

**Criminal Case Update
Summer Criminal Law Webinar
June 5, 2020**

Cases covered include reported decisions from the North Carolina appellate courts and the U.S. Supreme Court decided between October 4, 2019 and May 19, 2020. The summaries were prepared by School of Government faculty and staff. 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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Arrest, Search, and Investigation

Investigatory Stops

Middle finger gesture from passing car did not create reasonable suspicion of disorderly conduct

State v. Ellis, ___ N.C. ___, 841 S.E.2d 247 (May 1, 2020)

In this Stanly County case, no reasonable suspicion existed when a trooper, already conducting a traffic stop, observed the defendant gesturing with his middle finger from the passenger side of a car driving past the stop. The Court of Appeals unanimously rejected the State’s argument that the stop of the defendant was justified by the community caretaking exception to the Fourth Amendment, but a majority of the panel found that the stop was supported by reasonable suspicion of disorderly conduct ([here](#)). Judge Arrowood dissented and would have ruled that the act was protected speech under the First Amendment and that the trooper lacked reasonable suspicion [Jeff Welty blogged about that decision [here](#)].

On appeal to the Supreme Court, the State waived oral argument and conceded that the trooper lacked reasonable suspicion. The court agreed. The State’s evidence at suppression showed that the trooper saw the defendant waving from the car, and then begin “flipping the bird,” perhaps vigorously. The trooper did not know for whom the gesture was intended, and otherwise observed no traffic violations or other suspect activities. This failed to establish reasonable suspicion of a crime. In the court’s words:

The fact that [the trooper] was unsure of whether defendant’s gesture may have been directed at another vehicle does not, on its own, provide reasonable suspicion that defendant intended to or was plainly likely to provoke violent retaliation from another driver. . .Based on the facts in the record, we are unable to infer that, by gesturing with his middle finger, defendant was intending to or was likely to provoke a violent reaction from another driver that would cause a breach of the peace. Slip op. at 6-7.

The court did not consider the defendant’s First Amendment arguments in light of its ruling, and the matter was unanimously reversed and remanded.

A trooper unlawfully extended a traffic stop initiated for speeding by asking the defendant additional investigatory questions and for consent to search after the trooper had returned the defendant’s paperwork, issued him a warning ticket, and stated that the stop had ended

State v. Reed, ___ N.C. ___, 838 S.E.2d 414 (Feb. 28, 2020)

In this drug trafficking case arising out of a traffic stop, the court affirmed the conclusion of the Court of Appeals that the law enforcement officer who arrested the defendant violated the Fourth amendment by prolonging the stop without the defendant's consent or a reasonable articulable suspicion of criminal activity. Highway Patrol Trooper Lamm, a member of the Patrol's Criminal Interdiction Unit who was assigned to aggressively enforce traffic laws while being on the lookout for other criminal activity including drug interdiction and drug activity, clocked the black male defendant's vehicle by radar being operated at a speed of 78 miles per hour in a 65 mile-per-hour zone. Lamm initiated a traffic stop and observed at its outset that there was a black female passenger and a female pit bull dog inside the vehicle. The defendant provided Lamm with his New York driver's license and the rental agreement for the vehicle, which indicated that the female passenger, Usha Peart who also was the defendant's fiancée, was the renter and that the defendant was an additional authorized driver. Trooper Lamm ordered the defendant out of the vehicle, which Lamm characterized as displaying "signs of . . . hard [continuous] driving," and into the front seat of Lamm's patrol car, where he further ordered the defendant to close the door of the patrol car, which the defendant did after expressing some reluctance. Trooper Lamm did not consider the defendant to be free to leave at this point and began to question the defendant about his travel and other activities. Upon confirming that things were sufficiently in order regarding the rental car, Lamm completed the traffic stop and returned all paperwork to the defendant, telling him that the stop was concluded. About 20 minutes had elapsed at this point. After telling the defendant that the stop had ended, Lamm said "I'm going to ask you a few more questions if it is okay with you," and construed the defendant's continued presence in his patrol car as voluntary. Lamm testified that despite informing the defendant that the stop had ended, defendant would still have been detained, even if he denied consent to search the vehicle and wanted to leave. Lamm asked the defendant for consent to search the vehicle, to which he replied "you could break the car down," but further explained that Lamm should seek consent from Peart since she had rented the car. Lamm told the defendant to "sit tight" in the patrol vehicle as Lamm went to confer with Peart. At this time, Trooper Ellerbe, also a member of the Criminal Interdiction Unit, arrived at the scene in response to Lamm's request for backup where he was informed by Lamm that Lamm was going to attempt to obtain consent to search from Peart. Ellerbe then stationed himself next to Lamm's passenger seat where the defendant remained seated with the door closed. Lamm proceeded to talk with Peart and obtained her signature on the State Highway Patrol form "Written Consent to Search," which he had completed himself. Lamm then discovered cocaine in the backseat area of the vehicle and directed Ellerbe to place the defendant in handcuffs.

With this recitation of the factual circumstances surrounding the stop and search, the court proceeded to analyze, under the two-pronged analysis of *Terry v. Ohio*, 392 U.S. 1 (1968), (1) whether the stop was reasonable at its inception, and (2) whether the continued stop was "sufficiently limited in scope and duration to satisfy the conditions of an investigative seizure." Focusing on the second prong of the analysis because the defendant conceded that the stop was lawful at its inception, the court cited its previous decision in *State v. Bullock*, 370 N.C. 256 (2017) while explaining that "the duration of a traffic stop must be limited to the length of time that is reasonably necessary to accomplish the mission of the stop," and that a law enforcement officer may not detain a person "even momentarily without reasonable, objective grounds for doing so." The critical question on this second prong in the traffic stop context is whether Trooper Lamm "diligently pursued a means of investigation that was likely to confirm or dispel [his] suspicions quickly, during which time it was necessary to detain the defendant" or whether Lamm unlawfully extended an otherwise-completed stop. Reviewing its own precedent and that of the U.S. Supreme Court, the court explained that all of Trooper Lamm's investigative activities until the point where Lamm returned the defendant's paperwork, issued the warning ticket, and told

the defendant that the stop had ended were lawful. At that point, however, the mission of the stop was accomplished and Lamm unlawfully prolonged it by detaining the defendant in his patrol car and asking the defendant further questions without reasonable suspicion. As to whether reasonable suspicion existed to prolong the stop, the court found that inconsistencies in Lamm's testimony demonstrated that he was unable to articulate an objective basis for his purported reasonable suspicion and was unable to articulate the time at which he formulated such suspicion. The court disagreed with dissenting justices who took the view that the defendant's nervousness, his explanation of travel plans, the condition of the rental car, and the fact that it had been paid for in cash provided reasonable suspicion, saying that these circumstances were generally consistent with lawful travel and were unremarkable. The court concluded by agreeing with the Court of Appeals that the trial court erred in denying the defendant's motion to suppress evidence obtained as a result of the defendant's unlawful detention.

Justice Newby dissented, explaining that in his view, and as the trial court had found, the defendant consented to the prolonging of the stop in order to allow Trooper Lamm to ask him a few more questions.

Justice Davis, joined by Justices Newby and Ervin, also dissented, expressing the view that even is the defendant's consent to search was not voluntary, Trooper Lamm possessed reasonable suspicion to extend the stop. In finding that reasonable suspicion existed, Justice Davis noted the defendant and his passenger's inconsistent statements regarding their travel plans, certain features of the rental car agreement, the fact that the car had been paid for in cash, and the condition of the interior of the car, including that dog food was strewn about and that air fresheners were present.

Reasonable suspicion to stop defendant's vehicle was based on an objectively reasonable mistake of fact; extension of the stop was permissible based on reasonable suspicion of other criminal activity

State v. Wiles, ___ N.C. App. ___, 841 S.E.2d 321 (Mar. 17, 2020)

While parked on the side of the road, a trooper saw a truck pass by and believed that the passenger was not wearing a seat belt. After the trooper stopped the truck and approached the passenger side, he realized that passenger was wearing his seat belt, but the gray belt had not been visible against the passenger's gray shirt. The passenger stated that he was wearing his seat belt the whole time, and the trooper did not cite him for a seat belt infraction.

However, upon approaching the window, the trooper had also immediately noticed an odor of alcohol coming from the vehicle. The trooper asked the passenger and the driver (the defendant) if they had been drinking, and both men said yes. The trooper asked the men to step out of the truck, and saw that the defendant's eyes were red, glassy, and bloodshot. After further investigation, the trooper determined the defendant was impaired and charged him with DWI. The defendant filed a motion to suppress, arguing there was no reasonable suspicion to support the initial or extended vehicle stop. The trial court denied the motion, finding that the trooper had a mistaken but lawful basis for the initial stop, and he developed reasonable suspicion of other criminal activity that warranted an extension of the stop. The defendant proceeded to trial, was convicted of DWI, and appealed.

The appellate court affirmed the findings and rulings denying the suppression motion. First, the trial court's findings of fact were adequately supported by the trooper's testimony. Second, even though the trooper's initial belief that the passenger was not wearing a seat belt turned out to be mistaken, it was nevertheless objectively reasonable ("failing to see a gray seat belt atop a gray shirt is one a reasonable officer could make") and the extension of the stop was permissible based on the trooper "instantaneously" smelling an odor of alcohol coming from the vehicle, raising a reasonable suspicion of

DWI. Defendant's related constitutional arguments concerning the extension of the stop and probable cause to arrest were not properly raised at the trial level, so they were dismissed on appeal. As to defendant's remaining arguments regarding his trial (denial of motion to dismiss at close of evidence, allowing a "positive" PBT reading into evidence, and qualifying the trooper as an expert in HGN), the appellate court likewise found no error.

(1) Defendant's statements following officer's promise to not arrest were involuntary and properly suppressed; defendant's statements before the promise were voluntary; (2) No *Rodriguez* violation where officer had reasonable suspicion to stop vehicle and to extend the stop's duration; (3) Inevitable discovery applied where the officer could and would have searched the vehicle apart from illegally obtained statements; (4) Arrest of defendant by task force here was sufficiently attenuated from constitutional violations

U.S. v. Alston, 941 F.3d 132 (Oct. 24, 2019)

In this case from the Middle District of North Carolina, the defendant pled guilty to a weapons offense and appealed the denial of his motion to suppress. A Durham County deputy blue-lighted the defendant after seeing him run a red light. The defendant did not stop and reached under the passenger seat to the point that the deputy couldn't see him. The defendant continued reaching under the passenger seat while looking back at the deputy and collided with a parked car. When the deputy approached, the defendant stated the reason that he reached under the seat was because he dropped his cell phone. The deputy found this suspicious because the defendant was on a call over the car speakers and was holding his phone in his left-hand (but had reached under the seat with his right). When asked if he had any contraband, the defendant explained he only had a small amount of marijuana, which he gave the deputy. Discovering that the defendant's license was suspended, the deputy allowed the defendant to call his mother to get the car, who quickly arrived on scene. The deputy pressed the defendant about anything else that might be in the car, and the defendant offered a bag with scales, baggies, and more marijuana. The following exchange then occurred:

Deputy: "I'm going to need to get the heater [slang for a gun]."

Defendant: "Are you going to take me to jail?"

Deputy: "I need you to be honest with me and I won't take you to jail today."

Defendant: "It's underneath the passenger seat." Slip op. at 3.

While the deputy was talking with the defendant, he received a call from a task-force agent. The agent explained they were investigating the defendant for weapons offenses and asked whether the defendant had been stopped and if he was armed. The deputy confirmed. The agent informed the deputy that the task force was coming and to hold the defendant. The task-force agents arrived, arrested the defendant, and took him into custody.

The trial court allowed the motion to suppress in part, finding that some of the statements of the defendant were obtained in violation of *Miranda*—his remarks were involuntary past the point where the deputy promised not to arrest, although the defendant's earlier remarks before that point were voluntary and admissible. As to the gun, the trial court found that it would have inevitably been discovered because the officer had probable cause to search the vehicle. The defendant appealed.

(1) The Fourth Circuit agreed with the trial court regarding the defendant's statements and rejected the view that all of the statements and derivative evidence should have been suppressed. "Of course, the exclusionary rule bars admission of the nontestimonial physical fruit of statements obtained in violation

of *Miranda* when those statements are involuntary, and statements obtained in violation of *Miranda* are presumptively involuntary.” *Id.* at 6-7. Here, the district court agreed that many of the defendant’s statements here were involuntary, admitting the gun on a separate basis: “The court admitted the derivative evidence, including the gun, not because it was the fruit of voluntary statements but because the court found that the inevitable discovery exception to the exclusionary rule rendered the derivative evidence admissible.” *Id.* at 7. While the statement about the gun was involuntary and properly suppressed, the earlier statements by the defendant acknowledging possession of marijuana came before any promises or other coercion from the deputy and were therefore voluntary and admissible.

(2) There was no *Rodriguez* violation, because the deputy had reasonable suspicion to stop based on the red-light violation. He similarly had grounds to extend the stop after the defendant acknowledged possessing marijuana.

(3) Although neither the defendant nor the government argued inevitable discovery on appeal, the court addressed its application since this was the justification for the trial court’s denial of the motion.

Inevitable discovery demands that the prosecution prove by a preponderance of the evidence: first, that police legally *could* have uncovered the evidence; and second, that police *would* have done so. . . To rely on inevitable discovery doctrine, the Government first must prove that police could have used ‘lawful means’ to discover the illegally obtained evidence. ‘Lawful means’ include an inevitable search falling within an exception to the warrant requirement . . . that would have inevitably discovered the evidence. *Id.* at 8-9 (emphasis in original).

Here, the trial court specifically found that the deputy could have searched the car based on the automobile exception after the suspicious nature of the encounter and the defendant admitting to possession of marijuana, before any promises or involuntary statements. The Fourth Circuit agreed—the deputy plainly had probable cause to search the vehicle for marijuana. The car also inevitably *would* have been searched. The deputy’s testimony showed that his primary objective was to get the gun “off the street,” and that this was more important to him than taking the defendant into custody. All of the deputy’s acts were aimed at discovering the weapon and the deputy would have found the gun if he had lawfully searched the car. While some determinations of what may have inevitably happened will determine a remand for factual development, “[i]n this case, the evidence that the search was inevitable jumps off the pages of the record.” *Id.* at 12.

(4) The court acknowledged the result may be different in another case — “there might well be irreconcilable tension between an officer’s determination to obtain a gun and repeated assurances that he would not arrest the suspect.” *Id.*, n.2. Here, “[t]he task force’s pursuit of [the defendant] ‘is a critical intervening circumstance that is wholly independent’ of [the deputy’s] promise not arrest . . .,” citing *Utah v. Strieff*, 136 S. Ct. 2056 (2016) (where intervening circumstances separate the unconstitutional act from the seized evidence, the evidence is admissible under the attenuation doctrine exception to the exclusionary rule). *Id.*

(1) Traffic stop was supported by reasonable suspicion of drug trafficking and was not unreasonably extended under *Rodriguez*; (2) Admission of phone call between defendant and non-testifying informant to show context of defendant's statements on the call did not violate the Confrontation Clause; (3) Any Confrontation Clause violation by admission of evidence of the informant's act of calling the defendant did not rise to the level of plain error

U.S. v. Jordan, 952 F.3d 160 (Mar. 3, 2020)

This case from the Western District of North Carolina stemmed from a drug trafficking investigation. Federal authorities apprehended another suspect involved in drugs, and that person became an informant, providing law enforcement with the defendant's name as a supplier. The informant agreed to call the defendant and set up a purchase. The phone call was recorded, and the two men discussed drug transactions using coded language. Based on that conversation, officers obtained search warrants for the defendant's phone and to authorize placement of a tracking device on the defendant's vehicle. Agents observed him make several quick visits to different locations, at times bringing one package into a location and leaving with a different package. The agents asked local police to conduct a traffic stop of the defendant based on these observations.

The defendant ran a red light and was stopped by a Charlotte police officer. The defendant was on the phone and was "unwilling to engage" the officer. Multiple other cell phones were in view within the vehicle. The defendant was frisked, and a rubber glove found in the defendant's pockets (an item the officer knew to be associated with drug trafficking). The defendant's brother appeared on the scene of the stop and tried to involve himself in the encounter. The officer waited 11 minutes for backup and then allowed a drug dog to check the vehicle. It alerted, and the defendant admitted to possessing cocaine. A search subsequently revealed cocaine, more than \$25,000 in cash, six phones and a gun. The defendant waived Miranda and admitted his involvement in trafficking. Other drug stashes, guns, and large amounts of currency were found in the other places visited by the defendant on the day of the stop and at residences associated with him. The defendant moved to suppress, arguing that the traffic stop was unreasonably extended in violation of *U.S. v. Rodriguez*, 575 U.S. 348 (2015). He also sought to suppress his statements made on the phone call with the informant, arguing that they violated the Confrontation Clause (since the informant was not testifying at trial). The district court denied both motions, and the defendant was convicted at trial of all charges. He was sentenced to 35 years imprisonment and appealed.

(1) A stop based on a traffic offense may not be extended beyond the time necessary to complete the mission of the stop absent reasonable suspicion of an offense or consent pursuant to *Rodriguez*. Here, the stopping officer was aware that the defendant was under investigation for trafficking drugs. Further, under the collective knowledge doctrine, all of the information possessed by federal agents was imputed to the stopping officer. Based on the information from the informant, the search warrants that had issued, and the defendant's movements earlier in the day, law enforcement had reasonable suspicion of drug trafficking at the time of the stop. The suspicion of drug trafficking coupled with the presence of the defendant's brother on the scene justified the 11-minute extension to wait for backup to arrive as a matter of officer safety. The stop was therefore not unconstitutionally extended, and the district court's denial of the motion to suppress was affirmed.

(2) Parts of the phone call between the defendant and the informant were played at trial. An agent testified that he instructed the informant to call his supplier and explained the use of coded language between drug traffickers generally. The trial judge instructed the jury not to consider the informant's

statements on the phone call for the truth of the matter asserted, but only for context of the defendant's statements on the call. This did not violate the Confrontation Clause. In the court's words:

The [Confrontation] Clause does not, however, 'bar the use of testimonial statements for purposes other than establishing the truth of the matter asserted.' And so we have made clear—along with several other circuits—that recorded statements of non-testifying informants . . . may be used at trial consistent with the Confrontation Clause as long as they are offered only to provide context for the defendant's statements, and not for the trust of the matter asserted. That is exactly what happened here. Slip op. at 13.

(3) The defendant also objected to the admission of the phone call because he claimed the informant's act of calling him was a nonverbal assertion that identified him as the informant's supplier. This, he argued, was subject to the Confrontation Clause as assertive conduct. This argument was not raised at trial and was reviewed for plain error only. The Fourth Circuit noted that the Confrontation Clause applies to testimonial statements and agreed that assertive conduct can be a statement within the meaning of the clause. The First Circuit has deemed the act of an informant calling a defendant to arrange for delivery at police direction and driving with officers to the location of the transaction to be non-assertive conduct. See *U.S. v. Bailey*, 270 F.3d 83 (1st Cir. 2001). "Testimony about that compliance [with law enforcement instructions], . . . 'described conduct' rather than introducing statements." *Jordan* Slip op. at 15. The court distinguished other precedent where an officer selected the defendant's number from the informant's phone. There, the conduct was held to be assertive and subject to confrontation rights because of the clear implication that the informant must have told the officer the defendant's name—a verbal statement identifying the suspect could be inferred from that conduct. "Here, by contrast, [the officer] neither said nor suggested that [the informant] verbally identified [the defendant] as his supplier." *Id.* at 16. Without deciding "whether and under what circumstances compliance with law enforcement instruction might be deemed 'assertive conduct,'" the court declined to find plain error on these facts. *Id.* at 15.

Searches

(1) The trial court erred by denying the defendant's motion to suppress blood evidence obtained pursuant to an improper court order; (2) Evidence of the defendant's speeding and reckless driving established the malice necessary to support a second-degree murder conviction; (3) Evidence of the defendant's prior convictions was properly admitted under Rule 404(b)

State v. Scott, ___ N.C. App. ___, 838 S.E.2d 676 (Jan. 21, 2020)

The defendant was charged with second-degree murder after he crashed into another vehicle, killing a passenger in it. Five days after the crash the police obtained a court order for the release of the defendant's medical records related to his hospitalization as a result of the crash. SBI testing of blood drawn by the hospital showed the defendant's blood alcohol concentration was .22 grams of alcohol per 100 milliliters of blood. The trial court denied the defendant's motion to suppress and motion *in limine* related to the blood evidence and a jury found him guilty of second-degree murder and felony death by vehicle. (1) On appeal, the defendant argued that the trial court erred by denying the defendant's motion to suppress the blood evidence obtained pursuant to a court order. The Court of Appeals agreed that the defendant's motion to suppress should have been granted. The trial court order to release the medical records was not authorized under G.S. 8-53, G.S. 90-21.20B, or otherwise supported by exigent circumstances, reasonable suspicion, or probable cause, as the first indication of the defendant's intoxication was the result of the tests done on the blood samples obtained pursuant to

the order. Without the blood evidence, the second-degree murder conviction could not be supported on a theory of intoxication. (2) However, the court concluded over a dissent that there was sufficient evidence of the defendant's speeding and reckless driving to establish the malice necessary to support the conviction—a theory on which the jury was also instructed. Eyewitness testimony indicated the defendant passed the witness's vehicle at a high rate of speed in a no-passing zone just before the crash, and crash reconstruction data showed the defendant was driving over 70 miles per hour on a road with a posted speed limit of 45 miles per hour at the time of the crash. (3) The Court of Appeals also concluded that evidence of the defendant's three prior convictions for impaired driving and two prior instances of speeding, driving while license revoked, and no operator's license were properly admitted under Rule 404(b) to show the defendant's intent, knowledge, or absence of mistake to establish the malice element of second-degree murder. A judge dissenting in part would have concluded that the admission of the blood evidence violated the defendant's Fourth Amendment rights, was prejudicial, and not harmless beyond a reasonable doubt, and that the defendant was therefore entitled to a new trial.

State's appeal of trial court's order suppressing blood test result on the basis that the evidence was essential to its case did not preclude it from proceeding to trial without the suppressed evidence; thus, trial court did not err in denying defendant's motion to dismiss on the basis that the State was estopped from adjudicating its case against the defendant because the trial court suppressed the blood test result

State v. Romano, ___ N.C. App. ___, 836 S.E.2d 760 (Nov. 19, 2020)

The defendant was arrested for impaired driving. Because of his extreme intoxication, he was taken to a hospital for medical treatment. The defendant was belligerent and combative at the hospital and was medicated in an effort to calm his behavior. After the defendant was medically subdued, a nurse withdrew his blood. She withdrew some blood for medical purposes and additional blood for law enforcement use. No warrant had been issued authorizing the blood draw. The defendant moved to suppress evidence resulting from the warrantless blood draw on constitutional grounds. The trial court granted the motion, suppressing evidence of the blood provided to law enforcement and the subsequent analysis of that blood. The State appealed from that interlocutory order, certifying that the evidence was essential to the prosecution of its case. The North Carolina Supreme Court, in *State v. Romano*, 369 N.C. 678 (2017), affirmed the trial court's ruling suppressing the State's blood analysis, and remanded the case for additional proceedings.

While the case was pending before the state supreme court, the State filed a motion for disclosure of the defendant's medical records on the date of his arrest, which included records of the hospital's analysis of his blood. The motion was granted, and the medical records were disclosed.

After the case was remanded, the State proceeded to try the defendant on charges of habitual impaired driving and driving while license revoked for impaired driving. The defendant moved to dismiss the charges and to suppress the evidence of his medical records. The trial court denied the motions, and the defendant was convicted.

The defendant argued on appeal that the trial court erred by denying his motion to dismiss. Noting that the State appealed the order suppressing evidence from the warrantless blood draw on the basis that the State's analysis of his blood was essential to its case, the defendant argued that the State should not have been permitted to try the case against him on remand because that evidence was ordered suppressed. The court rejected the defendant's argument, stating that the supreme court's decision simply upheld the suppression of the evidence. It did not preclude the State from proceeding to trial

without the suppressed evidence on remand. Thus, the court of appeals concluded that the trial court did not err in denying defendant's motion to dismiss.

Search warrant established nexus to residence under totality of circumstances despite lack of allegation in affidavit that drugs were being sold in the home

State v. Bailey, ___ N.C. ___, 841 S.E.2d. 277 (May 1, 2020)

This Carteret County drug case involved a challenge to a search warrant for the defendant's home. A detective observed what he believed to be a drug transaction occur in a parking lot between a Jeep and another car. He knew the occupants of the Jeep and their address. The detective also knew that they had previously been involved in illegal drug sales. Both cars were followed by police. The car was stopped for traffic violations, and the woman inside ultimately admitted to having purchased heroin in the parking lot from one of the people inside the Jeep. The Jeep was separately followed to the occupants' residence. Officers obtained a warrant to search the house, and the defendant (who lived at the house, but was not one of the occupants of the Jeep) was charged with trafficking in cocaine. His motion to suppress was denied and he pled guilty, reserving his right to appeal the denial of the motion. A divided panel of the Court of Appeals affirmed ([here](#)) [Jeff Welty blogged about that decision, [here](#)]. Judge Zachary dissented and would have found that the warrant application failed to establish a nexus to the home, comparing the facts to those of *State v. Campbell*, 282 N.C. 125 (1972) (conclusory allegations of drug dealing without underlying facts tying the home to criminal activity were insufficient to establish nexus to search residence). The Supreme Court unanimously affirmed.

The court agreed that a search warrant for a residence must demonstrate some nexus between the suspected criminal activity and the home. "Such connection need not be direct, but cannot be merely conclusory." Slip op. at 6. Comparing cases, the court determined that the affidavit here established a sufficient connection to the home. The detective observed a probable drug transaction and was familiar with the subjects in the Jeep, including their drug histories and address. Coupled with the close-in-time admission from the buyer that she purchased heroin from one of the men and the fact that another officer followed the Jeep from the site of the suspected buy to the residence, the search warrant affidavit supported an inference that drugs or evidence of drug dealing would be found in the home. In the court's words:

It is true that [the detective's] affidavit did not contain any evidence that drugs were actually being sold at the apartment. But our case law makes clear that such evidence was not necessary for probable cause to exist. Rather, the affiant was simply required to demonstrate *some* nexus between the apartment . . . and criminal activity. *Id.* at 10 (emphasis in original).

The warrant was therefore supported by probable cause and comported with the Fourth Amendment. Concluding, the court observed: "In so holding, we break no new legal ground, and instead apply well-established principles of law to the facts presented." *Id.* at 11.

Confessions

Defendant's confession was induced by hope instilled by the interrogators and in the totality of circumstances was not voluntary; murder conviction and life without parole sentence reversed

State v. Lynch, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2020)

The defendant was convicted of first-degree murder, robbery with a dangerous weapon, and assault with a deadly weapon with the intent to kill inflicting serious injury. He was sentenced to life without parole for the murder conviction and to shorter terms for the other convictions. The case arose out of the robbery of a bar by two masked individuals, during which the owner of the bar was shot and killed and the perpetrators fled with the cash register. The 18-year-old defendant was arrested and waived his *Miranda* rights. The defendant adamantly denied his involvement throughout much of the three-hour, recorded interrogation but toward the end confessed his involvement. The defendant's motion to suppress his confession was denied by the trial judge, and at trial the State introduced his confession and the testimony of others involved in the robbery implicating the defendant. The defendant argued on appeal that his confession was not voluntary because it was induced by hope of a sentence of life imprisonment instilled by the statements and actions of the officers who interrogated him. The Court of Appeals reviewed the transcript of the confession and concluded that in the totality of the circumstances the defendant's confession was involuntary. The Court found that the defendant was predisposed to deny involvement and believed he would receive a life sentence whether he confessed or not. The Court also found that without being prompted by the defendant, the interrogators introduced the idea that they had ample evidence against the defendant, that they knew he was lying, that the judge could be influenced to show leniency if he confessed, and that they would be willing to testify on his behalf. The Court further found that the State failed to meet its burden to show that admission of the confession, which was constitutional error, was harmless beyond a reasonable doubt. The Court observed that there was sufficient evidence to convict the defendant without the confession in light of testimony from others involved in the robbery and video surveillance footage showing the masked perpetrators; however, no physical evidence linked the defendant to the crime and no one at the bar could identify the defendant as one of the perpetrators. The Court stated that it could not conclude beyond a reasonable doubt that all twelve jurors would have voted to convict without the confession.

Identifications

A prosecutor's legal assistant conducted an impermissibly suggestive identification procedure when she showed two witnesses a suspect's video-recorded interview with police and a recent photograph of the suspect, all after the witnesses had previously been unable to identify the suspect as a perpetrator. However, one of the witnesses' in-court identification of the defendant was independent of the suggestive procedure

State v. Malone, 373 N.C. 134 (Nov. 1, 2019)

Two men were angry about being cheated in a drug deal. They approached a house and shot two other men – one fatally – who they thought were involved in the rip-off. The victims were on the front porch at the time of the shooting. Two women who were also on the porch viewed photo lineups in an attempt to identify the perpetrators. They both identified one suspect. Neither identified the defendant as the other man, though one said that his picture “looked like” the suspect. The defendant was charged with murder and other offenses. Several years later, a legal assistant with the district attorney's office asked the women to come to the office for trial preparation. The legal assistant showed the women part

of the defendant's video-recorded interview with police as well as updated pictures of the defendant. One of the women looked out the window and saw the defendant, in a jail uniform and handcuffs, being led into the courthouse for a hearing. She immediately stated that he was one of the killers. The other woman came to the window and also saw the defendant. Both women later identified the defendant at trial as one of the perpetrators. The defendant argued that the identification was tainted by what he contended was a suggestive identification procedure conducted by the legal assistant. The trial judge found that the procedure was not unduly suggestive, and that in any event, the women's in court testimony was based on their independent recollection of the events in question. The defendant was convicted and appealed. The court of appeals found the procedure to be impermissibly suggestive and reversed the defendant's conviction. The State appealed, and the supreme court ruled: (1) The trial preparation session was an "impermissibly suggestive" identification procedure. Given that the women had not previously identified the defendant as a participant in the crime, the legal assistant's "actions in showing [the women] the video of [the defendant's] interview and recent photographs of [the defendant and the co-defendant] are exactly the kind of highly suggestive procedures that have been widely condemned as inherently suggestive" and amounted to improper "witness coaching." (2) However, the procedure did not give "rise to a substantial likelihood of irreparable misidentification . . . because the trial court's findings of fact support the legal conclusion that [one of the women's] in-court identification of defendant was of independent origin and sufficiently reliable." Among other factors, the court highlighted the woman's proximity to the perpetrators, her opportunity to observe them, and the fact that when she saw a picture of the defendant online shortly after the crime – wearing his hair in a style different from his lineup photo and apparently more similar to his appearance at the time of the crime – she identified him as a perpetrator. (3) Because one of the women made a valid in-court identification, any error in admitting the other woman's identification of the defendant was harmless. Three Justices, dissenting in part, would not have addressed whether the procedure at issue was unduly suggestive and would have decided the case based only on the "independent origin" holding.

Criminal Procedure

Right to Counsel

While a defendant may forfeit his or her right to counsel by engaging in egregious misconduct, the defendant in this case did not do so and the trial court erred by not ensuring that the defendant's waiver of counsel was knowing, intelligent, and voluntary

State v. Simpkins, 373 N.C. 530 (Feb. 28, 2020)

In this case where the defendant was tried without counsel for driving with a revoked license, RDO, and other charges, the Court of Appeals was correct in holding that the defendant did not forfeit his right to counsel and that the trial court therefore was required to ensure that the defendant's waiver of counsel was knowing, intelligent, and voluntary. Noting that it had never previously held that a criminal defendant in North Carolina can forfeit the right to counsel, the court agreed with holdings of the Court of Appeals establishing that "in situations evincing egregious misconduct by a defendant, a defendant may forfeit the right to counsel." The court reviewed decisions of the Court of Appeals where a finding of forfeiture was proper, and summarized that case law as follows:

If a defendant refuses to obtain counsel after multiple opportunities to do so, refuses to say whether he or she wishes to proceed with counsel, refuses to participate in the proceedings, or continually hires and fires counsel and significantly delays the proceedings, then a trial court may appropriately determine that the defendant is attempting to obstruct the proceedings and prevent them from coming to

completion. In that circumstance, the defendant's obstructionist actions completely undermine the purposes of the right to counsel. If the defendant's actions also prevent the trial court from fulfilling the mandate of N.C.G.S. § 15A-1242, the defendant has forfeited his or her right to counsel and the trial court is not required to abide by the statute's directive to engage in a colloquy regarding a knowing waiver.

Characterizing the conduct described above as "[s]erious obstruction" and disavowing previous statements by the Court of Appeals suggesting that "[a]ny willful actions on the part of the defendant that result in the absence of defense counsel [constitute] a forfeiture of the right to counsel," the court went on to explain that "[s]erious obstruction of the proceedings is not the only way in which a defendant may forfeit the right to counsel." The court suggested that a defendant who "intentionally seriously assaults their attorney" may also forfeit the right to counsel.

With this explanation of the law of forfeiture of the right to counsel, the court agreed with the Court of Appeals majority that the defendant in this case did not "engage in such serious misconduct as to warrant forfeiture of the right to counsel." Conceding that some of the defendant's conduct probably was highly frustrating, the court rejected the state's arguments that he forfeited his right to counsel by (1) putting forward frivolous legal arguments throughout the proceeding; (2) failing to employ counsel before appearing for trial where no evidence indicated that he consistently refused to retain counsel in an attempt to delay the proceedings; (3) being generally uncooperative during the proceeding. Because the defendant did not forfeit his right to counsel, the trial court was required, under G.S. 15A-1242 and the state and federal constitutions, to advise the defendant of the right to counsel, the consequences of proceeding without counsel, and "the nature of the charges and proceedings and the range of permissible punishments" before permitting the defendant to waive counsel and proceed pro se. The trial court's failure to do so in this case entitled the defendant to a new trial.

Justice Newby, joined by Justice Morgan, expressed his view that "[b]y continually refusing to answer the trial court's questions and posing his own questions to the court, defendant demonstrated his unwillingness to accept the judicial process, forfeiting his right to an attorney."

Trial judge erred in finding that the defendant forfeited his right to counsel and requiring the defendant to represent himself at trial

State v. Harvin, ___ N.C. App. ___, 836 S.E.2d 899 (Dec. 3, 2019), *review granted*, ___ N.C. ___, 840 S.E.2d 785 (April 29, 2020)

The defendant was convicted of first-degree murder, attempted first-degree murder, attempted robbery with a dangerous weapon, assault with a deadly weapon with intent to kill inflicting serious injury, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon. The Court of Appeals found that the trial judge erred in finding that the defendant forfeited his right to counsel and in requiring the defendant to represent himself at trial. In a lengthy colloquy at trial, the defendant requested the judge to activate or replace his standby counsel, who previously had been appointed as standby counsel when the defendant expressed a desire to represent himself. When the trial judge did not grant that request, the defendant stated that he did not want to represent himself and wanted to be represented by counsel. The Court found that the request was clear and unequivocal. The Court further found that when the trial judge previously appointed standby counsel, the judge did not make any note of dilatory tactics by the defendant or inform him that requesting that standby counsel be activated or replaced could result in forfeiture of his right to counsel; rather, the judge advised him that standby counsel could be activated as counsel. Although the defendant had five

previous attorneys, only two withdrew for reasons related to the defendant and then not because of a refusal by the defendant to participate in his defense but instead due to differences related to preparation of the defendant's defense. The Court concluded that the record failed to show that the defendant intentionally delayed or obstructed the process. A dissenting judge would have found that the trial judge's forfeiture ruling was not erroneous.

Failure to appoint counsel or secure a valid waiver of counsel for more than a year after the defendant was charged violated the defendant's Sixth Amendment right to counsel

State v. Lindsey, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 21, 2020)

In March 2018 the defendant was charged with multiple crimes after breaking into a gas station. In August 2018, the trial court first addressed the defendant's right to counsel. The defendant said that he did not want a lawyer, but then, when asked by the judge, "You're not just waiving court appointed counsel, you're waiving all counsel; is that correct?," the defendant replied that he was "simply waiving court appointed counsel." The defendant signed a waiver of counsel form, checking only box one, waiving his right to assigned counsel. The trial judge appointed standby counsel. The defendant argued several preliminary motions without the assistance of counsel between August 2018 and when his case came on for trial in March 2019. At that point, a different judge presiding over the trial noticed that the defendant had waived court-appointed counsel but not all counsel. After a full colloquy with the judge, the defendant checked box 2 on a new form, waiving his right to all assistance of counsel. The defendant was convicted and sentenced.

On appeal, the defendant argued that the trial court erred by failing to appoint counsel or secure a valid waiver of counsel until more than a year after the defendant's initial arrest. Over a dissent, the Court of Appeals agreed with him and ordered a new trial. The majority first established that the issue was properly preserved for appellate review, noting that prejudicial violations of a statutory mandate (here G.S. 15A-1242) are preserved for appeal notwithstanding the defendant's failure to object at trial, and the Supreme Court of North Carolina has recently reviewed unobjected-to Sixth Amendment denial of counsel claims. The court then concluded that the trial court erred by allowing the defendant to proceed unrepresented without first obtaining a proper waiver of all counsel after a proper inquiry under G.S. 15A-1242. The August 2018 colloquy was flawed to the extent that the trial court did not ask whether the defendant understood and appreciated the consequences of his decision to proceed without representation, and in any event resulted only in a waiver of assigned counsel. The State failed to establish that the defendant's self-representation through the pretrial period from August 2018 until the proper waiver colloquy in March 2019 was harmless beyond a reasonable doubt—which the court noted would have been difficult even if the State had tried, given the many issues addressed during the uncounseled period (possible plea negotiations, discovery, and evidentiary issues).

A dissenting judge would have concluded that the defendant failed to preserve the issue for appellate review.

Defendant received ineffective assistance of counsel where counsel advised him that deportation "may" result from the plea and not that the defendant was facing presumptive deportation; case remanded for a determination of whether the defendant was prejudiced

State v. Marzouq, ___ N.C. App. ___, 836 S.E.2d 893 (Dec. 3, 2019)

The defendant, a lawful permanent resident, was charged with various drug offenses and pled guilty under *Alford* to the charges of possession of heroin and maintaining a vehicle or dwelling, for which the trial judge imposed a two-year suspended sentence. About one year into his sentence, the defendant was seized by Immigration and Customs Enforcement (ICE) and placed into detention and removal proceedings. He filed a motion for appropriate relief (MAR), arguing that had he known the plea would affect his immigration status and result in deportation, he would not have taken it. The trial judge denied the MAR. The Court of Appeals granted certiorari and ordered the trial judge to review whether the defendant's *Alford* plea was induced by misadvice of counsel and whether the misadvice resulted in prejudice. The trial judge again denied the MAR. He found that the defendant had been advised that he might be deported if he pled guilty and that he should speak to an immigration attorney. The Court of Appeals granted certiorari a second time. Relying on *Padilla v. Kentucky*, 559 U.S. 356 (2010), and *State v. Nkiam*, 243 N.C. App. 777 (2015), the Court recognized that it is not sufficient for an attorney to advise a client that there is a risk of deportation where, as here, deportation is presumptively mandatory. The Court stated: "Waffling language suggesting a mere possibility of deportation does not adequately inform the client of the risk before him or her, and does not permit a defendant to make a reasoned and informed decision." The Court remanded the case to the trial judge to determine prejudice—that is, whether there is a reasonable probability that but for counsel's ineffective assistance, the result of the proceeding would have been different. The Court specifically directed the trial court to consider the impact of other charges against the defendant. The Court recognized that a defendant cannot show a different outcome, as required by the prejudice standard, if deportation would still result from other charges. The Court found the record insufficient on this issue. The defendant had a prior drug paraphernalia conviction, but that offense does not render him presumptively deportable, and other pending charges, but the record did not contain findings as to whether any other convictions made the defendant deportable.

Discovery and Brady Issues

(1) Sufficient evidence supported each of the defendant's convictions; (2) Trial court properly denied motion to suppress; (3) Any error in the admission of the vodka bottle found in the defendant's lap was abandoned on appeal; (4) No *Brady* violation on the facts of the case

State v. Hoque, ___ N.C. App. ___, 837 S.E.2d 464 (Jan. 7, 2020)

The defendant was found guilty by a Cleveland County jury of impaired driving and resisting a public officer and was found responsible for possession of open container. He appealed, challenging the denial of his motion to dismiss, the denial of his mid-trial motion to suppress, an evidentiary ruling, and alleging constitutional violations for lost evidence. The Court of Appeals unanimously affirmed.

(1) The defendant claimed there was insufficient evidence that he operated the vehicle while impaired. As to operation, the defendant was found asleep behind the wheel with the car running in the middle of the road and had a bottle of vodka between his legs. No passengers were present, and the defendant asked the officer if he could move the car, revving the engine several times. He also used the driver side door to exit the vehicle. This was sufficient to establish operation. "An individual who is asleep behind the wheel of a car with the engine running is in actual physical control of the car, thus driving the car within the meaning of the statute." As to impairment, while the defendant's blood alcohol content was only 0.07, the defendant's blood revealed the presence of marijuana, amphetamine and methamphetamine. In addition to the blood test, the defendant "failed" horizontal and vertical gaze

nystagmus tests, refused a breath test, had a strong odor of alcohol, was “confused and disoriented,” and exhibited other signs of impairment. This was sufficient evidence of impairment.

The defendant also claimed there was insufficient evidence to support his conviction for resisting a public officer. Specifically, he argued that he was merely confused and in pain at the time of his interactions with the officers, and that this was the cause of his “negative interactions” with the officers. The court rejected this argument, noting: “The conduct proscribed under [N.C. Gen. Stat. §] 14-223 is not limited to resisting an arrest but includes any resistance, delay, or obstruction of an officer in discharge of his duties.” Here, the defendant committed multiple acts that obstructed the officer’s duties. The defendant would not roll down his window when asked by the officer, he repeatedly tried to start his car after being commanded to stop, he refused a breath test at least 10 times, and repeatedly put his hands in his pockets during the nystagmus testing after being instructed not to do so. He also refused to get into the patrol car once arrested and refused to voluntarily allow his blood to be drawn after a search warrant for it was obtained. In the court’s words:

Through these actions and his inactions, Defendant directly opposed the officers in their efforts to discharge their investigative duties of identifying him, speaking with him, and performing field sobriety tests. Thus, Defendant resisted the officers within the meaning of the statute.

The motion to dismiss for insufficient evidence of resisting a public officer was therefore properly denied.

The defendant also claimed his motion to dismiss for insufficiency as to the possession of open container of alcohol should have been granted. He pointed out that the bottle found in his car was not missing much alcohol and the officer admitted to emptying the bottle on the side of the road. Rejecting this argument, the court observed:

[T]he amount of alcohol missing from the container is irrelevant for purposes of this offense, because a container is opened ‘[i]f the seal on [the] container of alcoholic beverages has been broken.’ Additionally, the fact that [the officer] poured out the contents of the container goes to the weight of the evidence, not its sufficiency.

The trial court therefore did not err in denying the motion for insufficient evidence for this offense.

(2) As to the suppression motion, the issue was preserved despite the motion being untimely because the court considered and ruled on the motion. The defendant argued that the forcible blood draw violated his rights to be free from unreasonable force. He did not challenge the validity of the search warrant authorizing the blood draw. Claims of excessive force are evaluated under the Fourth Amendment reasonableness standard. *Graham v. Connor*, 490 U.S. 386 (1989). “Determining whether the force used to effect a particular seizure is ‘reasonable’ under the Fourth Amendment requires a careful balancing of ‘the nature and quality of the intrusion on the individual’s Fourth Amendment interests’ against the countervailing governmental interests at stake.” *Id.* at 22 (citations omitted). Here, the officer had a valid warrant (obtained after the defendant’s repeated refusals to provide a breath sample), and the blood draw was performed by medical professionals at a hospital. Any acts of force by police to obtain the blood sample were the result of the defendant’s own resistance. The court observed:

Defendant had no right to resist the execution of a search warrant, and in fact, his actions rose to the level of criminal conduct under N.C. Gen. Stat. §

14-223, for resisting a public officer. . . Defendant ‘cannot resist a lawful warrant and be rewarded with the exclusion of the evidence.’

The force used to effectuate the blood draw was reasonable under the circumstances and did not violate the Fourth Amendment.

The defendant also argued that his motion to suppress should have been granted for failure of the State to show that his blood was drawn by a qualified professional. G.S. 20-139.1(c) provides that doctor, registered nurse, EMT, or other qualified person shall take the blood sample. “An officer’s trial testimony regarding the qualifications of the person who withdrew the blood is sufficient evidence of the person’s qualifications.” Here, the officer testified that a nurse drew the blood, although he could not identify her by name and no other proof of her qualifications was admitted. This was sufficient evidence that the blood was drawn by qualified person, and this argument was rejected.

(3) The trial court admitted into evidence the bottle found between the defendant’s legs at the time of arrest. According to the defendant, this was an abuse of discretion because the officers admitted to destroying the content of the bottle (by pouring it out) before trial. The defendant argued this was prejudicial and required a new trial. Because the defendant offered no authority that admission of the bottle into evidence was error, this argument was treated as abandoned and not considered.

(4) During the arrest, the stopping officer forgot to turn on his body camera and only began recording the investigation mid-way through. The officer also failed to record interactions with the defendant during processing after arrest in violation of department policy. The trial court found no constitutional violation. The defendant complained on appeal that the “intentional suppression” of this camera footage violated his Sixth and Fourteenth Amendment rights and sought dismissal or a new trial. However, the defendant only argued the Fourteenth Amendment *Brady* violation on appeal. His Sixth Amendment argument was therefore abandoned and waived.

As to the alleged *Brady* violation, the defendant did not seek dismissal in the trial court. “We are therefore precluded from reviewing the denial of any such motion, and Defendant’s request that this Court ‘dismiss the prosecution against him’ is itself dismissed.” However, the defendant’s argument at suppression that the failure to record the blood draw violated due process and warranted suppression was preserved. Under *Brady v. Maryland*, 373 U.S. 83 (1963), suppression of material evidence relevant to guilt or punishment violates due process, regardless of the government’s good or bad faith. Here though, there was no evidence that the State suppressed anything—the video footage was simply not created. *Brady* rights apply to materials within the possession of the State. “Defendant essentially asks this Court to extend *Brady*’s holding to include evidence not collected by an officer, which we decline to do.” There was also no indication that the video footage would have been helpful to the defendant. The court therefore rejected this claim. “Although the officers’ failure to record the interaction violated departmental policy, such violation did not amount to a denial of Defendant’s due process rights under *Brady* in this case.”

Trial court erred by dismissing DWI charges for the destruction of dash cam video that was only potentially useful to the defendant without assessing whether the footage was destroyed in bad faith

State v. Taylor, ___ N.C. App. ___, 836 S.E.2d 658 (Nov. 19, 2019)

The defendant was cited for misdemeanor driving while impaired on November 27, 2016. His attorney requested discovery in July 2017, specifically asking for dash cam and body camera footage. The defendant was subsequently indicted for habitual impaired driving and other traffic offenses based on

the November 27, 2016 incident. In January 2018, the defendant's attorney again requested dash cam footage. The defendant's attorney was informed in February 2018 that the dash cam video had been deleted from the local server, and the Highway Patrol was attempting to locate it from other sources. In March 2018, defense counsel was informed that the video had been purged and was not available for release.

The defendant moved to dismiss the charges based on the destruction of the dash cam video. The trial court granted the motion, concluding that the destruction of the dash cam video footage violated the defendant's right to exculpatory evidence under *Brady v. Maryland*, 373 U.S. 83 (1963), and required dismissal of the charges. The State appealed.

The court of appeals noted that suppression of evidence favorable to an accused violates due process when the evidence is material to guilt or punishment, regardless of the good faith or bad faith of the prosecution. But when the evidence is only potentially useful, the State's failure to preserve the evidence does not violate the defendant's constitutional rights unless the defendant shows bad faith on the part of the State.

Though the trial court concluded that the destruction of the dash cam video footage was a *Brady* violation, it made no findings on what the dash cam video footage would have shown. Indeed, it could not have made such findings because there was no record of what the footage may have shown. The dash cam footage was not material exculpatory evidence; instead, it was only potentially useful. To establish a constitutional violation based on the destruction of potentially useful evidence, the defendant must show bad faith. The trial court erred by concluding that destruction of the footage warranted dismissal, regardless of bad faith on the part of the State. The court of appeals remanded the case to the trial court for a determination of whether the footage was destroyed in bad faith. A dissenting judge would have reversed the trial court on the basis that the evidence presented could not support a finding of bad faith.

Reinstatement of Charges

(1) The trial court did not err by denying the defendant's petition for writ of certiorari; (2) The defendant's writ of mandamus was an improper substitute for appeal and was filed in the wrong court

State v. Diaz-Tomas, ___ N.C. App. ___, 841 S.E.2d 355 (Apr. 21, 2020), *temp. stay granted*, ___ N.C. ___, 840 S.E.2d 221 (April 21, 2020)

In 2015, the defendant was charged with impaired driving and driving without an operator's license. He failed to appear on the charges in 2016, which prompted the district court to issue an order for arrest and the State to dismiss the case with leave. In 2018 the defendant was arrested on the OFA, ordered to appear, and then arrested again for once more failing to appear. In January 2019 he filed a motion in district court seeking to reinstate the charges that had been dismissed with leave, which the district court denied. In July 2019, the defendant filed a petition for writ of certiorari in superior court, seeking review of the district court's denial of his motion to reinstate the charges. The superior court denied the petition, leading the defendant to file a petition for writ of certiorari in the Court of Appeals. The Court of Appeals concluded that the superior court did not err by denying the petition. Certiorari is a discretionary writ, and the defendant did not show that the superior court's decision was unsupported by reason or otherwise entirely arbitrary.

(2) The defendant also filed two other petitions in the Court of Appeals: a writ of mandamus seeking to compel the district court to grant his motion to reinstate the charges, and a motion asking the court to take judicial notice of the Wake County Local Judicial Rules. As to the writ of mandamus, the Court of Appeals concluded over a dissent that it was improper for two reasons—first, that it was being used as a substitute for an appeal or certiorari, and second that it should have been filed in superior court, not the appellate division. As to the motion to take judicial notice, the court did not need to resolve it to decide the case. Finally, the Court of Appeals declined to consider the defendant’s argument that the district court erred by denying his motion to reinstate charges, unanimously concluding that the issue was not properly before the court.

A judge dissenting in part included additional facts about the procedural history of the case. After the defendant’s initial failures to appear, he did appear when his case was calendared as an “add-on” case in December 2018, but the State declined to reinstate the charges. The dissenting judge agreed with the majority that mandamus was not the proper remedy, but she would have concluded that the superior abused its discretion by denying the petition for writ of certiorari. In the absence of an order from superior court revealing the basis for its rationale in denying the petition, and in light of the defendant’s allegations, which she described as “cogent” and “well-supported,” she would have remanded the case for a hearing and decision on the merits.

Pleadings

State was permitted to obtain new habitual felon indictment after trial of underlying felony although original habitual felon indictment was marked as “NOT A TRUE BILL”

State v. Hodge, ___ N.C. App. ___, 840 S.E.2d 285 (Feb. 18, 2020)

The defendant was charged with three counts of breaking and entering, three counts of larceny after breaking and entering, two counts of obtaining property by false pretenses, and one count of felonious possession of stolen goods. The State ostensibly indicted the defendant as an habitual felon, for which the defendant waived arraignment, but the grand jury had returned the indictment marked as “NOT A TRUE BILL.” At the close of the State’s evidence at the trial of the underlying felonies, the trial judge granted the defendant’s motion to dismiss the breaking and entering charges, the related larceny charges, and one of the false pretenses counts. The jury convicted the defendant of one false pretense count and of the lesser offense of misdemeanor possession of stolen goods. Those convictions rested on the defendant’s possession of five stolen videogames and the sale of those videogames to a pawn shop for \$12. After the jury’s verdict, the trial judge granted the State’s request to continue sentencing to obtain a new habitual felon indictment. The defendant was thereafter tried on the new habitual felon indictment and sentenced to 115 to 150 months in prison.

The defendant argued at trial and on appeal that the trial court did not have jurisdiction to try and sentence the defendant as an habitual felon. A majority of the Court of Appeals rejected the defendant’s argument, relying on *State v. Oakes*, 113 N.C. App. 332 (1994). Quoting from a portion of the *Oakes* opinion, the majority stated that an habitual felon indictment must be part of a prosecution “for which no judgment” has yet been entered. *Oakes*, 113 N.C. App. at 340. Accordingly, because judgment had not yet been entered, the State could obtain and prosecute a new habitual felon indictment. The majority also held that the trial judge did not abuse her discretion in granting a continuance to allow the State to obtain a new habitual felon indictment, rejecting the defendant’s argument that the continuance was improper because it resulted in an exponential increase in his sentence. The dissenting judge distinguished the current case from *Oakes*. The dissent observed

that *Oakes* found that the defect in the habitual felon indictment was “technical” and “[a]t the time defendant entered his plea to the underlying substantive felony and proceeded to trial, there was pending against him an habitual felon indictment presumed valid by virtue of its ‘return by the grand jury as a true bill.’” *Id.*, 113 N.C. App. at 339. Here, there was not a true bill of indictment, and allowing the State to obtain a new habitual felon indictment after the defendant entered his plea to the underlying felony was, in the dissent’s view, “beyond the boundaries of due process.” [Note: For a further discussion of case law on when the State may obtain a superseding habitual felon indictment, see Jeff Welty, *North Carolina’s Habitual Felon, Violent Habitual Felon, Habitual Breaking and Entering Laws*, ADMINISTRATION OF JUSTICE BULLETIN No. 2013/07, at 14–16 (Aug. 2013) (discussing cases allowing superseding habitual felon indictment for technical defects after trial of underlying felony but not for substantive changes).]

The State is not required to file a superseding information before trial in order to retain the trial court’s subject matter jurisdiction

State v. Stallings, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 21, 2020)

The defendant was indicted for trafficking in MDMA, among other charges. When the case came on for trial, the trial judge called in prospective jurors and questioned them about undue hardships and conflicts with the parties and informed them of the charges against the defendant. The prosecutor then requested a bench conference at which he pointed out that the substance in the lab report showed that the relevant substance was methamphetamine, not MDMA. The prosecutor gave the defendant the choice between having the State dismiss the MDMA charge and reindict for trafficking in methamphetamine or waiving indictment and proceeding by bill of information. The defendant chose the latter and was convicted at trial. On appeal, the defendant argued that the trial court lacked subject matter jurisdiction because the State did not file the superseding information “before . . . commencement of trial” within the meaning of G.S. 15A-646. The Court of Appeals disagreed, concluding that G.S. 15A-646 does not place any timing deadline on the State, but rather merely imposes a ministerial duty on the judge to dismiss the initial charge if a superseding indictment or information is filed before trial. The appellate court also rejected the defendant’s argument that the trial court lacked subject matter jurisdiction because the defendant was not formally arraigned on the new charge, as the lack of formal arraignment is not revisable error when the defendant does not object and assert inadequate knowledge of the charge.

An indictment charging assault inflicting serious bodily injury was not defective for alleging specific injuries that would not, on their own, qualify as serious bodily injury

State v. Rushing, ___ N.C. App. ___, 836 S.E.2d 262 (Nov. 5, 2019)

The defendant was convicted by a jury of assault inflicting serious bodily injury and assault on a female based on an argument and fight with the mother of his child. He pushed her down, threw her head into the concrete, punched her, dragged her, and flung her onto the hood of a car. Among other injuries she had two concussions and a fractured eye socket that rendered her temporarily blind in one eye for two weeks. The defendant argued on appeal that the indictment failed to allege the crime of assault inflicting serious bodily injury in that it alleged injuries that would be no more than misdemeanor assault inflicting serious injury, namely, “several lacerations to the face resulting in stitches and a hematoma to the back of the head.” The court of appeals disagreed, holding that the additional description of the victim’s injuries in the indictment was irrelevant as to its validity, and may be regarded as incidental to the salient statutory language, which was present.

Motions Practice

Defendant's motions to dismiss at trial adequately preserved all challenges to the sufficiency of the evidence and could be argued on appeal; however, the state presented sufficient evidence to withstand those challenges

State v. Golder, ___ N.C. ___, 839 S.E.2d 782 (Apr. 3, 2020)

The defendant in this case was not a licensed bondsman, but over a period of five to six years he paid an employee at the clerk's office to make entries into a computer record system indicating that the defendant had filed motions to set aside the bond forfeiture in numerous cases, even though no motions had been filed. Since no motions were actually filed or served on the district attorney or board of education, neither agency was on notice to file a response within the statutorily required 20-day period, meaning the bond forfeitures would be set aside automatically. The clerk was eventually fired for his role in the scheme and began cooperating with the State Bureau of Investigation. The defendant was ultimately convicted of aiding and abetting obtaining property by false pretenses, accessing a government computer, and altering court records, as well as unlicensed bail bonding.

On appeal, the defendant argued that the trial court erred in denying his motions to dismiss on the grounds that the state had failed to present sufficient evidence that he (i) aided and abetted the commission of the felony offenses, or (ii) obtained property in excess of \$100,000, since at the time the false representations were made the interests of the state and the school board in the bonds to be forfeited were only speculative. The Court of Appeals rejected both arguments, finding that they were not properly preserved at trial. The aiding and abetting argument was never specifically raised in the defendant's motions, and while the defendant did raise the property argument in his first motion to dismiss, his later motion to dismiss at the close of all the evidence only challenged the dollar value of the property rather than the issue of whether it qualified as a thing of value at all, so the court ruled that the second argument was likewise barred on appeal.

The North Carolina Supreme Court disagreed and held that the defendant properly preserved both arguments for appeal. Distinguishing objections and constitutional challenges which must be specifically argued at trial to be preserved, the arguments challenging the sufficiency of the evidence in this case were properly preserved under Rule 10(a)(3) of the Rules of Appellate Procedure. A motion to dismiss "places an affirmative duty upon the trial court to examine the sufficiency of the evidence against the accused for every element of each crime charged," so the "simple act of moving to dismiss at the proper time preserved all issues related to the sufficiency of the evidence for appellate review." The jurisprudence of the Court of Appeals that has attempted to distinguish between general and specific motions to dismiss for sufficiency of the evidence "and to assign different scopes of appellate review to each category, is inconsistent with Rule 10(a)(3)."

Turning to the merits of the defendant's arguments, the court held that the state presented sufficient evidence to withstand a motion to dismiss on both issues. First, viewed in the light most favorable to the state, the evidence established that the defendant aided and abetted the clerk's actions by meeting with him and agreeing to the scheme, sending him text messages with instructions and case names, and paying him for entering the fraudulent motions. Second, G.S. 14-100 covers both obtaining and attempting to obtain a thing of value, so the defendant's efforts to reduce the amount he would have to pay on the forfeited bonds constituted a "thing of value" within the broad scope of the statute.

The defendant waived his right to severance when he did not file a motion to sever

State v. Yarborough, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 21, 2020)

The defendant was convicted after a jury trial of first-degree murder, attempted first-degree murder, and other serious felony charges after he shot and killed his former girlfriend and then pistol-whipped and fired a gun at another woman, a registered nurse. On appeal he argued that the trial court erred by joining the charges for trial. The defendant had objected to the State's motion for joinder, but he never filed a motion to sever charges as provided in G.S. 15A-927. The Court of Appeals concluded that the defendant waived the issue, declined to review the issue in its discretion under Rule 2 of the Rules of Appellate Procedure, and further declined to consider whether he received ineffective assistance of counsel for his trial lawyer's failure to file a motion to sever charges. The Court of Appeals deemed the latter issue more appropriate for a motion for appropriate relief filed in the trial court, and so dismissed that claim without prejudice.

Third prosecution based on same alleged conduct was (1) vindictive and (2) violated the defendant's rights to joinder of offenses under G.S. 15A-926

State v. Schalow ("Schalow II"), ___ N.C. App. ___, 837 S.E.2d 593 (Jan. 7, 2020); *review granted*, ___ N.C. ___, 839 S.E.2d 340 (April 1, 2020)

The defendant was charged with attempted first-degree murder and various other assaults against his wife in Henderson County. The State proceeded only on the attempted murder at trial. After the jury was empaneled, the trial court discovered that the indictment failed to allege malice, an essential element for attempted first-degree murder. The trial court ordered a mistrial over the defendant's objection and dismissed the indictment. At retrial, the defendant's double jeopardy argument was overruled, and the defendant was convicted of attempted murder. On appeal in that case ("*Schalow I*"), the Court of Appeals determined that the second prosecution violated the Double Jeopardy Clause and vacated the conviction (Phil Dixon blogged about that case, [here](#)). Following that ruling, the State sought discretionary review in the Supreme Court and indicted the defendant on 14 counts of felony child abuse relating to the assaults on his wife. In remarks to the media, the District Attorney stated as follows:

If . . . the Supreme Court refuses to take up the case, then I have a plan to address that circumstance and will take additional action to see that [Defendant] is held accountable for his actions. . . . I will do everything that I can do to see that [Defendant] remains in custody for as long as possible. Slip op. at 4.

The N.C. Supreme Court declined to review the Court of Appeals decision in *Schalow I*, and the DA posted on social media about his intentions to ensure the defendant stayed in custody, that he received a sentence similar to his first, and to prosecute the defendant again. Additional indictments for assaults against his wife were brought. All of the new charges in the third prosecution were based on the same alleged assaults against the defendant's wife that constituted the basis for the first prosecution.

At trial, the defendant again moved to dismiss. He claimed the prosecution violated double jeopardy, constituted a vindictive prosecution, and was in violation of his rights to joinder of offenses. The trial court denied the motion, and the defendant sought certiorari review of that decision pretrial, which was granted. [The defendant had previously sought pretrial review of the denial of his motion to dismiss for

double jeopardy in *Schalow I* and was denied.] The court granted relief on the vindictive prosecution and joinder claims.

(1) Under *North Carolina v. Pearce*, 395 U.S. 711 (1969), it is a due process violation for the court to impose penalties on the defendant in response to the defendant's successful appeal or collateral attack. *Blackledge v. Perry*, 417 U.S. 21 (1974) later extended the protection from vindictive acts to charging decisions by the prosecution, so that the State could not try the defendant for more serious charges following the defendant's successful appeal from the original charges of conviction. "The *Blackledge* court clarified that a defendant need not show that the prosecutor actually acted in bad faith; instead, where the reviewing court determines that 'a realistic likelihood of 'vindictiveness' exists, a presumption of vindictiveness may be applied." *Id.* at 7. To demonstrate a vindictive prosecution, the defendant must show that either actual intent to punish the defendant for the lawful exercise of his rights, or that the facts support presuming vindictiveness and the State failed to rebut that presumption. If a prosecution is found to be vindictive, the conviction must be vacated.

Here, the district attorney charged the defendant three different times for the same conduct. Each time, the district attorney increased the seriousness and number of charges, resulting in greater sentencing exposure to the defendant at each prosecution. The first case charged attempted manslaughter (based on the flawed indictment for attempted first-degree murder); the second case involved attempted first-degree murder; the third case involved 14 counts of child abuse, three class C assaults, two class F assaults, and one class H assault, with aggravating factors alleged in each. The defendant was facing over 35 years more time in prison in the third case, compared to the second. "[W]here a defendant is indicted on charges carrying a 'significantly increased potential period of incarceration' after the defendant 'does what the law clearly permits him to do'—here, appealing from the judgment in the Second Prosecution—a reviewing court may presume prejudice." *Id.* at 10. The presumption here was "particularly appropriate here" due to the involvement of the same prosecutor at each stage. The court rejected the State's argument that no presumption of vindictiveness should apply, because the State was only attempting to correct pleadings errors. The defendant was exposed to 19 more charges in the third prosecution, carrying significantly increased penalties. This was not rectifying pleading defects and warranted a presumption of vindictiveness.

The State also failed to rebut the presumption of vindictiveness. The only evidence showed that the DA charged in response to the outcome of its appeal of *Schalow I* and that the DA was determined to ensure the defendant stayed in custody "as long as possible." Even if this did not amount to actual vindictiveness (which the court did not decide), the defendant showed that his case warranted a presumption of vindictiveness which the State failed to overcome. "[T]o hold such evidence can be sufficient to overcome a presumption of vindictiveness would effectively eviscerate the presumption altogether, and thereby render *Pearce* and its progeny nugatory." *Id.* at 12. The new charges were therefore dismissed.

(2) Under G.S. 15A-926, related offenses may be joined for trial. If a defendant is tried on a joinable offense and thereafter is put on trial for another related offense, he may move for dismissal for failure to join offenses, subject to the exceptions in the statute. Under *State v. Warren*, 313 N.C. 254 (1985), where the prosecution withholds additional charges in an effort to avoid statutory joinder of offenses, the new charges must be dismissed. In the words of the *Warren* court:

If a defendant can show, for example, that during the first trial the prosecutor was aware of substantial evidence that the defendant committed the crimes for which he was later indicted, this would be some

evidence that the delay in bringing the later indictment was for the purpose of circumventing the statute. A showing that the State's evidence at the second trial would be the same as the evidence presented in the first trial would also tend to show that the prosecutor delayed the indictment on the additional crimes for such purpose. A finding of either or both circumstances would support but not compel a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute. *Id.* at 15.

Here, the new charges were all based on the same conduct as the original assault charges that were dismissed before trial, and the child abuse allegations were apparently based on the theory that the defendant assaulted his wife in the presence of the child, causing mental injury. The State also represented to the trial court in a pretrial hearing that there had been no new investigation and would be no new substantive evidence at trial. The defendant therefore met both prongs of *Warren*—the prosecutor knew about substantial evidence of the assaults and child abuse during the earlier prosecutions, and the evidence necessary to prove those offenses was no different than the evidence presented in the earlier trial. While these findings “support but do not compel” the conclusion that the State purposefully held back additional charges to circumvent joinder rights (and no prior case has ever reversed the denial of motion to dismiss based on *Warren*), here, it was appropriate. According to the court:

[B]ecause (1) Defendant has shown that both *Warren* circumstances are present, (2) the State has had multiple previous opportunities to join the offenses on which it now seeks to try Defendant, (3) the State has neither argued that it was somehow unable to try the offense at an earlier time nor proffered any explanation for why the offenses were not tried along with the earlier charge, we hold that the *Warren* exception should apply. *Id.* at 21.

The defendant was therefore entitled to dismissal of the new charges for violation of his rights to statutory joinder of offenses. The court did not rule on the defendant's double jeopardy argument because it granted relief on the other two claims. The matter was reversed and remanded for the motion to dismiss to be granted.

Closing Argument

Prosecutor's statements in closing argument regarding the defendant's decision to plead not guilty deprived the defendant of a fair trial

State v. Goins, ___ N.C. App. ___, 839 S.E.2d 858 (Feb 4, 2020), *temp. stay granted*, ___ N.C. ___, 837 S.E.2d 549 (Feb. 20, 2020)

During closing argument at the defendant's trial for attempted first-degree murder, assault with a deadly weapon on a law enforcement officer and possession of a firearm by a felon, the prosecutor repeatedly brought up the defendant's failure to plead guilty. The prosecutor stated, “Might ask why would [Defendant] plead not guilty? I contend to you that the defendant is just continuing to do what he's done all along, refuse to take responsibility for any of his actions. That's what he does. He believes the rules do not apply to him.” Later, the prosecutor stated, “[Defendant's] not taking responsibility today. There's nothing magical about a not guilty plea to attempted murder. He's got to admit to all the other charges. You see them all on video. The only thing that's not on video is what's in his head. He also knows that those other charges carry less time. There's the magic.” The defendant did not object to

these statements, and the trial court did not intervene. On appeal, the defendant argued that these references in the State's closing argument violated his right to a fair trial. Over a dissent, the Court of Appeals agreed.

The court noted that criminal defendants have an absolute constitutional right to plead not guilty and be tried by a jury of their peers. This right encompasses the right to be free from condemnation in front of the jury for making that choice. The court held that the prosecutor's statements in closing argument complaining about the defendant's decision to plead not guilty violated his right to a fair trial and, as a result, ordered a new trial.

A dissenting judge would have held that the defendant waived any constitutional objection to the prosecutor's closing argument by failing to raise it below and that, while the prosecutor's references to the defendant's failure to plead guilty were improper, the defendant could not show prejudicial error given the overwhelming evidence of his guilt.

In a murder case where the defendant asserted self-defense, the prosecutor's closing argument that a fear based on the victim's race would not be a reasonable fear did not prejudice the defendant

State v. Copley, ___ N.C. ___, 839 S.E.2d 726 (Apr. 3, 2020)

In this first-degree murder case, the defendant, who was white, was charged with shooting through a window in his garage door and killing the victim, who was black. The victim was one of a group of about 20 people who had briefly gone to a party at a nearby house, and he was shot and killed when he ran through a portion of the defendant's yard. The defendant admitted to the shooting, but argued that he was acting in self-defense and defense of habitation. At trial, the defendant testified that he had yelled at the group to "shut the f— up" and they yelled back "f— you; go inside; white boy." The state's evidence included a recorded 911 call in which the defendant reported there were "hoodlums" racing in the street (the defendant later admitted this was false) and stated that he was "going to kill him," he was "locked and loaded," and he would "secure the neighborhood."

During closing arguments, the prosecutor stated that the issue of race was "the elephant in the room" since it had been raised during jury selection and alluded to during the defendant's evidence and closing argument. The defendant objected, but the trial court overruled the objection and allowed the prosecutor to argue that if the defendant's fear of the victim was based on the victim's race, then it was not a reasonable fear that would support a claim of self-defense: "Now, reasonableness and that fear, a fear based out of hatred or a fear based out of race is not a reasonable fear, I would submit to you. That's just hatred. And I'm not saying that's what it is here, but you can consider that. And if that's what you think it was, then maybe it's not a reasonable fear." The defendant was convicted and appealed. Citing *State v. Jones*, 355 N.C. 117 (2002), the Court of Appeals held that the prosecutor's statements regarding race were an improper appeal to bias and reversed the conviction. [Note: For further discussion of the Court of Appeals decision, see Emily Coward, "*State v. Copley: Addressing Race During Closing Argument*," N.C. Criminal Law Blog (June 18, 2019).]

The North Carolina Supreme Court reversed the Court of Appeals, finding that neither the majority nor the dissent had conducted a "complete prejudice analysis" in the case. The higher court acknowledged *Jones* but explained that it was an inadequate basis for comparison because the challenged statements in *Jones* arose during the closing arguments in the sentencing phase of a death penalty case. To properly evaluate prejudice during the guilt-innocence phase of a non-capital case, the reviewing court must also consider: (i) the other evidence of the defendant's guilt; and (ii) the remainder of the closing argument. Assuming without deciding that the challenged statements were improper, the defendant failed to establish prejudice in this case. First, viewing the comments about race "in the

context of the entire closing,” the court found that the comments were only a small part of an argument that primarily focused on the defendant’s lack of credibility, the strong evidence of his guilt, and the absence of a basis for claiming self-defense, which undermined a finding of prejudice. Second, in light of all the other “compelling evidence” of the defendant’s guilt in this case (e.g., incriminating statements recorded on the 911 call, firing through a closed garage door, challenges to the defendant’s credibility, and his admission to the shooting), the defendant failed to meet his burden of demonstrating a reasonable possibility that the jury would have acquitted him in the absence of the prosecutor’s comments. The appellate court’s decision was reversed, and the case was remanded for ruling on the defendant’s remaining arguments.

Justice Earls wrote separately in concurrence to address the unresolved issue of whether the prosecutor’s comments were improper. Derogatory or inflammatory statements appealing to bias or prejudice are improper, but neutral and non-derogatory statements regarding race are permissible if they bear a material relevance to an issue in the case (such as motive). Justice Earls concluded that the prosecutor’s statements in this case were not an appeal to racial animus; instead, they addressed relevant issues of race that had arisen during jury selection and the defendant’s testimony. Therefore, it was “proper and permissible for the prosecutor to urge the jury not to allow any racial considerations or stereotypical assumptions about young black men to impact their ultimate decision about what was reasonable fear in these circumstances.”

Jury Issues

(1) Once trial court rules on the merits of a *Batson* challenge, the question of whether the defendant made a prima facie case is moot; (2) Multiple errors in *Batson* analysis required new *Batson* hearing; trial court failed to historical evidence of discrimination, failed to conduct comparative analysis of juror answers, and improperly weighed the defendant’s use of peremptory challenges

State v. Hobbs, ___ N.C. ___, ___ S.E.2d ___ (May 1, 2020)

The defendant was tried capitally in Cumberland County and convicted of first-degree murder (among other offenses). On appeal, he argued the trial court erred in denying his *Batson* challenges to three peremptory strikes used by the State against black jurors during jury selection. The Court of Appeals unanimously affirmed ([here](#)). On discretionary review, the North Carolina Supreme Court reversed in a 6-1 divided opinion.

Under *Batson v. Kentucky*, 476 U.S. 79 (1986), when a defendant objects that the State has struck a juror for racially discriminatory reasons, the court undertakes a three-step hearing. First, the court determines whether the defendant made a prima facie showing that the exercise of the peremptory strike was discriminatory. The defendant meets that hurdle “by showing that the totality of the relevant facts give rise to an inference of racial discrimination [and] is not intended to be a high hurdle . . .” Slip op. at 8-9. At this stage, the defendant’s burden is one of production, not persuasion. If the defendant meets that burden, the State must then provide a race-neutral justification for the use of the strike. If the State provides facially neutral explanations, then the court proceeds to the third step, allowing the defendant an opportunity to rebut the State’s explanation and show purposeful discrimination by the State in its exercise of the strike. At this stage, the court must consider all of the evidence and determine whether the prosecution’s use of the strike “was motivated in substantial part by discriminatory intent.” *Id.* at 12.

(1) As to the defendant's first two *Batson* objections, the trial court ruled against the defendant at the first stage, finding that he did not make a prima facie case. However, the trial court proceeded to the second and third steps of the analysis, asking the State to justify its use of the strikes and then denying the *Batson* challenge on the merits. The Court of Appeals held that the issue of whether the defendant made a prima facie case was not moot and agreed with the trial court that a prima facie case had not been established. This was error, as that issue was moot. *See, e.g. State v. Robinson*, 330 N.C. 1, 17 (1991) (so holding). "When the trial court has already ruled that a defendant failed in his ultimate burden of proving purposeful discrimination, there is no reason to consider whether the defendant has met the lesser burden of establishing a prima facie case of discrimination." *Hobbs* slip op. at 13 (citations omitted). These circumstances were distinguishable from other cases cited in the Court of Appeals decision where the trial court ruled on the first step but did not conduct a complete *Batson* analysis.

(2) The trial court and the Court of Appeals failed to properly weigh the defendant's evidence of purposeful discrimination. As to the first two challenges, the Court of Appeals did not consider purposeful discrimination at all, ruling only that the defendant did not make a prima facie showing. Since that issue was moot, the Court of Appeals should have conducted a full *Batson* analysis. While the trial court purported to conduct a "full hearing" on the *Batson* claims for the first two challenged jurors, its analysis of purposeful discrimination also failed to consider all of the evidence. The trial court noted the races of the defendant, the victims, and witnesses, and observed that the State had used three-fourths of its peremptory challenges on black venire members. It also noted that the defendant had exercised nearly half of his peremptory challenges to excuse black venire members. The trial court listed the State's race-neutral justifications and stated that it "considered" the defendant's argument that comparative answers between jurors struck and jurors kept by the State rebutted those justifications. It concluded no discrimination had occurred and did not specifically address the defendant's argument regarding historical evidence of discrimination in jury selection in the county. Multiple errors in this analysis required a new *Batson* hearing.

One, the defendant's use of peremptory challenges is irrelevant to determining the State's intention in striking the juror, and it was improper for the trial court to consider that evidence. Second, the trial court failed to address all of the defendant's evidence of discriminatory intent, including evidence of a pattern of historical discrimination in voir dire within the county. Without explaining how this evidence was weighed, the trial court's analysis was incomplete. Finally, the trial court erred by failing to conduct comparative analysis of the answers of the jurors struck and of those passed on by the State. The trial court examined the different questions asked by the State of the jurors but failed to meaningfully compare the jurors' answers in response. Evidence in the record suggested that white jurors passed by the State gave answers similar to those given by similar black jurors who were excused by the State. This was relevant and should have been addressed. In the court's words:

Evidence about similar answers between similarly situated white and nonwhite jurors is relevant to whether the prosecutor's stated reasons for exercising a peremptory strike are mere pretext for racial discrimination. Potential jurors do not need to be identical in every regard for this to be true. 'If a prosecutor's proffered reason for striking a black panelist applies just as well to an otherwise-similar nonblack who is permitted to serve, that is evidence tending to prove purposeful discrimination to be considered at *Batson's* third step'. *Id.* at 21-22 (citations omitted).

These errors required reversal and remand to the trial court for new hearing. The same errors affected the trial court's denial of the defendant's third *Batson* claim. On remand, the trial court was instructed to conduct another *Batson* hearing as to all three claims, taking into account the totality of the evidence, including comparative analysis of juror answers and the historical evidence regarding racial discrimination. The trial court was further instructed to make findings of fact and conclusions of law, and to certify its order to the North Carolina Supreme Court within 60 days or "within such time as the current state of emergency allows." *Id.* at 24.

Justice Newby dissented and would have affirmed the trial court and Court of Appeals. [Prior to the Supreme Court's decision, Emily Coward blogged about this case, [here](#).]

Trial court did not abuse its discretion in (1) determining that a witness for the State was competent to testify despite his impairment and (2) denying the defendant's motion for a mistrial based on the testimony from the impaired witness

State v. Burgess, ___ N.C. App. ___; ___ S.E.2d ___ (May 5, 1010)

At the defendant's trial for drug charges, a witness who purchased drugs from the defendant testified for the State. After the witness testified, the trial court expressed concern that the witness appeared to be impaired by drugs or alcohol. The court ordered the witness's probation officer to drug-test the witness. The test was positive for amphetamines and methamphetamine. The probation officer testified before the jury about the testing of the witness and the positive results.

The defendant moved for a mistrial and to disqualify the witness under Rule of Evidence 601(b) and strike his testimony. The trial court denied both motions. The defendant was convicted of several drug charges and appealed. The Court of Appeals found no error.

(1) Impairment by drugs does not render a witness incompetent if the witness is able to express himself well enough to be understood and is able to understand the obligation to testify truthfully. The Court of Appeals determined that the defendant failed to demonstrate that the witness did not meet this standard. The witness's testimony was corroborated by other evidence, which, while not directly showing his competency, indicated that he was able to recall dates and events. The trial judge, who was in the best position to assess the competency of the witness, determined that he could understand the witness's testimony and that the witness was generally understandable by the jurors. Given the trial court's ample opportunity to observe the witness, it was not required to conduct a *voir dire* to assess the witness's competency. Finally, the Court of Appeals noted that evidence of the witness's impairment was presented to the jury, and jurors were free to determine whether they found the witness's testimony credible. The Court of Appeals thus concluded that the trial judge did not abuse its discretion in denying the defendant's motion to exclude and strike the witness's testimony.

(2) A mistrial is a drastic remedy warranted only for serious improprieties that make it impossible to obtain a fair and impartial verdict. The Court of Appeals rejected the defendant's argument that the giving of testimony by a key witness for the State who was impaired met this standard. The witness was competent to testify despite his impairment and the jury was informed of his impairment. Thus, the trial court did not abuse its discretion in denying the defendant's motion for a mistrial.

New trial required where judge failed to indicate that declining to provide jurors with a transcript of witnesses' testimony was an exercise of discretion

State v. Nova, ___ N.C. App. ___, 841 S.E.2d 330 (Mar. 17, 2020)

The defendant was indicted for taking indecent liberties with a child and went to trial. At trial, the jury heard testimony from the victim and the defendant. During deliberations, the jury asked to see a transcript of both witnesses' testimony. The trial judge told the jury that "unlike on TV" transcripts are not made in real time, it would take "a couple weeks at the fastest" to create them, so it is "just not able to be done." On appeal, the defendant argued this was reversible error because the trial judge failed to clearly state that she was declining to provide a transcript as a matter of judicial discretion, rather than because it was impossible. The appellate court agreed, based on nearly indistinguishable binding precedent, even though in this case it "readily can be inferred" from the trial judge's comments that she was aware that she had the discretion to order a transcript but was choosing not to do so because of the delay it would cause. The court noted that "we believe the Supreme Court should review this line of cases," but "as an intermediate appellate court [...w]e are bound by both our own precedent and the Supreme Court's, and thus constrained to find error."

Additionally, the error is deemed prejudicial when it is material to the determination of guilt or innocence and involves issues of confusion or contradiction such that the jury would want to review the evidence to understand it. Both factors applied in this case because there was no physical evidence and "the State's case relied entirely on witness testimony." Since the jury asked to review a transcript of that testimony, and the trial court erroneously told the jury it was not possible, "there is a reasonable possibility that the trial court's error affected the outcome of the jury's deliberations." The conviction was vacated and remanded for a new trial.

Failure to hold *Remmer* hearing for potential juror bias was reversible error

U.S. v. Johnson, 954 F.3d 174 (Mar. 25, 2020)

This Maryland case involved various drug, gun, and racketeering charges against multiple gang members, including charges of conspiracy to murder a witness. The witness had been in protective custody but was "evicted" from the program for violating its rules and then murdered, despite a tip to police the night of his murder about the threat. During trial testimony about the murder ("the heart of the government's case"), the jury saw graphic images of the deceased victim and heard about "frantic efforts" by the police to find the witness on the night of his death. After this testimony, several jurors informed the clerk that they'd noticed the defendant talking with his defense team and that he had "looked up" at the jurors. The trial judge dismissed this concern and took no further action. Later that day, "one or more" jurors informed the clerk of their concerns that the defendant might have learned personal details of the jurors during jury selection. At the end of that day, jurors passed a note to the clerk again expressing concerns about their safety. The judge dismissed these concerns as too general and not warranting further inquiry. Motions for mistrial and individual voir dire of jurors on the issue were denied.

More than a month later during trial, a bailiff informed the judge that a juror had reported that people associated with the defendant had tried to photograph the juror while the jurors left the courtroom, and that this concern was expressed in front of the rest of the jury. The judge ordered a law clerk and deputy to question each juror on whether something happened. The questioning took place off the record and outside the presence of the lawyers or judge. The questioning was limited to whether something had

happened and did not inquire into juror's feelings or impartiality. Juror #4 responded to the questioning by reporting he saw two women photograph jurors and that he informed some of the other jurors of this concern. Other jurors confirmed that Juror #4 had reported this concern. Other jurors reported seeing people on their phones in the public spaces of the courthouse but didn't believe the jurors were being photographed. The trial judge determined that nothing corroborated Juror #4's concerns and concluded that no juror had been photographed. Out of concern that the juror may potentially have been prejudiced, Juror #4 was dismissed. The remaining jurors were not informed of why Juror #4 was dismissed, and the court denied a request to individually voir dire the jury on any potential prejudice.

Law enforcement investigated the issue the next day and searched a cell phone of a person seen by the jurors but failed to find any images of the jurors. Hearing this, the trial court informed the jury of the investigation and its results. It concluded any concerns had been addressed and again declined to grant a mistrial or question the jurors further. The jury convicted on all counts and the defendants moved for a new trial, arguing that the failure to hold a *Remmer* hearing on the issue of potential juror bias was error. The court denied the motion, the defendants were sentenced to life and appealed.

Outside or external influences on a jury affecting their deliberative process violate a defendant's right to an impartial jury under the Sixth Amendment. Pursuant to *Remmer v. U.S.*, 347 U.S. 227 (1954), a defendant who makes an initial credible showing "that 'unauthorized contact was made,' and that the contact 'was of such a character as to reasonably draw into question the integrity' of the trial proceedings . . ." is entitled to an evidentiary hearing on the effect of the contact on the jury, as well as a presumption that such outside contact affected the jury's impartiality (a "*Remmer* presumption"). Slip op. at 9. Such outside conduct may be direct or indirect. The government can overcome that presumption by demonstrating "'no reasonable possibility' that the jury 'was influenced by an improper communication.'" *Id.* at 10. Here, the circumstances involving Juror #4's reports met *Remmer*'s requirements and a hearing should have been held.

The trial judge procedurally erred by having court staff, rather than the trial judge, conduct jury questioning. "[T]he procedure employed by the district court disregarded the fact-finding purpose of a *Remmer* hearing, which is based on considerations of due process. . . This procedure also deprived the defendants of the presumption of prejudice to which they were entitled under *Remmer*." *Id.* at 11. The trial judge also substantively erred by failing to question jurors on the impact of the reports by Juror #4, instead focusing only on whether in fact something had happened. "Without questioning each juror individually, the district court could not know whether any remaining jurors were prejudiced by Juror #4's stated concerns, even if those jurors had not witnessed any of the alleged activity." *Id.* at 13. The district court's denial of the post-trial motion was therefore vacated, and the matter remanded for a *Remmer* hearing.

Judge Motz dissented. She would have found that the conduct at issue was "innocuous" and that the defendants were not entitled to a *Remmer* presumption or hearing.

Crimes

Theft Offenses

In a larceny case, the State established no more than the defendant's mere opportunity to commit the crime and failed to present sufficient evidence that the defendant was the perpetrator

State v. Campbell, 373 N.C. 216 (Dec. 6, 2019)

In a larceny case, the State failed to present sufficient evidence that the defendant was the perpetrator. The State's evidence at trial showed that audio equipment had been taken from Manna Baptist Church after the church doors were inadvertently left unlocked following a Wednesday evening service. The doors were locked by a church secretary the next morning and remained locked until Sunday morning. The church's pastor discovered that the equipment was missing following the Sunday service. The defendant's wallet was found near where some of the equipment had been stored. In an interview with an investigator, the defendant admitted to being at the church on the night the doors were left unlocked but claimed to not remember anything that he had done while he was there. At trial he testified that while at the church he did "a lot of soul searching" and drank a bottle of water but that he "did not take anything away from the church." An EMT who interacted with the defendant soon after he left the church testified that the EMT did not see him carrying anything at that time.

The court reviewed "well-settled caselaw" establishing that "evidence of a defendant's mere opportunity to commit a crime is not sufficient to send the charge to the jury." Reviewing the evidence, the court said that while it "may be fairly characterized as raising a suspicion of defendant's guilt of larceny," crucial gaps existed in that "[t]he State failed to actually link defendant to the stolen property or to prove that he was in the church at the time when the equipment—which was never recovered—was stolen." The court noted that the evidence showed a four-day time span over which the theft could have occurred and that a number of other persons had access to the interior of the church during that period. It further noted that the State was unable to show how the defendant would have been physically able to carry away the cumbersome audio equipment at issue. The evidence presented was, in the court's words, "simply not enough to sustain a conviction for larceny."

State's impeachment of witness by prior inconsistent statements was not substantive evidence; evidence that was substantive was insufficient to support conviction of aiding and abetting robbery with a dangerous weapon

State v. Ingram, ___ N.C. App. ___, 839 S.E.2d 865 (Feb. 18, 2020)

The basic facts of this case are as follows: Marvin Price closed his account at the Mountain Credit Union, withdrawing \$25,000 in cash. He put \$300 to \$400 in his wallet and the remainder in an envelope. When he arrived home and got out of his car, he was robbed at gunpoint by Michael Ingram, who asked Price, "Where is the \$25,000?" Price claimed that he deposited it at another bank, although he had not actually done so, and Michael Ingram took the wallet only. In a separate case, Michael Ingram was convicted of robbery with a dangerous weapon. The defendant in this case is Michael Ingram's brother. He was tried jointly with Ms. Robinson, who worked at the credit union and with whom the defendant had a child, on charges of conspiracy to commit robbery with a dangerous weapon and aiding and abetting robbery with a dangerous weapon. They were acquitted of conspiracy and found guilty of aiding and abetting. This appeal concerned the defendant only.

The question addressed by the Court of Appeals was whether the State offered sufficient evidence to withstand the defendant's motion to dismiss, which the trial judge had denied. At trial, the State called Michael Ingram, who testified that he did not remember the robbery and did not know why he had been convicted. He did not testify to anything incriminating about the defendant. The State then called a detective to impeach Michael Ingram. The detective testified that Michael Ingram said that the defendant told him about the \$25,000 bank withdrawal and drove him to Price's home. The Court of Appeals recognized that the detective's testimony was limited to impeaching Michael Ingram's credibility. The only substantive evidence offered by the State was that Ms. Robinson had a relationship

with the defendant, that she was working at the credit union along with three other employees when Price withdrew the \$25,000, and that she talked on the phone with the defendant while Price was at the credit union. The State argued that the jury could infer from this evidence that Ms. Robinson told the defendant of the withdrawal and that the defendant then arranged with his brother to rob Price. The Court found that while circumstantial evidence may support conviction of a crime, the State's argument was speculative. The Court concluded that without the information from the detective's testimony, which was not admitted for substantive purposes, there was not substantial evidence to withstand the defendant's motion to dismiss. The Court concluded that the trial judge should have granted the defendant's motion and reversed the judgment. [Note: The Court found it unnecessary to address the defendant's other issue on appeal—that the trial judge erred in permitting the detective to testify about Michael Ingram's statements because the State was aware that Michael Ingram would not be forthcoming as a witness; the real purpose of the detective's testimony was to get otherwise inadmissible hearsay before the jury in violation of *State v. Hunt*, 324 N.C. 343 (1989); and the testimony was unduly prejudicial and not cured by the trial judge's limiting instruction.]

Conspiracy

Instructing the jury that the defendant may be convicted of conspiring with people other than those named in the indictment violated the defendant's right to be informed of the accusation against him; new trial

State v. Chavez, ___ N.C. App. ___, ___ S.E.2d. ___ (Apr. 7, 2020)

This Mecklenburg County case involved charges of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The defendant and two other men (one of whom was unidentified) entered the victim's home and attacked him with a machete and hammer. The victim's girlfriend escaped with an infant and called police. The defendant and his named co-conspirator apprehended the girlfriend outside of the home, where the defendant instructed the other man to kill her. He refused, and the defendant fled; the other man stayed with the woman until police arrived (and became the named co-conspirator in the indictment). The defendant was convicted of all charges at trial and sentenced to a minimum term of 336 months.

Reversing, the Court of Appeals held that the trial court erred by instructing the jury that the defendant may be convicted of conspiring with people other than those named in the indictment violated the defendant's right to be informed of the accusation against him. Under *State v. Mickey*, 207 N.C. 608 (1935), such instruction "virtually put the defendant upon trial for an additional offense." *Id.* at 15 (citing *Mickey*). This was plain error.

Where there is no variance between the indictment, the evidence, and the jury instructions, there is no error where the trial court fails to name the specific co-conspirators alleged in the indictment. See *State v. Pringle*, 204 N.C. App. 562 (2010). The trial court in such a situation may instruct the jury that the defendant could have an agreement with "at least one other person." Where, as happened here however, a single co-conspirator is named in the indictment, but the evidence shows a conspiracy between more than two people, such instruction fails to comport with the evidence and indictment and constitutes error. Further, this error was prejudicial, requiring a new trial on the conspiracy charge:

Because the trial court's instruction error permitted the jury to convict Defendant on a theory not legally available to the State, the erroneous instruction was grave error which amounted to a denial of Defendant's fundamental right to be informed of the accusations against him, N.C. Const. Art. I, Sec. 23, and thus the trial court plainly erred its jury instruction on the charge of conspiracy to commit first-degree murder. . . Accordingly, we order a new trial on the conspiracy to commit first-degree murder. *Id.* at 21.

Impaired Driving

The trial court erred by denying the defendant's motion to dismiss DWI and felony death by motor vehicle charges due to insufficient evidence of impairment; sufficient evidence of malice to submit a second-degree murder charge to the jury

State v. Nazzari, __ N.C. App. __, 840 S.E.2d 881 (Mar. 3, 2020)

In this case arising from a fatal automobile collision involving convictions for second-degree murder, DWI, felony death by motor vehicle, and failure to maintain lane control, the trial court erred by denying the defendant's motion to dismiss the DWI and felony death by motor vehicle charges due to insufficient evidence of impairment. There was, however, substantial evidence of malice with respect to second-degree murder and the trial court did not err in submitting that charge to the jury, nor did it err in submitting to the jury the failure to maintain lane control charge.

Likening the case to its previous decision in *State v. Eldred*, 259 N.C. App. 345 (2018), the court found that there was insufficient evidence the defendant was impaired at the time of the collision where the officer who formed the opinion on impairment, an opinion based on observations occurring five hours after the collision, did so "entirely through passive observation" of the defendant, without requesting him to perform any field tests. Moreover, the court noted, the officer did not ask the defendant if or when he had ingested any impairing substances. The trial court erred by denying the defendant's motion to dismiss the DWI charge, and, because DWI was a necessary element of the felony death by motor vehicle charge, also erred in denying the defendant's motion to dismiss that charge.

Substantial evidence supported the failure to maintain lane control charge under G.S. 20-146(d)(1), a statute providing the disjunctive mandates that a motorist must (1) drive his or her vehicle "as nearly as practicable entirely within a single lane" and (2) refrain from changing lanes unless he or she "has first ascertained that such movement can be made with safety." The defendant had argued that the fact that a tow truck partially obstructed his lane of travel meant that it was not "practicable" for him to drive entirely within that lane. The court rejected that argument, finding that a reasonable juror could infer that the defendant could have avoided departing from his lane had he been traveling at a reasonable speed for conditions. The court also explained that there was substantial evidence that the defendant failed to ascertain that his lane change movement could be made with safety as the tow truck also obstructed the defendant's view of the perils which lay in his chosen lane change path.

The jury was instructed that the defendant would need to be found guilty of either DWI or failure to maintain lane control to be guilty of second degree murder, and having upheld his conviction on the lane control offense the court's only remaining task was to determine whether there was substantial evidence that the defendant acted with malice. Recounting the evidence in the light most favorable to the state, the court noted that the defendant was driving while knowing that his license was revoked for

DWI and non-DWI offenses, was driving at an irresponsible speed for the icy conditions, made an unconventional maneuver to attempt to pass the tow truck partially obstructing his lane, became involved in a severe collision, left the scene without ascertaining whether anyone was harmed, and washed his car in an apparent attempt to destroy evidence and avoid apprehension. The court also noted that the defendant's extensive record of motor vehicle offenses and car accidents was published to the jury, allowing the jury to infer that he was aware of the risk to human life caused by his behavior on the road but nevertheless once again engaged in dangerous driving with indifference to its consequences. This substantial evidence supported the element of malice by reckless disregard for human life.

Finally, the court determined that any error related to the admission of certain evidence was harmless because that evidence was relevant only to the issue of impairment, and further determined that the trial court's denial of the defendant's request for a jury instruction on the defense of accident, assuming the denial was error, was harmless because the jury's verdicts suggested that it had rejected the notion that the defendant's fatal unconventional traffic maneuver was unintentional.

Drug Offenses

Defendant's possession of 6.51 grams of methamphetamine after leaving a residence under surveillance for drug-related complaints, defendant's plans to visit a person charged with trafficking drugs, and his possession of plastic baggies were sufficient to show that defendant possessed with intent to sell or deliver methamphetamine

State v. Blagg, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2020)

Defendant was stopped by law enforcement officers after leaving a house under surveillance for suspected drug activity. A trained narcotics dog alerted to defendant's vehicle, which was subsequently searched. Officers discovered a bag containing 6.51 grams of methamphetamine, smaller baggies containing smaller amounts of an off-white crystalline substance that was not tested, unused syringes, a loaded syringe, cotton balls and additional plastic baggies. The officers did not find cash, weapons, cutting agents, scales, or business ledgers on defendant's person or in the vehicle. After he was arrested, the defendant offered to provide information about a person wanted for drug trafficking, who we said he was going to meet. The defendant argued that this evidence was insufficient to establish that he had the intent to sell or deliver methamphetamine.

Over a dissent, the Court of Appeals rejected this argument, finding that the evidence supported an inference that Defendant had the intent to sell or deliver methamphetamine. While the quantity of methamphetamine could have been for defendant's personal use, it was "not a small amount" and was sufficiently substantial to support an inference that the defendant possessed the drugs for purposes of distributing them. This inference was supported by testimony from a law enforcement officer that the typical transaction for methamphetamine was "anywhere from half a gram to one gram." Using this standard, the defendant had more than six times, and up to 13 times, the amount of methamphetamine typically purchased.

In addition, the defendant was stopped after leaving a residence that had been under surveillance multiple times for drug-related complaints. Defendant thereafter admitted that he had plans to visit an individual charged with trafficking drugs. Finally, the officers seized plastic baggies that the jury could have reasonably inferred were used for the packaging and distribution of methamphetamine.

A dissenting judge would have concluded that the trial court erred in denying defendant's motion to dismiss charges that he possessed methamphetamine with the intent to sell or deliver it. The dissent viewed the evidence as demonstrating "nothing more than possession of an amount of methamphetamine consistent with personal use, packaged in a single bag," along with a few empty plastic bags and paraphernalia that indicated only drug use, not intended distribution.

Offenses Against Minors

The definition of the term "sexual act" provided in Article 7B of G.S. Chapter 14 is limited in applicability to its own article and, consequently, does not apply to felony child abuse under G.S. 14-318.4

State v. Alonzo, ___ N.C. ___, 838 S.E.2d 354 (Feb. 28, 2020)

Contrary to the conclusion of the Court of Appeals below, the trial court did not err in this felony child abuse case under G.S. 14-318.4 by failing to instruct the jury that the term "sexual act" for purposes of the offense is the definition provided for the term in what is now Article 7B of G.S. Chapter 14 (Rape and Other Sex Offenses). Conducting a statutory construction analysis, the Supreme Court concluded that the legislative history of the Article 7B definitions statute, G.S. 14-27.20, indicated that the provided definition of "sexual act" was intended by the legislature to apply within its own article and, consequently, not to the offense of felony child abuse. The court noted that since its enactment and throughout numerous legislative changes the definitions statute in Article 7B consistently has stated that its applicability is limited to its own article. As neither the defendant nor the state presented the issue for the court in their petitions for discretionary review, the court declined to reach the defendant's argument that the trial court's instruction on the term "sexual act," which seemed to match the definition of indecent liberties under G.S. 14-202.1, was erroneously overbroad.

A defendant charged with felony indecent exposure under G.S. 14-190.9(a1) for exposing himself or herself "in the presence of" another person less than 16 years of age is not entitled to a jury instruction requiring the jury to find that the victim could have seen the exposed private part had the victim looked

State v. Hoyle, ___ N.C. ___, 838 S.E.2d 435 (Feb. 28, 2020)

A defendant in a felony indecent exposure case under G.S. 14-190.9(a1) (person at least 18 years of age exposing private parts in the presence of a person less than 16) is not entitled to an instruction requiring the jury to find that the victim could have seen the exposed private part had the victim looked. Rather, it is sufficient for the instruction to explain that the jury must find beyond a reasonable doubt that the exposure was in the presence of another person. In this case, the defendant exposed himself to a woman while sitting in the driver's seat of his car. Her child was playing nearby and the defendant was charged with felony indecent exposure for exposing himself in the presence of the child. The trial court refused to give the defendant's requested jury instruction that for it to find that the defendant exposed himself in the presence of the child it must find that the child "could have seen [the exposure] had [he] looked," and instead instructed that the element of the offense was satisfied if it found that the exposure "was in the presence of at least one other person." Examining its analysis of a prior version of G.S. 14-190.9 in *State v. Fly*, 348 N.C. 556 (1998) and the plain language of the current statute, the court held:

[T]he requirement that the exposure be “in the presence of” the victim does not require a jury to find that the victim could have seen the exposed private parts had he or she looked. The statutory requirement that the exposure be in the presence of another focuses on where a defendant places himself relative to others; it concerns what the defendant does, not what the victim does or could do. See, e.g., *Fly*, 348 N.C. at 561, 501 S.E.2d at 659 (“The statute does not go to what the victim saw but to what defendant exposed in her presence without her consent.”). If a defendant exposes himself in public and has positioned himself so he is sufficiently close to someone under the age of sixteen, the presence element of subsection 14-190.9(a1) is satisfied.

The court went on to find that there was sufficient evidence in this case that the defendant’s exposure was in the presence of the child victim where the child was about twenty feet away from the defendant playing in the yard of the child’s home.

Threats

(1) Alleged threats prohibited by statute must be “true threats” to survive constitutional challenge; (2) proving that the statement was a true threat, and was intended as one by the defendant, are essential elements of the offense; (3) defendant must subjectively intend the statement as a true threat, and it must be one that would be perceived in context as a threat by an objectively reasonable recipient; (4) as a mixed question of law and fact, convictions for making a threat are subject to whole case review on appeal

State v. Taylor, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2020), *temp. stay allowed*, ___ N.C. ___, 839 S.E.2d 856 (Apr. 7, 2020)

The victim in this case was the elected district attorney for the county, and the defendant was an acquaintance who worked in an office building next to the courthouse. After learning that the district attorney would not be pursuing criminal charges in a matter involving the death of a child, the defendant made a series of posts on Facebook. Some of the posts broadly addressed the defendant’s general anger and frustration with politics and the judicial system as a whole, while other posts more specifically referenced the district attorney in particular, using phrases such as “death to her as well” or calling for “old time mtn [mountain] justice,” and implied his willingness to use firearms against law enforcement if they came to his house in response to the posts. The defendant deleted the posts later the same evening, but a detective who was a Facebook friend of the defendant took screenshots of the posts before they were removed. After bringing in the SBI to investigate and interviewing the defendant about the posts, the defendant was charged with threatening a court officer under G.S. 14-16.7(a). Following a jury trial, the defendant was convicted and appealed.

At trial, the defendant raised a First Amendment challenge, arguing that anti-threat statutes such as G.S. 14-16.7 must be construed as constitutionally requiring proof of a “true threat,” meaning that the communication shows a serious intent to cause harm to the victim, and further arguing that the trial court should not admit the five posts offered by the state while excluding other posts and comments that would have provided relevant context and explanation. On appeal, the defense argued that the trial court erred by: (i) denying the defendant’s motion to dismiss at the close of evidence based on the state’s failure to prove the alleged threats were true threats; and (ii) failing to properly instruct the jury on the law and requirements of a true threat.

Ruling as a matter of first impression, the Court of Appeals found in favor of the defendant and reversed the conviction. The appellate court's decision contains an exhaustive review of case law from North Carolina and other jurisdictions on the First Amendment's application to anti-threat statutes and other forms of protected speech, but it relies most extensively on *Watts v. United States*, 394 U.S. 705 (1969), *Virginia v. Black*, 538 U.S. 343 (2003), and their progeny. Based on those cases, the appellate court agreed that laws which criminalize speech must be construed in accordance with the First Amendment; here, that means a threat cognizable under the statute must be a "true threat" as defined by *Black*: "under the First Amendment the State can punish threatening expression, but only if the 'speaker means to communicate a serious expression of an intent to commit an act of unlawful violence to a particular individual or group of individuals.'" To clarify its holding and provide guidance in future cases, the court made six supplemental holdings that were not yet fully addressed by the North Carolina case law.

First, when reviewing a conviction under an anti-threat statute, the appellate court will engage in a "whole record" review. Whenever a defendant's conviction is based in part on a determination that the state met its burden of proving a true threat, the appellate court will conduct an independent review of the entire record to determine the sufficiency of the evidence and whether the defendant's First Amendment rights were preserved.

Second, establishing that an alleged threat was a "true threat" must be treated as an essential element of the offense to be proved by the state. At trial in this case, the state relied heavily on the fact that the underlying statute and pattern jury instructions only used the single word "threat," without further qualification. The appellate court's holding on this point acknowledged that fact, but explained that in order to comport with the First Amendment, "'true threat' must be incorporated into the *definition* of N.C.G.S. § 14-16.7(a) if the statute is to be held constitutional" (emphasis in original).

Third, the "intent" to communicate a true threat is also deemed an essential element of the offense. A statement is only a true threat if it was made intentionally, meaning that it was made with both the general intent to make the threatening statement (considered "from the viewpoint of an objective, reasonable person considering the alleged threat in full context") and specific intent (i.e., a subjective intent to truly threaten). This does not require proof that the defendant actually intended to carry out the threatened act, but he must have intended that it would be received as a true threat by him to do so.

Fourth, deciding on appeal whether a statement was a true threat is a mixed question of fact and law. Therefore, proving a true threat will usually be a matter for the jury (or judge acting as trier of fact) to decide initially, but as noted above the appellate courts will conduct a "de novo whole record review" on appeal, even if the jury was properly instructed on the law and there is some evidence in the record to support its finding.

Fifth, noting that many types of protected speech may be unpopular, crude, or even aggressive, a "true threat" is defined in accordance with *Black* as only those statements where "the speaker intends to communicate, to a particular individual or group of individuals, a threat, being 'a serious expression of an intent to commit an act of unlawful violence[.]'" This definition incorporates the intent requirements adopted above, meaning that the defendant had the "subjective intent to threaten a person or group of persons by communicating the alleged threat." But deciding whether a statement was a true threat must also be evaluated objectively, based on the "context in which the communication was made; i.e., all the facts surrounding the communication of the challenged speech." In other words, finding a statement to be a true threat requires both a subjective and an objective determination: (i) the defendant subjectively intended the statement to be understood as a true threat; and (ii) the people

hearing or reading it would objectively understand it, in context, as a serious expression of intent to kill or injure the person or group identified.

Sixth, applying the preceding analyses to the particular statute at issue, the court identified and summarized the seven essential elements of the offense as follows:

In order to obtain a constitutional conviction for threatening a court officer pursuant to N.C.G.S. § 14-16.7(a), the State must prove, beyond a reasonable doubt, that: (1) the defendant; (2) knowingly and willfully; (3) made a threat; (4) constituting a “true threat,” meaning a statement “that an ordinary, reasonable [person] who is familiar with the context in which the statement [wa]s made would interpret as a serious expression of an intent to do harm”; (5) to a court official; (6) knowing the court official was a court official; and (7) when the defendant communicated the statement, the defendant specifically intended the statement to be understood by the court officer as a real threat expressing the defendant’s intention to carry out the actions threatened.

Additionally, since proving a true threat is an essential element of the offense, failure to properly instruct the jury on these issues violates the defendant’s First, Sixth, and Fourteenth Amendment rights. That error is prejudicial unless the appellate court finds that it was harmless beyond a reasonable doubt.

Finally, turning back to the case at hand, the court conducted an independent whole case review to decide whether the statements made by this defendant were true threats, whether the defendant had the subjective intent that they reach the recipient and cause her to believe that he intended to kill her, and whether they would be understood as threats by an objectively reasonable person.

Looking first at the plain language of the posts, although some of them did contain aggressive statements such as “death to her as well” and “she will be first to go,” the court concluded that they were also vague or contingent on the occurrence of unlikely events (such as a revolution), and “there were no specifics such as time, manner, place, ability, preparation, or other facts that might allow a reasonable person to read Defendant’s words as a ‘true threat’ to kill D.A. Welch.” As a result, none of the posts offered by the state rose to the level of constituting a true threat.

The court then evaluated the statements in context, considering other factors such as the defendant’s reference (and apparent access) to firearms, his close proximity and ability to reach the purported victim, and the initial concern of the detective who saw the posts indicating that she viewed the threat as real. However, other evidence indicated that neither the victim nor law enforcement perceived the statements as true threats, such as the detective’s somewhat delayed response to the posts, the purported victim’s belief that additional security was unnecessary, the fact that officers did not further investigate the defendant’s ability to carry out the alleged threats, a history of “polite and non-threatening” interactions between the parties, and the broad nature of other comments directed at the judicial system as a whole.

As part of its whole case review, the appellate court also considered the hyperbolic nature of many posts on “public forums” like Facebook, the political context of the defendant’s related comments about the judicial system, the lack of specificity to any alleged threats, the reactions of others who saw the posts, and the defendant’s explanation for the posts. In sum, the court found that as a matter of law the defendant’s posts did not rise to the level of being a “true threat” in this case, and the evidence did not support a finding that the defendant’s intent in posting the comments was to make the purported victim believe he actually intended to kill her. Consistent with the holdings above, the appellate court found

that the trial court erred by failing to instruct the jury on the constitutionally required elements of a “true threat” and state’s burden to prove the defendant’s intent, and further found that the error was not harmless beyond a reasonable doubt in this case, given the erroneous law and arguments presented to the jury.

Based on its whole record review (or, in the alternative, based on the regular standard of appellate review as well as the trial court’s failure to properly instruct the jury), the defendant’s conviction was reversed and the case was remanded for entry of judgment of acquittal. The court then reiterated and summarized the essential elements of the offense, the state’s burden of proof, and the jury instructions required for a constitutionally valid conviction under the statute.

Insufficient evidence existed to support conspiracy to intimidate jurors; denial of motion to dismiss reversed

State v. Mylett, ___ N.C. ___, ___ S.E.2d ___ (May 1, 2020)

The defendant was the twin brother of another criminal defendant and was attending his brother’s trial for assault on a government official in Watauga County (itself the subject of a published opinion, [here](#)). Following the guilty verdict in his brother’s case, the defendant made comments to several jurors as they exited the courthouse. These included statements that the jurors “got it wrong,” that his brother was innocent, that the jurors had “ruined his [brother’s] life,” that he “hoped they slept well,” and similar remarks. Before those comments, the defendant’s brother’s girlfriend exited the courtroom visibly upset, and courthouse video footage showed the defendant briefly comforting her before approaching the jurors. The defendant was charged with six counts of intimidating jurors and conspiracy to intimidate jurors with his brother and his brother’s girlfriend under G.S. 14-225.2(a)(2). That subsection provides that a defendant is guilty of juror harassment when he “threatens . . . or intimidates [a] former juror or spouse [of a juror] . . . as a result of the prior official action of [the] juror in a grand jury proceeding or trial.”

The trial court denied pretrial motions challenging the jury intimidation statute as unconstitutional under the First Amendment, denied the motion to dismiss for insufficient evidence, and declined to instruct the jury on the definition of “intimidate.” The defendant was convicted of conspiracy to intimidate jurors at trial and acquitted on the other counts. A majority of the Court of Appeals rejected the defendant’s First Amendment arguments, finding the statute constitutional. The majority also found that the conviction was supported by sufficient evidence, and that the trial court did not err in failing to give the requested jury instructions ([here](#)). Chief Judge McGee dissented on each point. The Supreme Court agreed that the evidence was insufficient to support a conspiracy and reversed.

A criminal conspiracy is an agreement between two or more people to commit a crime with intent to carry out the agreement. While such agreement may be proven by circumstantial evidence, the evidence must show either an express agreement between the conspirators, or facts warranting an inference of the agreement. On the other hand, “[c]onspiracies cannot be established by mere suspicion, nor [by] evidence of mere relationship between the parties . . .” Slip op. at 8. The State’s evidence here raised no more than a conjecture of guilt, and the motion to dismiss for insufficient evidence should have been granted. “The record is almost entirely devoid of any interactions between defendant and [his brother] or defendant and [the girlfriend] from which the formation of any agreement can be inferred.” *Id.* at 13. The court acknowledged that “synchronized, parallel conduct” among defendants can support an inference of criminal agreement but rejected the State’s argument that such circumstances existed here. According to the court:

. . . [S]uch an inference would be far stronger where the conduct at issue is more synchronized, more parallel, and more clearly in furtherance of a crime. . . Moreover, while defendant was acquitted of the charges of harassment of a juror by threats or intimidation and we express no opinion on the sufficiency of the evidence with respect to those charges, the evidence was far from overwhelming. Put simply, this is not a situation like a drug transaction or bank robbery where it is evident that an unlawful act has occurred, and where the degree of coordination associated with those unlawful acts renders an inference of ‘mutual, implied understanding’ between participants far more reasonable. *Id.* 13-14 (citations omitted).

The matter was therefore reversed and remanded for the conviction to be vacated. In light of its holding, the court declined to consider the First Amendment challenges to the statute.

Justice Ervin dissented, joined by Justices Davis and Newby. According to the dissent, the majority failed to view the evidence in the light most favorable to the State, and the trial court should have been affirmed as to the sufficiency of evidence. Without expressing an opinion on the merits of the issue, the dissenters would have therefore proceeded to examine the defendant’s First Amendment challenges.

Weapons Offenses

Affirming Court of Appeals, N.C. Supreme Court adopts justification as defense in firearm by felon cases

State v. Mercer, 375 N.C. 459 (Feb. 28, 2020)

Confronting a question of first impression, the court held that “in narrow and extraordinary circumstances” the common law defense of justification may be an affirmative defense to a charge of possession of a firearm by a felon under G.S. 14-415.1. Noting that justification is an affirmative defense which a defendant carries the burden of proving at trial, the court joined the Court of Appeals in adopting an analysis from *United States v. Deleveaux*, 205 F.3d 1292 (11th Cir. 2000) and held that a defendant invoking justification as a defense to a violation of G.S. 14-415.1 must show:

(1) that the defendant was under unlawful and present, imminent, and impending threat of death or serious bodily injury; (2) that the defendant did not negligently or recklessly place himself in a situation where he would be forced to engage in criminal conduct; (3) that the defendant had no reasonable legal alternative to violating the law; and (4) that there was a direct causal relationship between the criminal action and the avoidance of the threatened harm.

Having established that justification is a defense to a violation of G.S. 14-415.1, the court examined whether the defendant in this case was entitled to a jury instruction on the defense. Such an instruction is required, the court explained, when each of the four “*Deleveaux* factors” is supported by evidence taken in the light most favorable to the defendant. The defendant’s evidence suggested that he was under a qualifying threat as it showed that he and two friends, J and Wardell, arrived to his home to find that a group of fifteen people, some of whom were armed, had assembled at the home intending to fight the defendant. As tensions elevated towards violence, the defendant took Wardell’s gun as Wardell seemed unfamiliar with it and, in the defendant’s view, would be unable to use it in their

defense. The court concluded that there was evidence of each of the *Deleveaux* factors under these facts and that the trial court committed prejudicial error by denying the defendant's request to instruct the jury on the defense.

A dissenting justice, Justice Morgan, "welcom[ed] the establishment of the justification defense" for this criminal offense but did not believe that the evidence in the instant case was sufficient to require the trial judge to give the instruction.

Statute prohibiting the possession of "any gun" on educational property was ambiguous as to whether possession of multiple guns at the same time supported multiple convictions; therefore, applying the rule of lenity in the defendant's favor, only one conviction was proper

State v. Conley, ___ N.C. ___, 839 S.E.2d 805 (Apr. 3, 2020)

The defendant in this case was in possession of five guns and two knives on educational property. After threatening a school bus driver and attempting to shoot the first responding deputy, the defendant was taken into custody after a struggle with additional officers. Following a jury trial, the defendant was convicted of attempted first degree murder, five counts of possessing a gun on educational property, and one count each of possessing a knife on educational property, cruelty to animals, and assault by pointing a gun. On appeal, the defendant argued that it was error to enter judgment on five separate counts of possessing a gun on educational property because the language in G.S. 14-269.2(b) which prohibits possessing "any gun" is ambiguous as to whether it authorizes multiple punishments for the simultaneous possession of more than one firearm. The Court of Appeals unanimously agreed that the language was ambiguous, and therefore under the rule of lenity the statute had to be construed as permitting only a single conviction even if the defendant possessed more than one firearm.

The North Carolina Supreme Court granted the state's petition for discretionary review and affirmed the ruling from the Court of Appeals. Citing *State v. Garris*, 191 N.C. App. 276 (2008), a case in which the Court of Appeals addressed similar statutory language prohibiting possession of "any firearm" by a convicted felon and held that only one conviction for the possession of multiple firearms was proper, the higher court agreed that the language was ambiguous in this case because it could be construed as referring to either a single or multiple firearms. Pursuant to *State v. Smith*, 323 N.C. 439 (1988), another case involving ambiguity as to the number of permissible convictions, when a statute fails to "clearly express the General Assembly's intent as to the allowable unit of prosecution" the "ambiguity should be resolved in favor of lenity toward the defendant." The court rejected the state's arguments in favor of a contrary interpretation that would permit multiple convictions, holding that it "would be an act of pure judicial speculation in guessing which interpretation the legislature actually intended."

Justice Morgan dissented, joined by Justice Newby. The dissent distinguished the cases cited in the majority opinion by arguing that the legislative intent to permit multiple convictions under this particular statute can be inferred from the unique dangers posed by guns on educational property "and the legislature's clear intent to protect a vulnerable population from potential school shootings."

A "flash bang" grenade is a weapon of mass death and destruction as defined in G.S. 14-288.8(c)(1)

State v. Carey, ___ N.C. ___, 838 S.E.2d 367 (Feb. 28, 2020)

In this impersonating a law enforcement officer and possession of a weapon of mass death and destruction case, the Court of Appeals erred by concluding that "flash bang" grenades did not constitute

weapons of mass death and destruction as defined in G.S. 14-288.8(c)(1). The defendant had argued that the intended purpose of a flash bang grenade is “to merely stun, disable or disorient others.” The Supreme Court examined the language of G.S. 14-288(c)(1), which explicitly provides that “[a]ny explosive or incendiary . . . [g]renade” is a weapon of mass death and destruction, and determined that the General Assembly did not intend to differentiate between different types of grenades for purposes of the offense. The Court of Appeals erred by engaging in a fact-intensive examination of the extent to which any particular weapon is capable of causing mass death and destruction, and instead should have simply referred to the “straightforward list of [prohibited] weapons,” which includes any “explosive or incendiary” grenade.

Evidence

Experts

Admission of expert fingerprint testimony violated Rule 702 by failing to demonstrate reliable application of the methods and principles to the defendant’s case; no plain error in light of overwhelming evidence of guilt

State v. Koiyan, ___ N.C. App. ___, 841 S.E.2d 351 (Apr. 7, 2020)

The defendant was convicted of armed robbery in Mecklenburg County and appealed. He complained that a fingerprint analyst’s expert testimony failed to show that the witness applied reliably applied the relevant methods and principles to the case, in violation of N.C. Evid. Rule 702(a)(3). Because the defendant failed to object at trial, the issue was reviewed for plain error only.

The testimony at issue here was similar to that of the fingerprint analyst in the recent case of *State v. McPhaul*, 256 N.C. App. 303 (2017) (finding error, though no prejudice, in the admission of fingerprint match testimony where the expert failed to demonstrate reliable application of the relevant principles to the case). While the expert’s testimony met the first two requirements of Rule 702—he established his training and expertise in the field and demonstrated that the methods used in the field were reliable—his testimony failed to establish reliable application of those methods to the defendant’s case. In the words of the court:

While [the expert] testified earlier that he generally examines prints for ‘all three levels of detail’ and looks for ‘ridges and bifurcations and their spatial relationship’ on each print, [the expert] failed to provide any such detail when testifying as to *how* he arrived at his conclusions *in this case*. *Koiyan* Slip op. at 9-10 (emphasis in original).

The expert also failed to identify any specific characteristics of the defendant’s prints that matched the latent prints. Admission of this testimony was error and violated Rule 702. However, the defendant could not show prejudice in light of “overwhelming evidence” of guilt. The court therefore declined to find plain error and the conviction was affirmed.

New trial where State Crime Lab forensic scientist was required to testify about DNA sample despite her insistence that the testimony was not scientifically valid

State v. Phillips, ___ N.C. App. ___, 836 S.E.2d 866 (Dec. 3, 2019)

The defendant was convicted of statutory rape of C.C., a 13-year-old child. This was the second trial of the defendant; at the first trial involving the events of that evening, the jury acquitted him on some charges and there was a mistrial on the statutory rape charge. At the second trial, the State called a forensic biologist, Dr. Wilson, from the North Carolina State Crime Lab and qualified her as an expert in DNA analysis. She testified that she tested DNA samples from swabs taken from C.C. and compared them to the DNA profiles from C.C., the defendant, and another person, Eckard, who was present that evening. Dr. Wilson testified she had found a mixture of contributors: two major contributors and one minor contributor. She presumed that one of the major contributors was C.C. and determined that the defendant's DNA profile was consistent with the other major contributor. She testified that the minor contributor's profile was "inconclusive due to complexity and/or insufficient quality of recovered DNA." The prosecutor asked whether Dr. Wilson was able to see anything about the minor contributor's profile. Dr. Wilson testified that when a profile is inconclusive as in this case, it is not permissible as a matter of State Crime Lab policy to do any comparison because such a comparison is not scientifically accurate. At a hearing outside the presence of the jury, the prosecutor said his purpose in asking the question was to counter the defendant's potential argument that Eckard, with whom the defendant had sex that evening, may have been the source of the DNA and may have transferred the defendant's DNA to C.C. The trial judge ruled that the prosecutor could direct Dr. Wilson to look at the alleles shown in the records and testify about them. Before the jury, she then testified that three of the alleles in the minor contributor's profile were the same as Eckard's profile but the other three alleles were different. The Court of Appeals found that this testimony violated Rule 702 of the North Carolina Rules of Evidence. The Court found, first, that the testimony was expert opinion and, contrary to the State's argument, was not merely a statement of what Dr. Wilson could "see." The Court found, second, that the expert testimony violated Rule 702. The testimony was not based on sufficient facts or data because the recovered DNA for the minor contributor was inconclusive, and it was not the product of reliable principles and methods because Dr. Wilson said that the comparison was scientifically inaccurate. The Court of Appeals found the admission of this testimony was prejudicial and ordered a new trial. A dissenting judge agreed that the testimony was improper because it was irrelevant under Evidence Rule 402 and unduly prejudicial under Evidence Rule 403. However, the dissent would have reviewed the case under the plain error standard for prejudice, which the dissent did not find, because the defendant based his objection on Evidence Rule 702 only and, although he objected initially before the jury and during the voir dire hearing before the trial judge, failed to renew his objection when Dr. Wilson resumed her testimony.

Impeachment

Preemptive impeachment evidence regarding defendant's pre-arrest silence did not violate protections against self-incrimination where defendant gave notice of intent to rely on defense of duress

State v. Shuler, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 7, 2020)

In this Haywood County case, police were called about a disturbance at a hotel involving a specific car. They arrived and approached the vehicle. A man standing outside of the car identified himself and police quickly determined there were outstanding warrants for his arrest. He was taken into custody and officers approached the defendant, seated in the car. She too had outstanding warrants. Before the officer took her into custody, he asked if she had any contraband. The defendant silently removed a bag of marijuana from her bra in response. The officer again asked if she had any more contraband, specifically asking about methamphetamines, and explained that possession of drugs in jail is a separate

charge. The defendant again silently removed another bag (this time, of methamphetamine) from her bra. She was charged with trafficking methamphetamine and possession of marijuana. Before trial, the defendant gave notice of intent to rely on duress as a defense. She alleged that, prior to the police approaching the car, the man standing beside the car (with whom she admitted associating) threw the drugs at her as police arrived and threatened to “chain her to a tree” if she didn’t hide them.

At trial, a detective was asked by the State during its case-in-chief whether the defendant made any statements about the man standing by car at the time of her arrest. The defense objected on Fifth Amendment grounds and was overruled. The defendant then moved for a mistrial outside the presence of the jury and again complained that the question emphasized the defendant’s silence at the time of arrest. This too was denied. The defendant testified about the alleged duress but did not explain her silence at the time of police questioning. The jury was instructed on duress and convicted on both charges. On appeal, the defendant renewed her Fifth Amendment objections to the police testimony about her silence.

While it is improper for the State to use the defendant’s silence following arrest as substantive evidence of guilt, the evidence may be admissible for impeachment purposes when the “defendant’s prior silence is inconsistent with [her] present statements at trial.” Slip op. at 7. The defendant argued that the testimony was improperly used as substantive evidence of guilt, arising from an effort of the State to preempt her duress defense. The defendant pointed to *State v. Mendoza*, 206 N.C. App. 391 (2010), where the court found error based on this type of preemptive impeachment evidence regarding the defendant’s pre-arrest silence. The court distinguished that case and found that because the defendant gave notice of intent to rely on duress, she could be preemptively impeached with evidence of her pre-arrest silence:

When the State seeks to impeach a defendant through silence, ‘[t]he test is whether, under the circumstances at the time of arrest, it would have been natural for defendant to have asserted the same defense asserted at trial. . . Here, it would have been . . . natural for Defendant to have told the arresting officer the contraband she possessed belonged to [the other man] and he had threatened her to conceal it, if she ‘believed that to be the case.’ *Id.* at 9 (citations omitted).

The admission of this testimony was therefore not error, and the convictions were unanimously affirmed.

Personal Knowledge

Trial court did not err in allowing testimony about defendant’s extradition or instructing the jury on flight

State v. Graham, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2020), *temp. stay granted*, ___ N.C. ___, 839 S.E.2d 352 (Apr. 3, 2020)

The defendant was charged with four counts of engaging in sexual acts against a child under 13 and taking indecent liberties with a child. The defendant was alleged to have touched a child, A.M.D., in sexual manner on several occasions over a period of one to two years. The state’s evidence at trial consisted primarily of testimony from the victim, A.M.D., and corroborating testimony from other witnesses to whom she had disclosed the abuse.

After the allegations in this case came to light, the defendant left the area and could not be located. The lead detective sought assistance from the U.S. Marshals, and the defendant was eventually located in and extradited from Puerto Rico. Defendant argued that the trial court erred by allowing the detective to testify about the extradition since he had no direct personal knowledge about what transpired, and argued that the court erred a second time by instructing the jury on flight. The defendant did not raise either objection at trial, so the issues were restricted to plain error review. The appellate court held that it was not plain error to allow testimony about extradition since the detective had personal knowledge based on his own attempts to locate the defendant, his act of soliciting help from the Marshals, and his oversight of the whole case as lead detective. Even if it was error, it was not prejudicial since the jury also heard testimony that the defendant escaped from jail pending trial and was recaptured hiding in a nearby home. The jury instruction on flight was likewise proper, since defendant altered his usual routine after the accusations by leaving and staying away until he was located and extradited, reasonably supporting the state's position that he fled to avoid apprehension.

Hearsay

Officer testimony about the absence of conflicting information from witnesses was not offered for the truth of the matter asserted and was not plain error

State v. Chavez, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 7, 2020), *temp. stay granted*, ___ N.C. ___, ___ S.E.2d ___ (Apr. 24, 2020)

This Mecklenburg County case involved charges of attempted first-degree murder, conspiracy to commit first-degree murder, and assault with a deadly weapon with intent to kill inflicting serious injury. The defendant and two other men (one of whom was unidentified) entered the victim's home and attacked him with a machete and hammer. The victim's girlfriend escaped with an infant and called police. The defendant and his named co-conspirator apprehended the girlfriend outside of the home, where the defendant instructed the other man to kill her. He refused, and the defendant fled; the other man stayed with the woman until police arrived (and became the named co-conspirator in the indictment). The defendant was convicted of all charges at trial and sentenced to a minimum term of 336 months.

An officer was asked whether she received any conflicting information about the defendant's identity from witnesses interviewed about the case. The officer testified at trial that she did not. The defendant did not object at trial but complained that admission of evidence was hearsay, violated his confrontation rights, and constituted plain error. Rejecting this argument, the court found that the officer's testimony did not convey a statement from any of the interviewees and was capable of different interpretations. It was not therefore a statement offered for the truth of the matter asserted and violated neither hearsay rules nor the Confrontation Clause. Even if the admission of this evidence was error, it was not prejudicial and did not rise to plain error. The conviction for conspiracy to commit attempted murder was reversed, the remaining convictions affirmed, and the matter remanded.

Authentication

Crack cocaine rock that was "smashed" into powder prior to trial was admissible in evidence; "smashing" was not a material change to the evidence precluding its authentication, and the state established a chain of custody

State v. Dawkins, ___ N.C. App. ___, 837 S.E.2d 138 (Dec. 17, 2019)

Using a confidential informant to conduct a controlled buy, law enforcement officers purchased a small crack cocaine rock from the defendant. The rock field-tested positive for the presence of cocaine, and it was subsequently tested at the SBI and confirmed to be cocaine base. The defendant was indicted for sale and delivery of cocaine and possession with intent to sell and deliver cocaine, as well as having attained habitual felon status, and the case went to trial approximately two years later. At trial, the state offered the “rock” purchased from the defendant as State’s Exhibit #6, but the item inside the evidence bag was now a powder. The narcotics detective in the case testified that the substance had been “smashed” but it was otherwise “substantially the same” item he originally recovered from the informant and submitted to the SBI. The SBI analyst likewise testified that the substance in Exhibit #6 was a “rock” at the time she tested it and determined it was crack cocaine, and her lab results and report were admitted as Exhibit #7.

Following his conviction, the defendant argued on appeal that the trial court erred by admitting Exhibit #6 because it was not readily identifiable and had been altered, and therefore it could not be authenticated by the state’s witnesses. The appellate court disagreed for several reasons. First, citing case precedent, physical changes to drugs such as smashing or pressing them together “do not amount to material changes raising admissibility concerns.” Second, even if this were a material change, the state presented an adequate chain of custody to show that the substance contained in Exhibit #6 was the same one purchased from the defendant and ultimately tested by the SBI, and the witnesses’ testimony established that whatever caused the rock to be “smashed” must have occurred sometime after it was tested. Third, the defendant failed to demonstrate that any error in admitting Exhibit #6 would be prejudicial, since there was no objection to the introduction of Exhibit #7 or the analyst’s testimony about the testing she performed on that substance, meaning that the same information was before the jury through other evidence. As a result, there was no reasonable possibility that a different verdict would have been reached even if Exhibit #6 had been excluded.

Sentencing

Prayer for Judgment Continued

PJC counts as conviction under statute defining conviction as including adjudication of guilt

Mace v. North Carolina Department of Insurance, ___ N.C. App. ___, 840 S.E.2d 839 (Feb. 18, 2020)

The petitioner was found guilty of simple assault in a bench trial before a district court judge, who entered a prayer for judgment continued (PJC). In reliance on the advice of his attorney, the petitioner, an insurance agent, did not believe that he was required to report the PJC to the North Carolina Department of Insurance (DOI). The DOI found that the petitioner’s failure to report the PJC violated G.S. 58-2-69(c), which requires licensees to notify the DOI of criminal convictions and defines conviction as including “an adjudication of guilt, a plea of guilty, or a plea of nolo contendere.” Because of his reliance on the advice of counsel, the DOI imposed a \$100 civil penalty instead of suspending or revoking the petitioner’s license. The petitioner appealed. Reviewing several previous decisions about the treatment of PJCs, the Court of Appeals recognized that a PJC constitutes an adjudication of guilt and upheld the DOI’s determination.

Appeal of district court's denial of defendant's motion to enter judgment on PJC was not properly before Court of Appeals

State v. Doss, ___ N.C. App. ___, 836 S.E.2d 856 (Dec. 3, 2019)

In 1999, the defendant was found guilty of assault on a female, and the trial judge entered a prayer for judgment continued (PJC) with a condition that the defendant pay costs of court. In 2017, the defendant was denied a concealed carry permit in West Virginia on the ground that his 1999 case resulted in a conviction for domestic violence and that he misstated in his permit application that he had never been convicted of an act of violence or act of domestic violence. In 2018, the defendant filed a motion in North Carolina to enter judgment in the 1999 case, which he then would be able to appeal to superior court for a trial de novo. The district court denied the motion, and the defendant appealed to the Court of Appeals. The Court found that the defendant did not have a right to appeal and refused to treat the defendant's brief as a petition for a writ of certiorari. The Court therefore dismissed the defendant's appeal. In addition to its holding, the Court made several other observations. (1) The District Attorney's office that handled the defendant's 1999 assault on a female case advised West Virginia that the case involved domestic violence even though the remaining records in ACIS indicated that the case did not involve domestic violence. (2) The Court recognized that it could be argued that the defendant's representation on his permit application was not a misrepresentation about whether he had a conviction because the question is ambiguous and he could have believed in good faith that a PJC was not a conviction. (3) The Court observed that although a PJC with a condition that the defendant pay costs is not a condition that converts a PJC into a final judgment, a trial judge may not impose that condition without the defendant's consent. When a defendant consents to a PJC, the defendant waives any right to appeal. (4) In support of its refusal to treat the defendant's brief as a petition for a writ of certiorari, the Court stated that it would be unfair to the State to allow the defendant to renege on a twenty-year-old deal for a PJC with costs, ask the trial court to enter judgment, and appeal the judgment to superior court, which would most certainly result in dismissal of the charges because the State no longer has the evidence to proceed. (5) The court observed that G.S. 15A-1416(b)(1) gives the State the right to move for appropriate relief to enter a final judgment on a PJC, presumably when a defendant has not satisfied the conditions of a PJC, but the defendant does not have the same statutory right. (6) The court noted that the defendant can petition the superior court for a writ of certiorari under Rule 19 of the North Carolina Rules of Superior and District Court.

Satellite-Based Monitoring

Lifetime satellite-based monitoring based on defendant's conviction for aggravated sexual offenses was an unreasonable search under *Grady III*

State v. Gordon, ___ N.C. App. ___, 840 S.E.2d 907 (March 17, 2020), *temp. stay granted*, ___ N.C. ___, 839 S.E.2d 351 (Apr. 2, 2020)

The defendant pleaded guilty in 2017 to multiple sexual offenses and was sentenced to 190-288 months. After determining that the convictions qualified as "aggravated offenses" under G.S. 14-208.6(1A), the court conducted a satellite-based monitoring (SBM) hearing. Evidence at the hearing showed that the defendant had a moderate to low Static-99 score (indicating a lower likelihood of re-offending) and only one prior offense, but based on the facts of the underlying case and testimony from the state's witness that the device was a relatively minor intrusion, the trial court ordered that he be monitored for life upon his release. The defendant appealed the order, arguing the state had failed to show that imposing monitoring on him was reasonable under the Fourth Amendment.

Based on prior decisions that culminated in *Grady v. North Carolina*, 575 U.S. 306 (2015) (“*Grady I*”) and *State v. Grady*, 817 S.E.2d 18 (N.C. App. 2018) (“*Grady II*”), the appellate court vacated the monitoring order in this case in an earlier opinion (820 S.E.2d 329) filed on September 4, 2018, finding that the state had failed to meet its burden of showing that monitoring this defendant would be a reasonable search 15 or 20 years in the future. The state sought discretionary review of that decision at the North Carolina Supreme Court, but after issuing its opinion in *State v. Grady*, 372 N.C. 509 (2019) (“*Grady III*”), the state supreme court remanded this matter back to the appellate court for reconsideration in light of that decision. *Grady III* applied the earlier rulings finding that SBM is a “search” under the Fourth Amendment, and then used a totality of the circumstances test to decide if the search was reasonable, balancing the defendant’s privacy interest against the legitimate government interest in tracking the defendant. *Grady III* concluded that SBM was unconstitutional as applied to any unsupervised person ordered to enroll in monitoring solely on the basis of being a recidivist offender, but left open the possibility that defendants placed on SBM for other reasons (such as commission of an aggravated offense) might be permissible.

Reconsidering the instant case in light of *Grady III*, the appellate court conducted a totality of the circumstances analysis and weighed the defendant’s Fourth Amendment and privacy rights against the legitimate government interest in preventing sexual assaults, and once again held that the state had failed to meet its burden of showing that lifetime SBM was a reasonable search of this defendant. Compared to the high degree of intrusion into the defendant’s privacy, the state could not forecast either the need or scope of such monitoring 15 or 20 years in the future, whether the defendant would be supervised or unsupervised at that time, or even whether the same technology would still be in use, and the state failed to demonstrate that the monitoring would achieve its stated goal of preventing future sexual assaults. The trial court’s order imposing lifetime SBM on the defendant was therefore reversed.

Applying the North Carolina Supreme Court’s reasoning from *State v. Grady*, the Court of Appeals holds that an order imposing 30 years of SBM for a reportable offense against a minor is an unreasonable search in violation of the Fourth Amendment

State v. Griffin, ___ N.C. App. ___, 840 S.E.2d 267 (Feb. 18, 2020), *temp. stay granted*, ___ N.C. ___, 838 N.C. 460 (Mar. 6, 2020)

In *State v. Grady*, 372 N.C. 509 (2019), the North Carolina Supreme Court held that lifetime satellite-based monitoring (SBM) is unconstitutional as applied to any person who is ordered to enroll in SBM because he or she is a recidivist. The Court held that SBM in those circumstances constitutes an unreasonable search in violation of the Fourth Amendment. [Note: For a further discussion of the *Grady* decision, see Jamie Markham, *Satellite-Based Monitoring Is Unconstitutional for All Unsupervised Recidivists* (Sept. 12, 2019).] The Court of Appeals in this case considered the constitutionality of a 30- year SBM order against a person who was not a recidivist and not automatically subject to SBM. The defendant was convicted of first-degree sex offense with a child and was sentenced to 144 to 182 months in prison. On his release from prison in 2015, he was placed on a five-year term of post-release supervision. The State sought SBM under G.S. 14-208.40(a)(2), which allows a judge to impose SBM for a term of years against a person who has committed an offense involving the physical, mental, or sexual abuse of a minor. Following a hearing, the trial judge ordered the defendant to submit to SBM for 30 years. The defendant did not contest the imposition of SBM for the five-year period of post-release supervision but argued that the imposition of SBM for an additional 25 years was unconstitutional. Applying the reasoning of *Grady*, the Court of Appeals agreed. It found first that the imposition of SBM for 25 years, although less than the lifelong term at issue in *Grady*, constituted a

significantly lengthy and burdensome warrantless search. It found further that the State did not meet its burden of showing SBM's efficacy in meeting its professed aims, having failed to offer any evidence that SBM is effective in apprehending sex offenders, preventing new sex offenses, or otherwise protecting the public. The Court also found that the trial judge's findings in imposing SBM in this case—that the defendant had betrayed the minor victim's trust, had not completed a sex offender treatment program (SOAR) in prison, and had a moderate-low risk of reoffending based on the Static-99—did not support imposition of SBM. One judge concurred in the result only.

Imposition of satellite-based monitoring (“SBM”) for life based on aggravated sexual offenses was unreasonable search, but majority of Court of Appeals holds that imposition of SBM during the period of post-release supervision (“PRS”) was reasonable

State v. Hilton, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2020)

In 2007, the defendant pled guilty to statutory rape and statutory sexual offense and was sentenced to 144 to 182 months of imprisonment. With credit for presentence confinement, he was released in July 2017 subject to PRS, which included a condition that he not leave Catawba County without the consent of his probation officer. After his release, the defendant violated that condition by going to Caldwell County without the knowledge or approval of his probation officer. He was subsequently charged with taking indecent liberties with his fifteen-year-old niece and absconding to Caldwell County. During the pendency of his case in Caldwell County, the State initiated proceedings to enroll the defendant in SBM through a bring-back hearing pursuant to G.S. 14-208.40B. After a hearing, the trial judge ordered the defendant to enroll in SBM for life. The Court of Appeals ruled that the imposition of lifetime SBM on the defendant constituted an unreasonable search. A majority of the Court ruled further that the imposition of SBM during the defendant's period of PRS was reasonable. The majority found that the defendant's expectation of privacy is low during PRS. And, although the State failed to present evidence showing the efficacy of SBM in solving sex crimes, it presented evidence showing SBM's efficacy in determining whether the defendant violated the condition of PRS that he remain in Catawba County. The majority held that the “for life” language in G.S. 14-208.40B is severable from the rest of the statute and affirmed the trial judge's order to the extent it imposes SBM for the period of the defendant's PRS. A dissenting judge concurred with the majority's reversal of lifetime SBM but would have reversed the imposition of SBM for the period of PRS. He stated that the State did not show the efficacy of SBM during PRS and that statute on lifetime SBM could not be construed to authorize SBM for the period of PRS.

Appellate Issues

Time served awaiting trial is not voluntary compliance with the judgment within the meaning of G.S. 15A-1431(d) (requiring in-person notice of appeal following a defendant's compliance with the district court judgment)

State v. Dudley, ___ N.C. App. ___, ___ S.E.2d ___ (April 7, 2020)

The defendant was convicted of misdemeanor stalking in district court in Forsyth County and sentenced to time served. The defendant filed a pro se written notice of de novo appeal to superior court on the ninth day after the district court's judgment. The State moved to dismiss the appeal under G.S. 15A-1431(d). The superior court dismissed the appeal and a petition for writ of certiorari, and the defendant sought certiorari review in the Court of Appeals.

G.S. 15A-1431 proscribes jurisdictional rules governing criminal appeals from district to superior court. A defendant typically has 10 days from the time of judgment to give notice of de novo appeal by filing a written notice of appeal or by giving notice in open court. Under subsection (d), however, once a defendant complies with a district court judgment, notice of appeal must be given by the defendant in person before the presiding judge or certain other officials. According to the State, the defendant had complied with the judgment, since he already served the sentence imposed by the district court. His notice of appeal was therefore defective and deprived the superior court of jurisdiction to hear the appeal. The defendant maintained that his pretrial confinement (leading to the time served judgment) could not serve as voluntary compliance with the judgment within the meaning of the statute. The Court of Appeals agreed with the defendant.

Under the plain language of the statute, “the word ‘compliance’ carries with it a connotation of voluntariness.” Slip op. at 5. Official commentary to the statute also supported this view. In the court’s words:

[The defendant’s] purported ‘compliance’ with his criminal sentence was not his choice. He was involuntarily detained in pre-trial confinement while awaiting trial and was later credited with time served . . . [The defendant] therefore properly gave notice of appeal by doing so in writing within ten days of entry of judgment. *Id.* at 6.

The superior court’s dismissal of the appeal was therefore unanimously reversed, and the matter remanded for trial in superior court.

There is no statutory appeal from district court to superior court of a revocation of probation imposed pursuant to a deferred prosecution

State v. Summers, ___ N.C. App. ___, 836 S.E.2d 316 (Nov. 5, 2019)

The defendant was placed on probation in district court pursuant to a formal deferred prosecution agreement under G.S. 15A-1341(a1). A district court judge found him in violation and revoked his deferred prosecution probation. The defendant appealed to superior court for a de novo violation hearing, but a superior court judge dismissed the appeal for lack of jurisdiction. The court of appeals affirmed the dismissal, concluding that there is no statutory right to appeal a revocation of probation in the deferred prosecution context, as that revocation does not “activate[] a sentence” within the meaning of G.S. 15A-1347(a). The court noted that the superior court could, in some cases, review district court revocations of deferred prosecution probation through its authority to issue writs of certiorari under Rule 19 of the General Rules of Practice for the Superior and District Courts.

A finding of no plain error does not preclude a finding of ineffective assistance of counsel

State v. Lane, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2020)

Defendant was convicted in December 2016 of trafficking in opium or heroin and related offenses. He appealed, arguing that the trial court erred by failing to instruct the jury that possession pursuant to a valid prescription was a defense to trafficking by possession. The Court of Appeals in *State v. Lane*, 257 N.C. App. 262 (2017) (unpublished), held the trial court did not commit plain error because defendant could not show that he was prejudiced by the lack of such an instruction. The defendant subsequently filed a motion for relief alleging ineffective assistance of counsel claim based on his trial counsel’s failure to request a jury instruction on the definition of “unlawful” in the context of trafficking by possession or an instruction that possession pursuant to a valid prescription was a defense to trafficking in possession.

The trial court denied relief, concluding that because the defendant was not prejudiced under the plain error standard, his ineffective assistance of counsel claim must also fail. The defendant sought certiorari review, which the Court of Appeals granted. (1) The Court of Appeals held that the plain error standard and ineffective assistance of counsel test are not so similar that a finding of no plain error precludes a finding of ineffective assistance of counsel. Noting that neither the Court of Appeals nor the North Carolina Supreme Court has thoroughly examined and compared the two standards, the Court of Appeals took the opportunity to do so in *Lane II*.

Prejudice under plain error requires that the trial court's error have had a probable impact on the jury's finding of guilt. The plain error rule requires a defendant to show that the error in question tilted the scales and caused the jury to convict the defendant. In contrast, prejudice under the ineffective assistance of counsel test requires a showing of reasonable probability that, but for counsel's unprofessional errors, the result of the proceeding would have been different. A reasonable probability is a probability sufficient to undermine confidence in the outcome. Under the reasonable probability standard, a defendant does not have to show that counsel's deficient conduct more likely than not altered the outcome in the case. The defendant does need to demonstrate, however, that at least one juror would have struck a different balance. While under the reasonable probability standard the likelihood of a different result must be substantial, not just conceivable, it is something less than that required under plain error.

There are other significant differences between the standards. Plain error is applied to trial court errors. Ineffective assistance of counsel applies to counsel errors and takes into account the objective reasonableness of counsel's performance. Plain error relief requires there be settled precedent at the time of appellate review; the ineffective assistance standard considers available authority at the time of the allegedly deficient representation and may require that counsel raise material issues even absent decisive precedent. Thus, the court concluded that when deficient performance by counsel creates a fundamentally unfair trial whose results are unreliable, an ineffective assistance of counsel claim will be successful despite the absence of plain error.