would have vacated that condition as not reasonably related to the offense or circumstances of the defendant. Based on that partial dissent, the defendant appealed to the North Carolina Supreme Court. In a per curiam order, the North Carolina Supreme Court affirmed. [Jonathan Holbrook blogged in part about the Court of Appeals decision in the case [here](#).]

Failing to appear as a witness when subpoenaed is punishable as criminal contempt

State v. Wendorf, ___ N.C. App. ___, 852 S.E.2d 898 (Dec. 1, 2020). The defendant in this case was found in criminal contempt after failing to appear as a witness at an assault on a female trial involving her husband where she was the alleged victim. The court first determined that failing to appear as a witness when subpoenaed is punishable as criminal contempt because it constitutes willful disobedience of, resistance to, or interference with a court's lawful process. The court then rejected the defendant's jurisdictional argument that the show cause order issued by the district court was facially defective for failing to comply with G.S. 15A-924(5), explaining that the statute's requirements for pleadings in criminal cases in superior court do not apply to proceedings for criminal contempt. The court concluded by rejecting the following arguments advanced by the defendant: (1) that the district court's failure to indicate that it used the reasonable doubt standard of proof deprived the superior court of jurisdiction on appeal from the district court's order; (2) that it was error for the superior court to allow the district court judge to testify in the de novo hearing on appeal from the district court's order;

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and (3) that competent evidence did not support the trial court's findings of fact related to the defendant's failure to appear.

Judge Berger concurred in a separate opinion, expressing his view that the majority should not have considered the defendant's argument under Evidence Rule 605 regarding the competency of the district court judge as a witness, as well as his view that the majority should not have engaged in plain error review of the witness competency issue as it was a matter within the trial court's sound discretion.

There is no statutory right to counsel under G.S. 7A-451(a)(1) in summary proceedings for direct criminal contempt

State v. Land, ___ N.C. App. ___, 848 S.E.2d 564 (Sept. 1, 2020), *temp. stay granted*, 375 N.C. 499 (Sept. 16, 2020). In this direct criminal contempt case involving summary proceedings where the defendant was sentenced for two instances of contempt, the Court of Appeals determined as a matter of first impression that the defendant did not have a statutory right to appointed counsel under G.S. 7A-451(a)(1). The court explained that precedent from the United States Supreme Court and the North Carolina Supreme Court establishes that there is no Sixth Amendment right to counsel in summary proceedings for direct criminal contempt. The court further explained that discussion in *Jolly v. Wright*, 300 N.C. 83 (1980), *overruled on other grounds by McBride v. McBride*, 334 N.C. 124 (1993), suggested that the language in G.S. 7A-451(a)(1) entitling an indigent defendant to appointed counsel in "any case" in which imprisonment or a fine of \$500 or more is likely to be adjudged should be construed to refer to "any criminal case to which Sixth Amendment protections apply." The court went on to point out that the contemporaneous nature of summary proceedings for direct criminal contempt where the trial court acts on its own first-hand observations supported the conclusion that the statutory right to counsel does not apply, but cautioned trial courts to exercise restraint in such proceedings.

The court remanded the matter to the trial court to correct a clerical error regarding the length of one of the defendant's contempt sentences. The court also found that the trial court's written judgment ordering that one of the sentences run consecutive to the other violated the defendant's right to be present at sentencing because the trial court did not specify the consecutive nature of the sentence when rendering it orally while the defendant was present in the courtroom, and remanded for the entry of a new judgment in the defendant's presence.