

Criminal Case Update

Cases covered include reported decisions from North Carolina and the U.S. Supreme Court decided between October 4, 2019 and June 12, 2020. The summaries were prepared by Shea Denning, Phil Dixon, Jonathan Holbrook, Jamie Markham, John Rubin, Christopher Tyner, and Jeff Welty.

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Appellate Issues

By failing to move to strike testimony that had been the subject of pretrial suppression motions which were denied, the defendant failed to preserve his arguments concerning the admissibility of the testimony

State v. Anthony, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2020)

In a case involving charges of possession of a firearm by a felon and possession of a weapon on educational property, the defendant failed to preserve for appellate review his argument that the trial court erred by denying his pretrial suppression motions related to the lawfulness of a traffic stop and a subsequent weapons frisk. At trial, the defendant objected to an officer's testimony regarding the officer's discovery of a handgun in the defendant's pocket, but the defendant did not move to strike the testimony. Citing precedent with regard to situations where the inadmissibility of testimony is not indicated by a question but becomes apparent by some feature of a witness's answer, the court stated that the "[d]efendant was obligated to move to strike [the officer's] answer after objecting for the record and before the jury to preserve his objection." Because he did not move to strike at trial or specifically argue plain error on appeal, the defendant failed to preserve his arguments concerning the admission of evidence about the handgun.

The court went on to reject the defendant's argument that his trial counsel was ineffective during the pretrial hearing on the suppression motion related to the weapons frisk. During that hearing, defense counsel expressed the view that the officer had the reasonable and articulable suspicion necessary to conduct a frisk upon seeing a bulge in the defendant's pocket while arguing that the officer unlawfully had decided to conduct the frisk prior to seeing the bulge. Noting that the defendant could not show prejudice and that the trial court did not rely on defense counsel's statement when ruling on the motion, the court overruled the defendant's IAC argument.

Majority of Court of Appeals declines to hear certiorari petition regarding probation revocation where pro se appeal by defendant was defective

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

The defendant was convicted of felony breaking or entering in 17 CRS 54550 and felony larceny after breaking or entering in 17 CRS 54551. The trial judge sentenced him to two consecutive 8 to 19 months prison terms, suspended the sentences, and placed him on probation. Violation reports were subsequently filed in both cases, and the defendant's probation was revoked by the trial judge in both cases. The defendant filed a pro se written notice of appeal. The majority found that the notice failed to comply with North Carolina Rule of Appellate Procedure 4 in that the notice "did not (1) designate the judgment from which he was appealing, (2) designate the court to which he was appealing, and (3) properly certify service." The majority found that these defects deprived the Court of jurisdiction over a direct appeal, dismissed the appeal, and declined to exercise its discretion to hear the defendant's arguments by way of petition for writ of certiorari. A dissenting judge, noting the technical nature of the defects in the defendant's notice of appeal, would have heard the defendant's certiorari petition in one of the cases, 17 CRS 54551. In that case, the trial judge revoked the defendant's probation based on absconding, but the violation report did not allege absconding. Only in the other case, 17 CRS 54550, did the violation report allege absconding. The dissent observed that the allegations in that case were insufficient to put the defendant on notice of that violation in the other case. The dissenting judge

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stated that it was an abuse of discretion to overlook this due process violation and deny the defendant's certiorari petition.

Appeal of ruling rejecting facial constitutional challenge to red-light traffic camera law dismissed as interlocutory for lack of judgment as to the State of North Carolina

Vaitovas v. City of Greenville, ___ N.C. App. ___, ___ S.E.2d ___ (May 19, 2020)

The plaintiff brought a facial constitutional challenge to a state law concerning automated red-light traffic cameras in the City of Greenville. She alleged the law violated the North Carolina Constitution prohibiting local laws relating to health and sued the City of Greenville, Pitt County Board of Education, and State of North Carolina through official capacity claims against Phil Berger, President Pro Tempore of the North Carolina Senate, and Tim Moore, Speaker of the North Carolina House of Representatives. The case was transferred to a three-judge panel of superior court judges appointed by the Chief Justice because the complaint is a facial constitutional challenge to a state law. The panel heard cross-motions for summary judgment and entered summary judgment in favor of the City of Greenville and Pitt County Board of Education. The plaintiff appealed. The Court of Appeals found that the record on appeal contained no indication that the three-judge panel ruled on an earlier motion to dismiss the claim against the State of North Carolina. The Court dismissed the appeal for lack of appellate jurisdiction because the challenged order entered judgment as to some, but not all, parties, and the appeal is interlocutory. The Court concluded: "Before this Court hears the matter and addresses the constitutionality of that law on the merits, the appeal should include a judgment entered as to the State, so that the State, if it chooses, can appear and advocate for its position on that constitutional question."

(1) Defendant waived appellate review of Fourth Amendment claim by failing to move to suppress evidence before the trial court; (2) Trial court erred by entering civil judgments for fees without first providing the defendant with notice and an opportunity to be heard

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

The defendant was convicted of trafficking in opium or heroin. He argued on appeal that the trial court committed plain error by allowing the State to introduce into evidence the drugs found in his vehicle. The Court of Appeals concluded that the defendant waived appellate review of this claim because he did not move before the trial court to suppress evidence of the hydrocodone tablets and there was no suppression hearing. In such circumstances, the appellate court lacks the fully developed record necessary to conduct plain error review.

The Court of Appeals further held that the trial court improperly imposed attorney's fees and an attorney-appointment fee against Defendant without providing him with notice and an opportunity to be heard. Thus, the court vacated the civil judgments imposing attorney's fees and the attorney-appointment fee, and remanded for further proceedings.

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.

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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.

(1) Sufficiency argument not made in the trial court was waived on appeal; (2) Defendant did not receive ineffective assistance of counsel based on waived sufficiency argument; (3) No error for court to instruct jury on the defendant's false and contradictory statements under the facts

State v. Carter, ___ N.C. App. ___, 837 S.E.2d 629 (Jan. 7, 2020)

In this Duplin County case, the defendant was convicted by a jury of financial card fraud, obtaining property by false pretenses, identity theft, and habitual felon. She appealed, arguing that her motion to

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dismiss for insufficiency of the evidence should have been granted as to the identity theft and that she received ineffective assistance of counsel. The Court of Appeals unanimously affirmed.

(1) The evidence showed that the defendant used the credit cards of two other people to make purchases for herself, representing herself as the owner of the cards. The defendant eventually admitted to police that she used the credit cards and provided a full written confession. At the close of evidence, the defendant asked the trial court to dismiss two (of six) counts of identity theft regarding Victim #1 based on a lack of proof that the defendant acted without that victim's permission. On appeal, the defendant challenged all six identity theft convictions, contending that there was no evidence she meant to represent herself as the two victims. This was a different argument than the one made to the trial court and was not preserved under *State v. Walker*, 252 N.C. App. 409 (2017) (holding that, without a "global" motion to dismiss, sufficiency arguments not raised in the trial court are waived on appeal).

Defendant failed to preserve any argument as to the four charges of identity theft pertaining to [Victim #2]. Likewise, the defendant failed to preserve the specific argument—that there was insufficient evidence that Defendant intended to represent that she was [Victim #1]. We thus decline to reach the merits of her argument.

The court declined to invoke its discretionary authority under Rule 2 of the Appellate Rules of Procedure to consider the unpreserved arguments.

(2) The defendant argued that she received ineffective assistance of counsel based on her trial lawyer's failure to preserve the above issues, arguing that the motion to dismiss for insufficiency would have been granted if had her trial lawyer made the argument. While ineffective assistance claims should normally be litigated through a motion for appropriate relief, here, the "cold record" was sufficient to allow appellate review of the claim. The defendant's argument that the State failed to present evidence that she represented herself as the victims was meritless under *State v. Jones*, 367 N.C. 299, 304 (2014) (rejecting interpretation of identity theft statute to require use of the victim's name, which would cause "absurd" results). The defendant's use of the victims' credit card numbers was sufficient "identifying information" under the statute and it was not error for defense counsel to fail to make this argument. The defendant did not therefore receive ineffective assistance of counsel.

(3) The trial court instructed the jury on false or conflicting statements of the defendant under N.C. P. I.—Crim. 105.21. The defendant originally told police that an ex-boyfriend was responsible for the fraud before later admitting to the conduct. On appeal, she argued that this instruction to the jury prejudiced her trial by impugning her character. The court disagreed.

[This] instruction is proper not only where defendant's own statements contradict each other but also where the defendant's statements flatly contradict relevant evidence. The instruction is in appropriate if it fails to make clear to the jury that the falsehood does not create a presumption of guilt.

The statements of the defendant to law enforcement were contradictory and conflicting, "tending to reflect the mental processes of a person possessed of a guilty conscience seeking to divert suspicion and to exculpate [her]self." The instruction was given in accordance with the considerable warnings in the commentary to that pattern instruction, was supported by the evidence, and was therefore proper under these facts.

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In a trial on solicitation to commit murder, where defendant did not object to the jury instructions at trial or allege plain error on appeal, the issue was not before the appellate court; defendant's characterization of the issue as a sentencing error was incorrect.

State v. Smith, ___ N.C. App. ___, 837 S.E.2d 166 (Dec. 17, 2019)

The defendant was charged with solicitation to commit first-degree murder after he asked someone he met through a mutual acquaintance ("Edwards") to murder his wife for money. After repeated requests from the defendant over the next few days, Edwards contacted law enforcement and assisted their investigation by wearing recording equipment at a subsequent meeting with the defendant to discuss details of the murder. The defendant was indicted for solicitation to commit first-degree murder, and after being convicted at a jury trial he was sentenced for a Class C offense. On appeal, the defendant argued that he was sentenced incorrectly because the jury was only instructed on solicitation to commit "murder." The jury was not asked to make any special findings regarding the level of malice it found regarding the crime solicited. Therefore, the defendant argued that he should have been convicted of soliciting only the lowest possible level of any form that offense (second-degree murder punished as Class B2 offense). Pursuant to G.S. 14-2.6(a), a solicitation to commit a B2 offense would be punished as a Class D felony, rather than as Class C felony for soliciting a Class A or B1 offense. The appellate court disagreed, noting that "Defendant creatively sidesteps the fact that he was not charged with murder, but with solicitation to commit murder. The jury was not required to find any of the elements of murder. As previously explained, one may be guilty of solicitation regardless of whether the solicited crime—murder, in this case—actually occurs. [...] The crime was in the asking." Rather than alleging a sentencing error, the defendant's appeal was really an argument against the sufficiency of the jury instructions. However, since the defendant did not object and raise that issue at trial, nor did he allege plain error on appeal, the issue was not properly before the court. "In that Defendant's entire appeal was predicated on an unpreserved issue and he failed to request plain error review, his conviction and subsequent sentence shall remain undisturbed."

The trial court erred by failing to give the defendant an opportunity to be heard on the issue of attorney's fees prior to entering a civil judgment against him in a case involving a guilty plea and the Court of Appeals reached the issue despite the limitations on appeals from guilty pleas provided in G.S. 15A-1444

State v. Mangum, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

Over a dissent and with one judge concurring in result only, the court determined that the trial court erred by failing to give the defendant an opportunity to be heard on the issue attorney's fees prior to entering a civil judgment against him. Among several procedural issues in this case was whether the defendant had a right to appeal the judgment given that he had pleaded guilty and G.S. 15A-1444 limits appeals from guilty pleas. Citing *State v. Pell*, 211 N.C. App. 376 (2011), the court held that the appeal of the civil judgment did "not arise from the underlying convictions" and, therefore, G.S. 15A-1444(a2) did not deprive the court of jurisdiction. Because of issues caused by the defendant's filing of the record on appeal prior to the time at which the civil judgment was filed, the court engaged in a lengthy discussion of the Rules of Appellate Procedure, as well as principles of law regarding petitions for writs of certiorari, on its way to determining that it had jurisdiction to address the merits of the appeal, either upon direct appeal or by certiorari.

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Judge Berger concurred in result only, stating that “anyone interested in efficiencies and saving taxpayer dollars should hope the Supreme Court of North Carolina takes advantage of this opportunity to return us to the plain language of [G.S.] 15A-1444(a2).”

Judge Tyson dissented, expressing the view that because of the defendant’s various “jurisdictional failures and criminal, civil, and appellate rules violations” he had failed to invoke the jurisdiction of the court, as well as the view that the defendant’s petition for certiorari should have been denied for lacking merit. Judge Tyson agreed with Judge Berger’s hope that the state supreme court would “return us to the plain language of [G.S.] 15A-1444(a2).”

Where defendant elicited challenged testimony, any error was invited and appellate review of the issue was waived

State v. Crane, ___ N.C. App. ___, 837 S.E.2d 607 (Jan. 7, 2020)

The defendant was convicted of impaired driving in Macon County and appealed. The defendant was driving a moped and collided with a car. A trooper responded, investigating and preparing a crash report (and later charging the defendant). At trial, the trooper testified during cross-examination by the defense about his investigation into the accident, recounting his impression of when and how the crash occurred without objection. The defendant complained on appeal that this testimony amounted to improper lay opinion since the trooper did not see the accident occur and was not tendered as an expert. Because no objection was made at trial, the defendant claimed plain error. The State argued that the defendant invited any error, and the Court of Appeals agreed. “Statements elicited by a defendant on cross-examination are, even if error, invited error, by which a defendant cannot be prejudiced as a matter of law.” Because this testimony was elicited by the defendant, any appellate review of the issue (including plain error review) was waived. The trial court was therefore unanimously affirmed.

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. Larry Lee Dudley, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 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 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)

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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.

(1) The defendant could not directly appeal the trial court’s denial of a motion to suppress when he failed to give notice of his intent to do so before plea negotiations were finalized. (2) Binding precedent from earlier panels compelled the court to deny the defendant’s petition for writ of certiorari.

State v. Kilette, ___ N.C. App. ___, 834 S.E.2d 696 (Nov. 5, 2019)

The defendant pled guilty to two counts of manufacturing methamphetamine after the trial court denied his motion to suppress items seized during a search. The case came back before the court of appeals on remand from the supreme court for reconsideration in light of *State v. Ledbetter*, ___ N.C. ___, 814 S.E.2d 39 (2018), and *State v. Stubbs*, 368 N.C. 40 (2015). (1) The court of appeals dismissed the defendant’s direct appeal because the defendant failed to provide notice to the State of his intent to do so before plea negotiations were finalized as required under *State v. Tew*, 326 N.C. 732 (1990). (2) The court of appeals denied the defendant’s petition for writ of certiorari, rejecting his contention that it should be granted under *State v. Davis*, 237 N.C. App. 22 (2014). *Davis*, the court of appeals concluded, failed to address prior binding court of appeals authority. As a result, the court deemed itself obliged to follow the supreme court’s guidance in *State v. Jones*, 358 N.C. 473 (2004), that when faced with inconsistent opinions from separate panels, a subsequent panel of the court of appeals must follow the earlier opinion. Following that rule, the court concluded that earlier decisions (including *State v. Pimental*, 153 N.C. App. 69 (2002) (holding that the court of appeals cannot grant a writ of certiorari when a defendant pleads guilty without first notifying the State of his or her intent to appeal a suppression, because that is not a “failure to take timely action” within the meaning of Appellate Rule 21) compelled it to deny the writ. The court viewed *Ledbetter* and *Stubbs* as clarifying the court of appeals’ jurisdiction to hear petitions for writ of certiorari, but not as relieving the court of its obligation to follow binding substantive precedent. A concurring judge would have denied the defendant’s petition for certiorari, but as a matter of discretion, and not pursuant to prior court of appeals cases that the judge did not view as binding after *Ledbetter* and *Stubbs*.

(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 filed in the wrong court.

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State v. Diaz-Tomas, ___ N.C. App. ___, ___ S.E.2d ___ (Apr. 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.

(1) By eliciting contested testimony in voir dire and securing a ruling from the judge, the defendant preserved for appeal the issue of the judge's refusal to allow the testimony; (2) The trial judge did not abuse his discretion by refusing to allow the defendant to cross-examine the complaining witness about her mental health and treatment; (3) The defendant could not complain of jury instructions to which he agreed

State v. Kowalski, ___ N.C. App. ___, 839 S.E.2d 443 (Feb. 18, 2020)

During cross-examination of the complaining witness in a case involving a charge of assault on a female, the defendant began a line of questions to which the State objected. The trial judge excused the jury and conducted a voir dire, during which the defendant's counsel demonstrated the proposed cross-examination of the witness, including questions about her mental health and treatment. The trial judge ruled that those questions were not relevant and that to the extent they were relevant they were more prejudicial than probative. When cross-examination resumed in front of the jury, the defendant did not attempt to elicit testimony about the witness's mental health. (1) The Court of Appeals rejected the State's argument that the defendant failed to preserve for appellate review the issue of the judge's

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refusal to allow the testimony. The defendant was not required to elicit the testimony before the jury where, as here, the defendant elicited the testimony in voir dire and secured a ruling from the trial judge. The Court distinguished *State v. Coffey*, 326 N.C. 268 (1990), where the trial judge conducted a voir dire, ruled that most of the proposed testimony was inadmissible, but indicated that counsel could ask other questions, which the judge would rule on when the questions were asked. When the jurors returned, however, the defendant did not ask any questions, including questions not yet ruled on by the judge. (2) The Court recognized that North Carolina allows cross-examination of a key witness regarding the witness's past mental problems or defects to challenge the witness's credibility, citing *State v. Williams*, 330 N.C. 711 (1992). The Court found in this case that the excluded testimony concerned prior instances of the witness's mental health and treatment and that one instance involved treatment the witness had sought for childhood trauma; however, the Court stated that the defendant did not ask or attempt to introduce evidence about a mental health diagnosis or mental state. The Court held that the defendant failed to show that the trial judge abused his discretion in finding that the excluded testimony was not relevant or to the extent it was relevant that it was more prejudicial than probative. (3) The defendant argued that the trial judge committed plain error by charging the jury that the alleged assault involved "grabbing, pushing, dragging, kicking, slapping, and/or punching" when the criminal summons alleged "striking her neck and ear." The Court rejected the defendant's variance argument because the defendant failed to object to the instruction at trial, did not request that the trial judge including the "striking" language from the summons, and contributed to the variance by proposing that the judge add the words slapping and punching to the instruction.

Bond Forfeiture

Motion to set aside bond forfeiture filed by corporate officer of surety company was unauthorized practice of law, but sanctions imposed for filing motion with no signature were improper.

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

The defendant's bond was forfeited after he failed to appear for court. After the defendant was served with an order for arrest for failing to appear, the surety on his bond (1st Atlantic Surety Company) filed a motion to set aside the forfeiture pursuant to G.S. 15A-544.5. The motion was signed by a corporate officer of the surety who was not an attorney. The local Board of Education, as a party in interest on the forfeiture, objected on the grounds that filing the motion was the unauthorized practice of law. The trial court agreed and denied the surety's motion, and the appellate court affirmed its ruling. Although a surety is permitted to file such a motion under the statute, it is a legal document and petition for use in court and therefore filing it constitutes the practice of law. While an individual bond agent could have filed this motion *pro se*, G.S. 84-5 dictates that a corporation must appear in court through a licensed attorney and cannot proceed *pro se*.

The trial court also granted the board's motion for sanctions against the surety, as allowed by the statute if the motion to set aside the bond forfeiture "was not signed." The appellate court reversed this part of the order, holding that although the corporate officer's signature on the motion was not authorized, that is not the equivalent of a motion bearing no signature at all.

Capacity to Proceed and Related Issues

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Trial court erred by not conducting another competency hearing before defendant's trial began, where the last competency hearing was held six months before trial and there were bona fide doubts about defendant's competency at the time of trial.

State v. Allen, ___ N.C. App. ___, 837 S.E.2d 196 (Dec. 17, 2019) temp. stay granted, ___ N.C. ___, 836 S.E.2d 654 (Jan. 7, 2020)

After selling one pill of buprenorphine to a confidential informant working with the sheriff's office on October 22, 2015, the defendant was charged with (i) sale, (ii) delivery, and (iii) possession with intent to sell and deliver a Schedule IV substance, as well as (iv) keeping or maintaining a vehicle for the purpose of selling buprenorphine, and (v) being an habitual felon. While awaiting trial, the defendant was involuntarily committed on three occasions, and twice found not capable of proceeding. The defendant was found to have intellectual disabilities that were exacerbated by severe abuse and neglect during his childhood, along with an opiate abuse and bipolar disorder, and he was unable to live independently or maintain a job. Although a prior examination had concluded that the defendant was not likely to regain his capacity to proceed, his third evaluation determined that he had regained capacity. After conducting a hearing on August 23, 2017, the trial court concluded that the defendant was competent to stand trial. Six months later, which was eight months after his last competency evaluation, defendant's trial commenced. Defendant was convicted of the three sale, delivery, and possession offenses, and he pleaded guilty to having attained habitual felon status.

On appeal, the defendant argued that the trial court erred by not holding another competency hearing before starting his trial, and the appellate court agreed. A trial judge's determination of competency is reviewed for abuse of discretion, and it is conclusive on appeal if it is supported by competent evidence. However, a defendant's competency can change over time, and in this case there was a bona fide doubt as to defendant's competency at the time of trial. It was therefore error for the trial court not to conduct another hearing closer to the date of trial. In addition to the defendant's history of mental illness and prior commitments noted above, the appellate court also based its decision on defense counsel's reluctance to agree that the defendant was competent, the defendant's pattern of noncompliance with treatment recommendations, and his unclear answers during the plea colloquy on his habitual felon status. Taken together, these factors raised "a legitimate question as to whether the psychiatric evaluation accurately reflected Defendant's capacity eight months later." The case was remanded for the trial court to conduct a retrospective competency hearing, if possible. If a retrospective hearing is no longer possible, the conviction is reversed and a new trial may be held when defendant is found competent.

The case was also remanded for correction of two clerical errors. First, the trial court's written order incorrectly stated that it was arresting judgment on the charge of selling a controlled substance, when in fact judgment was arrested on the charge of delivery of a controlled substance. Second, the judgment incorrectly listed buprenorphine as a Schedule IV controlled substance, but it was actually a Schedule III drug at the time of the offense.

Counsel Issues

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.

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State v. Simpkins, ___ N.C. ___, 838 S.E.2d 439 (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."

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)

Criminal Procedure

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.

(2) Under the facts of the case, the Court of Appeals determined that trial counsel's failure to request that the jury be instructed on the definition of "unlawful" and on the defense of possession pursuant to a valid prescription did not undermine confidence in the result and did not create a reasonable probability that the result of the proceeding would have been different.

Criminal Procedure

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), temp. stay granted, ___ N.C. ___, 835 S.E.2d 851 (Dec. 20, 2019)

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

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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.

(1) *Harbison* admission to AWDWISI in prosecution for attempted murder and AWDWIKISI was not an admission to attempted murder and did not constitute ineffective assistance of counsel; (2) *Harbison* colloquy by the trial court was proper

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

This Pitt County case involved charges of attempted first-degree murder, assault with a deadly weapon with intent to kill inflicting serious injury (“AWDWIKISI”) and felony breaking or entering. Before trial, the defendant signed a document allowing his attorney to argue that he was guilty of assault with a deadly weapon inflicting serious injury (“AWDWISI”). This “*Harbison* acknowledgement” stated that the defendant understood his right to plead not guilty and have all issues in his case tried; that the defendant understood he was not required to concede guilt as to any offense; that he voluntarily admitted guilt to the assault while understanding the consequences of that admission; and that he authorized his attorney to argue his guilt of that offense to the jury. The trial court conducted a colloquy with the defendant where the defendant orally reaffirmed the terms of the document. At trial, defense counsel argued that the defendant was guilty of AWDWISI but lacked the intent to kill necessary to support the first-degree attempted murder (or AWDWIKISI). The jury convicted on all counts and the defendant appealed. He argued that his admission of guilt to the assault was not knowing or voluntary and that he therefore received ineffective assistance of counsel. He also claimed the trial court's *Harbison* colloquy was deficient.

(1) Under *State v. Harbison*, 315 N.C. 175 (1985), it is per se ineffective assistance of counsel for defense counsel to admit a defendant's guilt to an offense without the defendant's consent. The defendant argued that his admission to the assault was effectively an admission to attempted murder. AWDWISI and attempted first-degree murder have different elements and AWDWISI is not a lesser-included offense of attempted first-degree murder. Thus, the admission to AWDWISI did not admit guilt to attempted murder. Further, the defendant knowingly and voluntarily admitted guilt to that assault, and his attorney never conceded guilt to attempted murder. The defendant therefore could not demonstrate ineffective assistance of counsel.

(2) Before accepting an admission of guilt at trial, the record should reflect the defendant's knowing and informed consent to the admission. Here, it did:

The record demonstrates that Defendant fully understood that trial counsel was going to concede guilt to AWDWISI, and the Defendant expressly consented to the concession. Further, Defendant specifically acknowledged that he understood the consequences of such admission. *Id.* at 11.

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Thus, the trial court's *Harbison* colloquy with the defendant was proper. In addition to his appeal, the defendant filed a motion for appropriate relief ("MAR") in the appellate division. Denying that motion, the court found that no *Harbison* violation occurred and that the defendant could not therefore show the existence of a ground for relief under the MAR statute. The convictions were thus unanimously affirmed.

Sufficient evidence supported conspiracy to commit attempted first-degree murder, and defense counsel was not ineffective by failing to challenge the sufficiency of evidence for that offense

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.

The defendant failed to preserve his challenge to the sufficiency of the evidence supporting the conspiracy charge. At the motion to dismiss, defense counsel conceded that the state had sufficient evidence for conspiracy. The court declined to invoke Rule 2 of the Appellate Rules of Procedure to reach the issue, finding the case did not present the type of "exceptional circumstances" justifying Rule 2 review. The defendant maintained in the alternative that his trial counsel's failure to move for dismissal constituted ineffective assistance of counsel ("IAC"). IAC claims are typically reviewed via a motion for appropriate relief, where facts may be developed at an evidentiary hearing. Here, though, the cold record was sufficient for the court to determine the IAC claim. "An attorney's failure to move to dismiss a charge is not ineffective assistance of counsel when the evidence is sufficient to defeat the motion." Slip op. at 6. The conspiracy charge here was amply supported by the evidence—it showed three men attacked the victim in the victims' bedroom and that the attack was "simultaneous [and] coordinated." This was substantial evidence of an agreement between the attackers to murder the victim, and the motion to dismiss was properly denied. The defendant thus could not demonstrate prejudice for an IAC claim, and the claim was rejected.

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

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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, Subpoenas & Related 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

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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

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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

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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.

No abuse of discretion for failure to impose discovery sanctions

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

In this Union County case, the defendant appealed convictions for methamphetamine trafficking and maintaining a vehicle for keeping or selling drugs (among others). An officer in Wadesboro observed the defendant's car at a "known drug house" and alerted a county deputy about the suspect vehicle, who in turn notified an officer with the Town of Wingate. The Wingate officer stopped the defendant for minor traffic violations. The officer ultimately searched the vehicle and found meth in a tire-sealant can with a hidden cavity. The defendant argued at suppression that the Wingate officer failed to disclose the source of his tip in discovery. That deputy testified at suppression that the Wadesboro officer was the source of the tip to the Wingate officer, but acknowledged his failure to disclose this information in his report. The defendant complained to the trial court of this last-minute disclosure. The prosecutor acknowledged "difficulty" in obtaining complete information but pointed out that she had sought information from the deputy about the source of the tip, learned it was a Wadesboro officer, and requested a supplemental report. Further, the prosecutor informed defense counsel about these steps. The motion to suppress was denied and the defendant was convicted at trial.

The trial court did not err in declining to impose sanctions on the State for discovery violations. Where a party fails to comply with statutory discovery obligations, G.S. 15A-910 authorizes the court to sanction the offending party. "Whether a party has complied with discovery and what sanctions, if any, should be imposed are questions address to the sound discretion of the trial court." Slip op. at 8 (citation omitted). Under that standard, the trial court will only be reversed if its decision was "manifestly unsupported by reason." *Id.* at 9. While the defendant was not made aware of the Wadesboro officer's identity until the suppression hearing, the State ultimately provided the deputy's supplemental report and there was no record evidence that the defendant specifically sought the unknown officer's identity. On these facts, the trial court did not err in declining to impose sanctions on the State for the alleged discovery violation.

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Habeas Corpus

A state trial judge must summarily deny an application for the writ of habeas corpus from a petitioner held pursuant to an immigration-related arrest warrant or detainer by a sheriff who is a party to a 287(g) agreement.

Chavez v. McFadden, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

Carlos Chavez and Luis Lopez, initially charged with state crimes and held in pretrial detention in the Mecklenburg County Jail, both became eligible for release from their state charges on October 13, 2017. But they were not released. The Sheriff, a participant in a § 287(g) agreement with the Department of Homeland Security, continued to hold them on immigration-related warrants and detainers. That same day, both men filed petitions for a writ of habeas corpus. A superior court judge entered orders finding that the men were being unlawfully detained and ordered their discharge from custody. The Sheriff declined to release either petitioner and delivered them to federal immigration custody. In November 2017, the Sheriff filed petitions for writ of certiorari with the Court of Appeals to review the trial judge's orders, and a writ of prohibition seeking to preclude similar orders in the future. The next month, the Court of Appeals allowed the petitions and entered an order prohibiting a trial court from issuing a writ of habeas corpus for a person detained pursuant to a 287(g) agreement. The following year the Court of Appeals vacated the trial court orders for lack of jurisdiction, concluding that they infringed upon the federal government's exclusive authority over immigration matters. *Chavez v. Carmichael*, 262 N.C. App. 196 (2018).

The Supreme Court allowed discretionary review and affirmed in part. The Court concluded as a threshold matter that although the matter was rendered moot when the Sheriff turned the men over to immigration authorities, the case fell within the scope of the public interest exception to the mootness doctrine. Proceeding to the merits, the Court concluded that a state court judge cannot interfere with the custody and detention of individuals held pursuant to federal authority, which includes state officials acting in accordance with a § 287(g) agreement. A trial court has jurisdiction to determine as an initial matter whether it has the authority to issue the writ, but once that initial examination of the application shows that the petitioner is being held pursuant to an immigration-related warrant or detainer, the trial court should summarily deny the application. Here, the applications, on their face, informed the judge that the petitioners were being held on immigration related process by a custodian who was a party to a § 287(g) agreement, and should therefore have been denied. The Court said the Court of Appeals erred to the extent that it held that the trial court lacked jurisdiction to make even an initial determination as to the basis for the petitioners' detention, and also by addressing the extent to which habeas relief is available to petitioners detained on immigration-related documents by sheriffs who are not parties to § 287(g) agreements. In a footnote, the Court vacated the portion of the Court of Appeals' decision ordering that a copy of its decision be sent to the Judicial Standards Commission.

Double Jeopardy

(1) Trial court has authority to consider propriety of mistrial order when defendant moves for dismissal for double jeopardy at subsequent trial; (2) Where defendant opposed mistrial request and

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argued against it, the issue was preserved for appellate review; (3) Missing witnesses did not support a finding of manifest necessity for mistrial; double jeopardy prevents retrial

State v. Resendiz-Merlos, ___ N.C. App. ___, 834 S.E.2d 442 (Oct. 15, 2019)

In this Watauga County case for indecent liberties, the defendant was accused of improper contact with a child in an incident allegedly witnessed by the child's sister and mother. The State sought to compel the mother and two daughters to testify at trial. After jury was impaneled and opening statements were given, the court released the jury for the day. The State sought a show-cause order for the mother of the alleged victim, stating that the witness and her children were not present despite having been personally served with a subpoena. The State recounted efforts to reach the witnesses at the mother's home and work, as well as at the children's school. The defense opposed the show-cause order and sought to have trial proceed. The trial court issued the show-cause for the mother and set the matter for hearing the next morning. The mother and children again did not appear in court the next day and the trial court received more information that the witnesses could not be found. The State then sought an order for the mother's arrest. Defense counsel again opposed the request, asking that the trial proceed or be dismissed and opposing any mistrial. The trial court issued the order for the mother's arrest and held the proceedings open until later in the afternoon. When the witnesses were still not present, the State moved for a mistrial, arguing that the witnesses were "necessary and essential" and that trial could not proceed without them. The defendant again opposed a mistrial. The trial judge granted the mistrial, finding that the witnesses were not available due to no fault of the parties and "that their absence 'deprived the State of its ability to present its case and to meet its burden of proof.'" At retrial, the defendant filed a motion to dismiss, arguing that a second trial would violate double jeopardy. The trial court denied the motion, ruling that because an earlier Superior Court judge had found a manifest necessity supporting the mistrial order, the present trial court could not overrule that earlier decision. The motion was therefore denied. The defendant sought review in the Court of Appeals by way of petition for writ of certiorari, which was granted. The Court of Appeals reversed.

(1) The State first argued that appellate review should be limited to the motion to dismiss and should not consider the propriety of the mistrial order. The court disagreed. Under *State v. Odom*, 316 N.C. 306 (1986), "where the order of mistrial has been improperly entered over a defendant's objection, defendant's motion for dismissal at a subsequent trial *must be granted*." In order to determine whether the motion to dismiss should have been granted, the court must also determine the propriety of the mistrial order. The court observed that it reviewed both the order denying the motion to dismiss and the mistrial order in the recent case of *State v. Schalow*, 215 N.C. App. 334 (2016), *disc. rev. improvidently allowed*, 370 N.C. 525 (2018), on similar facts.

(2) The State also alleged that the constitutional issue was unpreserved, because the defendant failed to object to the mistrial. Rejecting this contention, the court noted:

Although Defendant never formally recited the word "objection" or noted any "exception" to the trial court's declaration of a mistrial, he did 'present the trial court with a timely request' to deny the State's motion for a mistrial, 'stating the specific grounds for the ruling sought.'

While the defendant is generally not entitled to plead double jeopardy when he fails to object to the mistrial, here, the trial court heard arguments and ruled on the issue. This was sufficient to preserve the issue for appellate review.

(3) The trial court erred in denying the motion to dismiss based on its perceived inability to overrule another Superior Court judge. Under *Odom*, the court faced with a double jeopardy motion must determine whether the mistrial order was appropriate. While a mistrial normally does not support a

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double jeopardy claim, a mistrial must be supported by a manifest necessity when the defendant objects. A mistrial may be declared due to “physical necessity”—such as when a juror can no longer participate in the trial—or due to the “necessity of doing justice”—to protect the court system from “fraudulent practices” or where a fair trial has become impossible. Where the State seeks a mistrial, it has a “heavy” burden to carry in justifying the order. When the mistrial is based on missing or unavailable evidence, the “strictest scrutiny” applies under *Arizona v. Washington*, 434 U.S. 497 (1978). The inquiry looks at what the State knew at the time that trial began, and close cases should be resolved “in favor of the liberty of the citizen. . . .” Here, “it is clear the State took a chance by impaneling the jury ‘without first ascertaining’ that its witnesses . . . were present and available to testify.” There was no record evidence of any misconduct on the defendant’s part causing the witnesses to be absent, and all three witnesses were under subpoena before trial. The State assumed the risk that its witnesses would not appear, and that jeopardy would attach once the jury was impaneled. These circumstances did not constitute a manifest necessity. The court therefore unanimously reversed the trial court, remanding for the trial court to grant the motion to dismiss.

Indictment & Pleading Issues

The State may amend a criminal pleading after arraignment through a statement of charges if doing so does not change the nature of the charges.

State v. Capps, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

The defendant was charged by arrest warrant with misdemeanor injury to personal property, misdemeanor larceny, and reckless driving after he cut off the end of a truck stop’s air hose, attempted to strike his passenger with it, and then quickly fled with it when confronted by an undercover officer. He was convicted in district court and appealed to superior court. Before trial in superior court, the State moved to amend the charging language to correct the name of the corporate property owner for the injury to personal property and larceny charges. The prosecutor made the amendment on a misdemeanor statement of charges form with no objection from the defendant. The defendant was convicted and appealed. A divided Court of Appeals held that the superior court lacked jurisdiction to try the charges amended through the statement of charges, reasoning that under the language of G.S. 15A-922(e), a statement of charges may be filed after arraignment only if the defendant objects to the State’s original pleading. *State v. Capps*, ___ N.C. App. ___, 828 S.E.2d 733 (2019). The State appealed and the Supreme Court reversed, reinstating the convictions. The Court held that warrants may be amended at any time when doing so does not materially affect the nature of the charged offense or is otherwise authorized by law. And the State may make the amendment through a statement of charges, because the General Assembly intended statements of charges to be generally treated like amendments. The Court rejected the defendant’s argument that the defendant’s objection to the sufficiency of a warrant is a necessary prerequisite to a post-arraignment statement of charges.

(1) Majority of Court of Appeals holds that attempted armed robbery must specifically name victims and that indictment that alleged victims as employees of business was fatally defective

(2) Whole plea agreement covering defective charge and other charges had to be vacated; parties may enter into new plea agreement or State may proceed to trial on all charges, including new indictment for armed robbery

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

The defendant was indicted in 2013 for first-degree murder, attempted armed robbery, and conspiracy to commit murder for crimes committed in 1996. Pursuant to a plea agreement, the defendant pled guilty in June 2014 to a reduced charge of second-degree murder, attempted armed robbery, and conspiracy to commit robbery, for which he received a consolidated sentence of 120 to 153 months. In June 2015, the defendant filed a motion for appropriate relief claiming that the indictment for attempted armed robbery was fatally defective by failing to name any victim. The trial judge denied the motion, and the defendant petitioned for a writ of certiorari. (1) A majority of the Court of Appeals ruled that the indictment was fatally defective and did not provide the trial court with jurisdiction to enter judgment on the defendant's guilty plea to attempted armed robbery. The Court recognized that armed robbery is a crime against the person. Like common law robbery, it involves the taking of money or goods from the person or presence of another by violence or intimidation. The only difference is the use of a firearm or other dangerous weapon. Indictments for such crimes must specifically name the victim. The Court held that attempted armed robbery is indistinguishable from the completed crime in terms of the subject matter and the victim must be specifically named in the indictment. The indictment in this case alleged the victims as employees of the Huddle House. Relying on prior decisions, including the North Carolina Supreme Court's decision in *State v. Scott*, 237 N.C. 432 (1953), the Court ruled that this allegation was not sufficient to satisfy the requirement that the victim be specifically named. A dissenting judge would have found the indictment sufficient because the allegation that the defendant was attempting to steal property from the employees of Huddle House was sufficient to show that the defendant was taking others' property and the allegation that the lives of the employees were threatened or endangered by the defendant's possession of a firearm was sufficient to put him on notice of the manner and means by which the crime was perpetrated. (2) The Court of Appeals rejected the requested remedy of vacating his conviction for attempted armed robbery. The Court held that by successfully moving to vacate the judgment for armed robbery, the Court was obliged to vacate the whole plea agreement. The Court observed that the parties may enter into a new plea agreement or the State may proceed to trial on the charges, including attempted armed robbery pursuant to a new indictment.

(1) The State is not required to file a superseding information before trial in order to retain the trial court's subject matter jurisdiction; (2) The trial court did not commit plain error by failing to give a guilty knowledge instruction when the defendant's defense was that the drugs belonged to someone else.

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

(1) 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

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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. (2) The defendant also argued that the trial court committed plain error by failing, despite the lack of a request or objection, to instruct the jury on the requirement that the defendant have guilty knowledge of the methamphetamine. The Court of Appeals rejected the argument, distinguishing an earlier case, *State v. Coleman*, 227 N.C. App. 354 (2013). In *Coleman*, the court found plain error when the trial court failed to instruct on guilty knowledge for a defendant convicted of trafficking heroin who knew he possessed drugs, but who thought he had marijuana and cocaine, not heroin. Here, the defendant denied any knowledge about the existence of the methamphetamine and argued that it belonged to someone else. Even assuming the trial court erred by not giving the instruction, the Court of Appeals concluded it would not rise to the level of plain error given the evidence against the defendant.

1) A sex offense indictment that identified the child victim as "Victim #1" was fatally defective. (2) The trial court's erroneous failure to conduct a jury instruction conference prior to submitting the existence of a statutory aggravating factor to the jury did not "materially prejudice" the defendant.

State v. Corey, 373 N.C. 225, 835 S.E.2d 830 (Dec. 6, 2019)

In this sex offense and indecent liberties case, the court held: (1) a sex offense indictment that identified the child victim as "Victim #1" was fatally defective; (2) the trial court's erroneous failure to conduct a jury instruction conference prior to submitting the existence of a statutory aggravating factor to the jury did not "materially prejudice" the defendant.

(1) Following its decision in *State v. White*, 372 N.C. 248 (2019), the court held that an indictment charging the defendant with committing a sex offense with a child was fatally defective and facially invalid because it identified the victim as "Victim #1." As in *White*, the court found that identifying the victim as "Victim #1" did not satisfy the requirement in G.S. 15-144.2(b) that a short form sex offense with a child indictment "[name] the child."

(2) The court went on to determine that the trial court's failure to conduct an instruction conference prior to submitting the existence of the "position of trust or confidence" statutory aggravating factor to the jury was error but that it did not "materially prejudice" the defendant. After accepting the jury's verdict in the guilt-innocence phase of the trial, the trial court convened a proceeding for the purpose of determining whether a properly noticed "position of trust or confidence" statutory aggravating factor existed. The record clearly established that during this proceeding the trial court did not conduct a jury instruction conference or otherwise discuss the manner in which the jury should be instructed concerning the aggravating factor. G.S. 15A-1231(b) requires trial courts to hold a recorded conference on jury instructions but states that a failure "to comply fully" with the statute does not constitute grounds for appeal unless it "materially prejudiced the case of the defendant." The Court of Appeals had held, relying on its own precedent, that the total failure to conduct a jury instruction conference necessitated a new proceeding on the aggravating factor regardless of whether the defendant made a showing of "material prejudice." The Supreme Court rejected this approach and its distinction between cases in which the trial judge entirely fails to comply with G.S. 15A-1231(b) and those where there is partial compliance. Overruling any earlier decisions to the contrary, the Supreme Court explained:

[T]he reference in [G.S.] 15A-1231(b) to the necessity for the trial court to "comply fully" with the statutory requirement that a jury instruction conference be conducted, instead

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of distinguishing between a complete and a partial failure to comply with the applicable statutory requirement, is intended to require the making of a showing of “material prejudice” a prerequisite to an award of appellate relief regardless of the nature and extent of the trial court’s non-compliance with [G.S.] 15A-1231(b).

With this explanation of the statute, the court proceeded to analyze whether the defendant was materially prejudiced in this case and concluded that he was not, noting that there was undisputed overwhelming evidence that the victim was dependent on the defendant in various ways as his step-child and that the court previously had stated that evidence establishing a parent-child relationship tends to support the aggravating factor at issue.

In separate opinions, Justices Newby and Morgan dissented in part and concurred in result only in part. Justice Newby dissented from the portion of the majority opinion dealing with the validity of the indictment, noting that the defendant was “fully aware of the identity of the victim” and expressing his view that the indictment was sufficient. As for the instruction conference issue, Justice Newby interpreted G.S. 15A-1231(b) as not requiring a formal instruction conference at a sentencing proceeding to determine the existence of an aggravating factor. In a footnote, the majority opinion rejected this interpretation of the statute.

Justice Morgan also would have found the indictment valid because, scrutinizing the whole record, it sufficiently apprised the defendant of the charge against him. Justice Morgan noted that the victim’s initials appeared on the arrest warrant that was issued for the defendant and on an indictment returned against him for indecent liberties involving the same victim. Justice Morgan would have reached the same conclusion as the majority with regard to the instruction conference issue but would have done so by distinguishing rather than overruling the pertinent Court of Appeals opinions.

(1) 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. (2) The victim’s injuries resulted in a protracted loss or impairment and therefore sufficed as a serious bodily injury. (3) The defendant waived appellate review of the trial court’s failure to instruct the jury on a lesser-included assault.

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. (1) 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. (2) The injury to the victim’s eye met the statutory definition of “serious bodily injury” in G.S. 14-32.4(a) in that the defendant was completely blind in her left eye for one week and her vision was not fully restored for two full weeks after the assault. She could not drive for one week and was not able to return to work until her vision was completely restored. A reasonable juror thus could have concluded that the injury resulted in a “protracted loss or impairment of the function of a bodily member or organ,” and that it therefore qualified as a serious bodily injury.

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(3) Finally, the court declined to consider the defendant's argument on appeal that the trial court should have instructed the jury on misdemeanor assault inflicting serious injury. The defendant never objected to the instructions at trial and failed to argue plain error on appeal. Therefore, he waived the issue on appeal. A judge dissenting in part would have found the evidence here insufficient to qualify as a "protracted loss or impairment" when the victim fully recovered in in two weeks.

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. ___, ___ S.E.2d ___ (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).]

Joinder

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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.

Jurisdictional Issues

The defendant did not sufficiently demonstrate that he qualifies as an "Indian" under the federal Indian Major Crimes Act and the trial court was not required to submit that issue to the jury by means of a special verdict where the facts relevant to that issue were undisputed

State v. Nobles, ___ N.C. ___, 838 S.E.2d 373 (Feb. 28, 2020)

The defendant did not sufficiently demonstrate that he qualifies as an "Indian" under the federal Indian Major Crimes Act (IMCA) and, consequently, the trial court did not err in refusing to dismiss state murder, robbery, and weapons charges on jurisdictional grounds or in ruling that the jurisdictional issue was not required to be submitted to the jury by means of a special verdict. The federal Indian Major Crimes Act provides that "[a]ny Indian who commits [an enumerated major crime] against the person or property of another . . . within the Indian country[] shall be subject to . . . the exclusive jurisdiction of the United States." In this case, there was no dispute that the shooting at issue took place in "Indian country" as it occurred within the Qualla Boundary and there was no dispute that the resulting charges constituted major crimes for purposes of the IMCA. The only question was whether the defendant qualified as an "Indian" under the IMCA, which does not provide a definition of that term.

The court noted that the United States Supreme Court in *United States v. Rogers*, 45 U.S. 567 (1846) suggested a two-pronged test for analyzing whether a person qualifies as an Indian under the statute. To qualify as an Indian under the *Rogers* test, a defendant must (1) have "some Indian blood," and (2) be "recognized as an Indian by a tribe or the federal government or both. The parties in this case agreed that the first part of this test was satisfied because the defendant possessed an Indian blood quantum of 11/256 (4.29%). Noting that it had never applied the *Rogers* test, the court reviewed the analyses of courts in other jurisdictions as it determined whether the second prong of the test was satisfied. Finding that a four-factor balancing test enunciated in *St. Cloud v. United States*, 702 F. Supp. 1456 (D.S.D. 1988) was frequently used in jurisdictions across the country with respect to the second prong of the *Rogers* test, though with variability in the manner of its application, the court adopted the Eighth and Tenth Circuit's utilization of the test. It did so "based on our belief that this formulation of the test provides needed flexibility for courts in determining the inherently imprecise issue of whether an individual should be considered to be an Indian under the second prong of the *Rogers* test" and also

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recognized “that, depending upon the circumstances in a given case, relevant factors may exist beyond the four *St. Cloud* factors that bear on this issue.” A court applying the four-factor *St. Cloud* test considers the following factors:

1) enrollment in a tribe; 2) government recognition formally and informally through providing the person assistance reserved only to Indians; 3) enjoying benefits of tribal affiliation; and 4) social recognition as an Indian through living on a reservation and participating in Indian social life.

For various reasons, the court rejected the defendant’s initial arguments that his status as a first descendant of the tribe demonstrated his “tribal or federal recognition” as a matter of law. The court then proceeded to apply the four *St. Cloud* factors along with any additional factors relevant to the analysis, noting that the trial court’s findings regarding the defendant’s motion to dismiss had not been specifically challenged on appeal and therefore were binding. Applying the four-factor balancing test, the court found (1) it was undisputed that the defendant was not enrolled in any federally recognized tribe; (2) the only evidence of governmental assistance to defendant consisted of five incidents of free medical treatment he received as a minor; (3) though he did live and work on or near the Qualla Boundary for fourteen months prior to the murder, there was not evidence that defendant received broader benefits from tribal affiliation or that his employment on the Qualla Boundary was in any way connected to his first descendant status; (4) though the defendant was dating an enrolled tribal member at the time of the murder and had two tattoos depicting his cultural heritage, the defendant self-identified as being “white” on official documents and did not participate in Eastern Band of Cherokee Indian cultural, community, or religious activities. Turning to whether any other relevant factors existed, such as whether the defendant had ever been subjected to tribal jurisdiction in the past, the court found that there was no evidence of other relevant factors. With this analysis of the second prong of the *Rogers* test, a majority of the court held that the trial court properly concluded that the defendant was not an Indian for purposes of the IMCA and properly denied his motion to dismiss.

The court then turned to whether the defendant was entitled to a special jury verdict on the jurisdictional issue and whether the trial court erred by ruling on that issue as a matter of law. The court distinguished two of its prior cases involving issues of territorial jurisdiction and noted that in this case the defendant did not challenge the facts underlying the jurisdictional determination, a determination the court characterized under these facts as “an inherently legal question properly decided by the trial court.” The court concluded its analysis of this issue by observing that the dissent failed to cite any authority for the “proposition that in state court proceedings the *inapplicability* of the IMCA is an element of the crime that must be submitted for resolution by the jury.”

Justice Earls disagreed with the majority’s conclusion that the defendant was not entitled to a special jury verdict on the question of whether he is an “Indian” under the IMCA, and, assuming that the majority was correct that the question need not be submitted to the jury, disagreed with the majority’s conclusion that the defendant is not an Indian under the IMCA.

Superior court judge’s order directing the State to disclose contents of criminal investigative file in any criminal matter in which the State intends to call a specified law enforcement officer as a witness was an improper advisory opinion that exceeded the scope of the judge’s power

In re Washington County Sheriff’s Office, ___ N.C. App. ___, ___ S.E.2d ___ (May 5, 2020)

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The elected district attorney for prosecutorial district 2, which includes Washington County, filed an ex parte motion in superior court to determine whether a criminal investigative file contained potentially exculpatory information involving a Washington County law enforcement officer that the State would be required to disclose in cases in which it intended to call the officer as a witness. The motion was not filed in connection with any particular criminal prosecution. A superior court judge reviewed the file and ordered the district attorney's office to disclose to defendant and/or defense counsel the contents of the investigative file in any criminal matter in which the State intended to call the officer as a witness.

The law enforcement officer was notified of the order and appealed.

Over a dissent, the Court of Appeals determined that the judge exceeded the limits of the court's jurisdiction by entering an advisory opinion and vacated the order. The court reasoned that the order was an anticipatory judgment providing for the contingency that the officer would be called as a witness in a future criminal case. The order was "purely speculative" and amounted to an advisory opinion that the parties might "put on ice to be used if and when occasion might arise." Slip op. at 6 (internal citations omitted). The court stated that the advisory nature of the order was especially evident if one considered the alternative scenario in which the judge ruled that the State was not required to disclose information contained in the investigative report. Such an order would not bind trial courts from independent determinations of disclosure obligations in future cases.

A dissenting judge would have concluded that the trial court had authority to enter the order and that the appellate court was without jurisdiction to reach the merits of the petitioner's claims as the petition was not an aggrieved party to the proceeding from which he appealed.

Jury Selection

The Court of Appeals erred in upholding the trial court's finding that the defendant failed to establish a prima facie case of racial discrimination under *Batson*.

State v. Bennett, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

The defendant was charged with possession of a firearm by a felon and multiple drug crimes including drug trafficking. During jury selection, the State peremptorily challenged two potential jurors who were black before accepting a white juror. The defendant made a *Batson* motion, arguing that there was no basis aside from race for excusing the first two jurors. The trial court concluded that the defendant had not made a prima facie showing of racial discrimination, noting in particular that the State had "excused two, but kept three African Americans." The defendant was convicted and appealed. The Court of Appeals affirmed the trial court, holding that the defendant failed to make a prima facie case that the State's challenges were racially motivated. *State v. Bennett*, 262 N.C. App. 89 (2018).

On discretionary review, the Supreme Court reversed the Court of Appeals. As a preliminary matter, the Court agreed with the Court of Appeals that the record contained sufficient information about the relevant jurors' race to permit a substantive review of the defendant's *Batson* claim. There was no dispute among counsel for the parties or the trial judge concerning the racial identity of the relevant jurors, resulting in what amounts to a stipulation to their racial identity. The Court then concluded that the Court of Appeals erred in upholding the trial court's rejection of the defendant's *Batson* claim. After noting that a numerical analysis of strike patterns with respect to race is not necessarily dispositive, the Court said that the pattern here—where the State had challenged two of five African American

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prospective jurors but no white jurors, and where all of the State's peremptory challenges were used to excuse black prospective jurors—was sufficient to raise an inference of purposeful discrimination when there was no other immediately obvious justification for the challenges. The Court rejected the State's argument that the State's acceptance rate for African American prospective jurors (three out of five) was higher than in many previous cases affirming trial court findings of no purposeful discrimination. Those cases included other distinguishing facts beyond the acceptance rate, such as the State using peremptory challenge on at least one white prospective juror, or a juror expressing reservations about the death penalty. Having found that the trial court erred at step one of the *Batson* analysis, the Court remanded the matter for a hearing to complete the second and third steps of the required analysis.

Justice Newby dissented, writing that the defendant did not preserve the race of the jurors for the record, and that Court therefore should not have reached the merits of his claim. And even if the issue had been preserved, he would have concluded that the trial court did not clearly err.

(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

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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.

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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](#).]

The trial court did not err in finding that the defendant failed to establish a *prima facie* *Batson* claim.

State v. Campbell, ___ N.C. App. ___, 838 S.E.2d 660 (Jan. 21, 2020)

In this first-degree murder case, defense counsel objected to the State's use of peremptory challenges to strike three African American prospective jurors. The trial court denied defense counsel's *Batson* challenge, finding that the defendant had not established a *prima facie* case that the State acted in a racially discriminatory manner. The Court of Appeals found no error, first denying the State's motion to dismiss the appeal for failing to include a verbatim transcript of jury selection in the appellate record. A transcript is not required—although the court noted that it is “extremely difficult” to prevail on a *Batson* argument without one. Here, the Court of Appeals concluded that the narrative summary of jury selection proceedings in the appellate record was “minimally sufficient” to enable the court to review whether the defendant established a *prima facie* *Batson* claim by presenting factors relevant to the claim (so-called *Quick* factors, listed by the Supreme Court in *State v. Quick*, 341 N.C. 141 (1995), including the defendant's race, the victim's race, the race of key witnesses, and information about the State's use of peremptory challenges to strike jurors based on race). On the merits, however, the court concluded over a dissent that without more information about the *Quick* factors (the narrative summary did not state the victim's race, the race of key witnesses, or the final racial composition of the jury), it lacked sufficient information to conclude that the trial court erred. The court “urge[d] all criminal defense counsel that the better practice is to request a verbatim transcription of jury selection if they believe a *Batson* challenge might be forthcoming.” The court declined to consider the State's proffered nondiscriminatory reasons for striking three prospective African American jurors, because those reasons were provided only after the judge had already ruled that the defendant had failed to establish a *prima facie* case of discrimination. (The court distinguished situations where the State volunteers nondiscriminatory reasons before the judge rules on the question of a *prima facie* case, or where the court requires the State to give reasons before actually ruling on the first question.)

A judge concurring in part and dissenting in part agreed with the majority that the narrative summary in the record sufficed to deny the State's motion to dismiss the appeal, but would have concluded that the State's use of three out of four peremptory challenges on African American jurors was a sufficient basis on which to remand the case for the trial court to conduct a *Batson* hearing and make specific factual findings on whether the defendant made a *prima facie* case.

Jury Argument

(1) Defendant was not prejudiced by remarks made by the prosecutor in closing argument given the evidence of guilt presented by the State; (2) Trial court's order imposing lifetime satellite-based monitoring was unconstitutional

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

The defendant was convicted in a jury trial of multiple counts of statutory rape of a child, statutory sex offense with a child, and taking indecent liberties with a child. The trial court sentenced the defendant

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to 300 to 420 months of imprisonment and ordered lifetime satellite-based monitoring (“SBM”) upon his release from prison. The defendant appealed from his conviction, arguing that the State made improper closing arguments. He also argued that the trial court erred in imposing lifetime SBM because the State failed to establish that SBM constitutes a reasonable search under the Fourth Amendment.

(1) The defendant argued on appeal that several of the prosecutor’s statements in closing argument were improper and prejudicial, identifying five sets of objectionable arguments.

(a) The defendant argued that the prosecutor’s statements to the jury that they “cannot consider what they did not hear” and could not “speculate about what people that did not come into court and did not put their hand on the Bible and did not swear to tell you the truth might have said” improperly commented on the defendant’s exercise of his Fifth Amendment right not to incriminate himself. Assuming without deciding that these comments referred to the defendant’s exercise of his Fifth Amendment right not to testify, the Court of Appeals concluded that arguments were harmless beyond a reasonable doubt given the overwhelming evidence of defendant’s guilt.

(b) The defendant argued that the prosecutor improperly commented, in reference to the juvenile victims’ testimony, that “[a]dults have to bring them into court and ask them to tell a roomful of strangers about these sexual acts to try and prevent them from occurring in the future to others.” The defendant contended that this comment impermissibly (1) criticized his exercise of the right to a jury trial, and (2) suggested that the juvenile victims had to testify to prevent him from committing future crimes. Assuming without deciding that the prosecutor’s comment referred to the defendant’s right to trial, the Court of Appeals concluded that any error was harmless beyond a reasonable doubt in light of the overwhelming evidence of defendant’s guilt. As for the second basis of the defendant’s objection, the court noted that specific deterrence arguments are proper and determined that the trial court did not abuse its discretion in overruling the defendant’s objection to this comment in closing argument.

(c) The defendant contended that the prosecutor impermissibly told the jury that if they acquitted the defendant, “You will be telling [the juvenile victims] it was their fault.” The defendant argued that the statement improperly focused the jury’s attention on how the juvenile victims would interpret a verdict of not guilty rather than on determining whether the State had proven its case against the defendant. The Court of Appeals determined that given the evidence of defendant’s guilt, the prosecutor’s statement was not so grossly improper as to justify a new trial.

(d) The defendant argued that the prosecutor presented an argument that was calculated to mislead or prejudice the jury when he referred to expert testimony about the probability of a random match for the defendant’s DNA profile. The prosecutor told the jury: “If you saw that statistical number [one in 9.42 nonillion] and thought there was still a chance that’s not the defendant’s DNA found in [N.M.], that’s an unreasonable doubt.” Assuming without deciding that the prosecutor’s statement improperly conflated the “chance that’s not the defendant’s DNA found in [N.M.]” with the one in 9.42 nonillion chance of a random match, the Court of Appeals did not find that the statement rendered the conviction fundamentally unfair.

(e) Finally, the defendant argued that the trial court erred in failing to intervene when the prosecutor said, “The DNA tells the truth. The girls told the truth.” The defendant contended that this statement was a prohibited expression of the prosecutor’s personal opinion about the veracity of evidence and witness credibility. The Court of Appeals noted that while an attorney may not express his personal belief as to the truth or falsity of the evidence or as to the guilt or innocence of the defendant, a prosecutor may argue that the State’s witnesses are credible. Considering the record as a whole, the court concluded that the comment did not rise to the level of fundamental unfairness given the

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evidence presented at trial. The court noted that the State presented the testimony of both juvenile victims, the testimony of the victims' family members that corroborated their testimony, and the testimony of forensic experts that showed that Defendant's DNA matched the sperm collected from one of the juvenile victim's rape kit. Given this overwhelming evidence of guilt, the court was unable to conclude that the prosecutor's comments prejudiced the defendant.

(2) Over a dissent, the Court of Appeals granted certiorari review of the trial court's order imposing lifetime SBM and invoked Rule 2 of the Rules of Appellate Procedure to consider the defendant's constitutional claim, which was not raised before the trial court.

The trial court determined at sentencing that the defendant was convicted of reportable convictions pursuant to G.S. 14-208.6(4) and that statutory rape of a child by an adult and statutory sex offense were sexually violent offenses and aggravated offenses involving the sexual abuse of a minor. Pursuant to these findings, the court ordered that the defendant enroll in lifetime SBM upon his release from imprisonment.

The trial court did not, however, conduct a hearing to determine the constitutionality of ordering the defendant to enroll in SBM, as required by *State v. Grady*, 259 N.C. App. 664 (2018), *aff'd as modified*, 372 N.C. 509 (2019), and the State did not present any evidence regarding the reasonableness of an SBM search, which would be carried out following the defendant's release from prison in 25 to 35 years.

The Court of Appeals held that the trial court's failure to hold a hearing to determine the reasonableness of lifetime SBM for the defendant rendered the SBM order unconstitutional. The court thus vacated the imposition of lifetime SBM without prejudice to the State's ability to file a subsequent SBM application.

A dissenting judge would have dismissed the defendant's petition for certiorari review of the SBM order based on his failure to raise the constitutional challenge before the trial court.

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

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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

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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 Deliberations

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. ___, ___ S.E.2d ___ (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.

Jury Instructions

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Trial judge must give all jury instructions to the jury and may not have clerk read some of the instructions

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

The defendant's sole argument on appeal was that the trial judge violated the statutory mandates of G.S. 15A-1231 and 15A-1232 by allowing the clerk to read some of the jury instructions to the jury. The judge had the clerk read the instructions on "(1) the function of the jury; (2) the presumption of innocence; (3) the State's burden of proof and the definition of reasonable doubt; (4) the jury's duty in evaluating the credibility of witnesses; (5) the weight of the evidence; (6) the definitions of direct and circumstantial evidence; and (7) the effect of Defendant's decision not to testify." The judge read the remainder of the instructions about the specific charges and factual findings required by the jury to convict the defendant. The defendant argued that this procedure gave the jury the impression that the first instructions were less important than those read aloud by the judge herself. The Court of Appeals held that the trial judge violated the statutory mandate that the judge give all instructions to the jury. The Court urged the trial bench not to avoid its statutory duty and emphasized its importance. The Court also recognized the possibility of prejudice by the failure to do so but found the error harmless in this case. The trial judge instructed the jury to listen closely to the clerk; the judge interjected several times to correct misstatements by the clerk; the jury reached its verdict without seeking clarification from the judge; and when asked by the judge for any additions or corrections to the instructions, counsel for the defendant said no.

(1) Trial judge did not err in refusing to instruct the jury on consent in case involving assault inflicting serious bodily injury (AISBI)

(2) Trial judge did not abuse discretion in refusing to impose sanctions for State's failure to disclose fee paid to expert about the victim's injuries

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

The defendant met his former girlfriend and new boyfriend, the victim in the case, at a bar. The defendant asked the victim to step outside to talk. During the exchange, the victim told the defendant to hit him. (According to the concurrence, the victim said, "If you want to hit me, hit me, but this is not the way we need to solve this issue."). The defendant hit the victim and broke his jaw in two places, requiring surgery to repair the damage. (1) The defendant argued that the trial court erred in refusing to instruct the jury on AISBI. The majority stated that consent is not a defense to assault in North Carolina and held that the trial court did not err in refusing to instruct on consent for AISBI. The concurring judge found it unnecessary to decide whether consent is an element of or defense to assault, finding that the trial judge did not err in refusing to instruct on consent because the evidence did not show the victim consented to an assault inflicting serious bodily injury and arguably did not consent to an assault all.

(2) At sentencing, the State advised the trial judge that it had failed to disclose the fee paid to an expert to testify about the victim's injuries. The trial judge found the failure to disclose was an "honest mistake." The Court stated that it was not clear whether the trial judge found that a discovery violation had occurred, but assuming a violation occurred, the defendant was not prejudiced.

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(1) The trial court did not err by failing to give a defense of habitation instruction when the defendant neither requested the instruction nor objected to its omission at trial. (2) Plain error review is waived where the defendant invited the error.

State v. Coburn, ___ N.C. App. ___, 834 S.E.2d 691 (Nov. 5, 2019)

The defendant was convicted by a jury of assault with a deadly weapon inflicting serious injury based on an altercation involving the owner of the house at which he had been living. On appeal, the defendant argued that the trial court erred by not instructing the jury on defense of habitation. Though that defense had been discussed throughout the trial—from a pretrial motion to the charge conference, and during a lunchtime recess in chambers—the defendant never requested an instruction on defense of habitation under G.S. 14-52.2. (1) On appeal, the defendant argued that the judge erred by failing to instruct the jury on defense of habitation despite his failure to request it, and that the issue was preserved because, in light of the in-chambers discussion on possible jury instructions, the charge conference was not recorded in its entirety as required by G.S. 15A-1231. The court of appeals noted that the better practice is to record the entire charge conference, but it ultimately rejected the defendant’s argument that a failure to do so entitled the defendant to raise any issue related to the instructions on appeal, even those not requested or objected to. Under G.S. 15A-1231(b), failures to comply with the statute do not constitute grounds for appeal unless the defendant is “materially prejudiced.” Here, where the trial court specifically stated its intention to get everything “firmly on the record” after the recess discussion and twice mentioned the possibility of giving the defense of habitation instruction, and where the defendant neither requested the instruction nor objected to the court’s failure to give it, the defendant was not materially prejudiced by the failure to record the entire charge conference. (2) The court of appeals concluded that plain error review was waived because the defendant invited any error through his failure to request the instruction or object to its omission after it had been discussed so extensively.

Final mandate of jury instruction, in which trial judge erroneously stated that the jury could convict the defendant of voluntary manslaughter even if the State failed to prove the defendant did not act in self-defense, was not plain error

State v. Richardson, ___ N.C. App. ___, 838 S.E.2d 470 (Feb. 18, 2020)

The defendant was convicted of voluntary manslaughter and sentenced to 73 to 100 months in prison for shooting her boyfriend, Timothy Lee Fry, with whom she had lived for approximately three years. The evidence showed that their relationship was good at first but started to deteriorate after about a year. Fry verbally and physically abused her. He would choke her, pull her hair, and push her face. A gun enthusiast who kept loaded guns around the house, Fry would point the laser sight at the defendant’s forehead and chest. The abuse also included repeated instances in which Fry would coerce her into having sex with him and other, older men. The defendant suffered from depression and had once attempted suicide. On the day of the shooting, the defendant returned home from work to find Fry in the basement of their home. He asked her to go with him to South Carolina to have sex with an older man. When she refused, Fry held a handgun to her chest, acted like he was pulling the trigger, and told her he would kill her if she didn’t go. The defendant went upstairs. When she returned to the basement, Fry repeated that he was going to kill her if she didn’t go and grabbed where the gun was and started towards her. The defendant grabbed a shotgun leaning against the bathroom wall and fired five rounds, hitting him four times. The defendant testified, “The closer he came, the more I would shoot because he wouldn’t stop, he just kept coming towards me.” After each shot, she had to load a new shell into the chamber, push the slide forward, and pull the trigger. Two shots entered Fry’s chest. Another two

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entered through his left arm and armpit, traveling through his left lung and fracturing five ribs. The State's forensic pathologist testified that any one of the shots would have been enough to incapacitate and kill Fry. Three bullet holes from the shotgun's slugs were found in the carpet beneath Fry's body, suggesting that he was on the ground when shot; and each of the four bullet wounds had a downward trajectory. After shooting Fry, the defendant called 911 and told the operator that she had shot her boyfriend.

The trial judge instructed the jury on first-degree murder, second-degree murder, voluntary manslaughter, self-defense, voluntary intoxication, and diminished capacity. In the final mandate on voluntary manslaughter, the offense for which the defendant was convicted, the trial judge instructed the jury as follows but without the underlined phrase:

If you find from the evidence beyond a reasonable doubt that on or about the alleged date the defendant intentionally wounded the alleged victim with a deadly weapon and thereby proximately caused the alleged victim's death, and that the defendant . . . used excessive force, it would be your duty to find the defendant guilty of voluntary manslaughter, even if the State has failed to prove that the defendant did not act in self-defense.

The Court of Appeals held that the defendant failed to preserve the erroneous omission of the underlined language for appellate review. The defendant did not object to the omission and, after the judge excused the jury to commence its deliberations, did not request any modifications to the instructions when asked by the judge. The Court distinguished decisions finding no waiver in which the trial judge agreed to give a specific instruction and failed to give it altogether rather than omitting a portion of the instruction as in this case. Reviewing the instruction for plain error, the Court found that the defendant failed to show reversible error because the trial judge in other portions of the jury instructions included the language omitted from the final mandate.

Jury instruction was subject to plain error review and defendant did not invite error; 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

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.

The defendant complained that the trial judge improperly instructed the jury on the conspiracy charge. The defendant did not object to the instructions at trial. The conspiracy indictment named only one co-conspirator (the person that the State could identify), but evidence at trial showed the presence of two

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co-conspirators. The trial court's instruction allowed the jury to find that the defendant conspired with "at least one other person."

(a) Plain error review of the conspiracy jury instruction was available, and the defendant's failure to object to the proposed jury instructions at trial was not invited error. Unlike cases where the defendant proposed the language of an instruction and then challenged the instruction on appeal (which would be invited error), the defendant here did not seek or craft an instruction on conspiracy. That the defendant requested other, unchallenged jury instructions given by the trial court did not constitute waiver of plain error review for the conspiracy instruction.

(b) 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.

(1) The defendant was not entitled to a limiting instruction to guide the jury's consideration of his prior convictions in habitual DWI case where he testified to the convictions on direct examination;
(2) The defendant failed to preserve for appellate review his motion for the arresting officers' personnel records where he did not renew the motion after his first trial, which resulted in a mistrial

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

(1) At his trial for habitual DWI, the defendant took the stand, denied driving, and admitted his prior DWI convictions in explaining why he did not drive on the night in question and why, based on his past interactions with law enforcement, he did not speak to the arresting officers. On cross-examination, the State asked the defendant about the offense, date, and place of each of those convictions. The defendant asked the trial judge to instruct the jury pursuant to North Carolina Pattern Jury Instruction 105.40, which instructs that the jury should not consider a defendant's prior convictions as evidence of the defendant's guilt in the current case. The trial judge refused to give the instruction. Relying on *State v. Jackson*, 161 N.C. App. 118 (2003), the Court of Appeals found no error. Per that opinion, a defendant is not entitled to a special instruction instructing the jury to consider a defendant's testimony about prior convictions for purposes of the defendant's credibility only, where the defendant initially offers the

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testimony on direct examination. The Court held that the State's cross-examination of the defendant in this case was limited and did not constitute sufficient impeachment to require the instruction. The Court rejected the defendant's argument that it should reconsider *Jackson*, finding that it was bound by the prior decision. (2) Before his first trial on the habitual DWI charge, the defendant moved for and the trial judge conducted an in camera review of the arresting officers' personnel records. The trial judge denied release, finding no favorable and material evidence, and the Court of Appeals upheld the denial in an unpublished opinion. On appeal in this case, the defendant asked the Court of Appeals to review the records, which the trial judge had placed under seal at the first trial. The Court of Appeals held that the defendant failed to preserve the issue for appeal, having failed to make any motion asking the trial judge to review the records before his second trial. The Court stated that a mistrial has the legal effect of no trial. Therefore, the defendant could not rely on a motion made at his first trial to preserve issues for appeal at his later trial.

(1) The trial court did not err by denying the defendant's motion for a jury view of the crime scene; (2) the trial court did not err in its jury instructions on self-defense; (3) the trial court did not err in sentencing the defendant at prior-record level IV.

State v. Leaks, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

In this second-degree murder case, the trial court (1) did not abuse its discretion by denying the defendant's motion for a jury view; (2) did not err with respect to a jury instruction on self-defense; and (3) correctly sentenced the defendant at prior-record level IV.

The trial court did not abuse its discretion by denying the defendant's motion requesting a jury view of the crime scene, which the defendant argued was important to give the jury "an accurate view of what [the testifying eyewitnesses] would have been able to see and what kind of obstruction would have been in the line of sight that they would have, the area where this was occurring, as well as the distance involved[.]" In reaching its reasoned decision to deny the motion, the trial court considered the availability of photographs, diagrams, and other material" and noted that the alleged crime occurred during daylight.

As to the instruction on self-defense, the defendant argued that the trial court erred in instructing the jury that the defendant "believed it was necessary to *kill* the victim in order to save the defendant from death or great bodily harm" and instead should have instructed that the defendant "believed it was necessary to *use deadly force against* the victim," a modification contemplated by the pattern jury instruction on self-defense in murder cases in situations where the evidence shows that a defendant intended to use deadly force to disable but not to kill the victim (N.C.P.I. – Crim. 206.10 n.4). The court recognized that this argument raised the unsettled issue of the extent to which the 2011 enactment of G.S. 14-51.2 and G.S. 14-51.3, creating statutory rights to self-defense, supplemented or superseded North Carolina common law concerning self-defense and defense of another. Prior to the 2011 statutory enactments, the North Carolina Supreme Court in *State v. Richardson*, 341 N.C. 585, 592-94 (1995) held that "it is not necessary to change the self-defense instruction to read necessary 'to shoot or use deadly force' in order to properly instruct a jury on the elements of self-defense." The defendant argued that, notwithstanding *Richardson*, it was error to use the "to kill" language because G.S. 14-51.3 does not require a person to believe it is necessary to kill his or her assailant in order to save himself or herself from death or bodily harm and instead authorizes the use of deadly force if a person is "in any place he or she has the lawful right to be" and "reasonably believes that such force is necessary to prevent imminent death or great bodily harm to himself . . ." Finding itself bound by *Richardson*, the court determined that the trial court did not err in its instruction to the jury on self-defense.

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With regard to the trial court's calculation of the defendant's prior-record-level points for sentencing purposes, a calculation based upon certified copies from the Clerk of Superior Court of the defendant's criminal records, the court found that the trial court did not err by adding one prior-record-level point for a misdemeanor assault with a deadly weapon conviction that resulted in a PJC and did not err in adding one prior-record-level point for misdemeanor breaking and entering and injury to real property offenses that were consolidated and to which the defendant pleaded guilty. Even if the trial court erred in adding two prior-record-level points instead of one point by treating another breaking and entering conviction as a felony rather than as a misdemeanor, the assumed error was harmless because it did not change the defendant's prior-record level.

In the absence of conflicting evidence on an essential element, the trial court did not commit plain error by not instructing on a lesser-included offense.

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

The defendant was convicted of trafficking in opium among other crimes. He argued on appeal that the trial court committed plain error when, despite the lack of a request by the defendant, it failed to instruct the jury on the lesser-included offense of selling hydrocodone. The Court of Appeals found no error. The court applied the rule that the trial judge should instruct the jury on any lesser included offense supported by any version of the evidence when there is conflicting evidence on an essential element of the charged. Here, there was no conflicting evidence. An analyst testified that the total weight of the drug tablets sold by the defendant was over 8 grams, while another witness testified that the defendant sold twenty "10-milligram hydrocodone" pills. The testimony was not conflicting, however, because only the total weight of the pill mixture mattered in establishing the elements of the charged offense. In the absence of conflicting evidence, the trial judge did not err by not instructing on a lesser-included offense.

Even if it was error to instruct the jury on the theory of acting in concert, defendant did not show it was prejudicial where the state presented exceedingly strong evidence of guilt that was not in dispute or subject to serious credibility questions.

State v. Pierre, ___ N.C. App. ___, 837 S.E.2d 151 (Dec. 17, 2019)

Two men ("Stroud" and "Bernard") hosted two young women ("Jermisha" and "Kendretta") at Stroud's home on two occasions. During the second visit, Kendretta experienced a "spell" where she fell down and started kicking, apparently as a result of consuming alcohol and synthetic weed. About an hour after Kendretta recovered and left, the defendant showed up at Stroud's house in a car, accompanied by at least two other individuals. The defendant identified himself as "KP" and confronted Stroud on the front porch, where he accused him of trying to take sexual advantage of Kendretta. The defendant stated he was here to kill Stroud and pulled out a gun. Stroud initially struggled with the defendant, but once the defendant drew and aimed his gun, Stroud fled inside. The defendant fired multiple shots into Stroud's home and then drove away. Stroud's niece was able to identify "KP" as the defendant, and she later spoke to the defendant about what happened and he admitted shooting into the house. The defendant was indicted, tried, and convicted on charges of discharging a firearm into an occupied dwelling and possession of a firearm by a convicted felon.

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On appeal, the defendant argued that the trial court erred by instructing the jury on the theory of acting in concert (over the defendant's objection and a request for a special verdict form) because that theory was not supported by the evidence and including it in the instructions was prejudicial. Pursuant to *State v. Malachi*, 371 N.C. 719 (2018), even if the jury was instructed on an unsupported legal theory, the appellate court must engage in a two-part inquiry to determine prejudice: "first we ask whether the State presented 'exceedingly strong evidence of defendant's guilt on the basis of a theory that has sufficient support' from the evidence presented; and, second, we must ensure that 'the State's evidence is neither in dispute nor subject to serious credibility-related questions[.]' [...] If we are satisfied that those conditions have been met, we must conclude 'it is unlikely that a reasonable jury would elect to convict the defendant on the basis of an unsupported legal theory.'" Reviewing the evidence in the case, the court found that both parts of the inquiry were satisfied by the state's evidence. First, the eyewitness testimony, along with physical evidence such as a bullet recovered from inside the home, provided exceedingly strong evidence that the defendant did discharge a firearm into an occupied dwelling. Second, minor discrepancies in the trial testimony such as what type of car the defendant drove to Stroud's house did not rise to the level of presenting a material dispute in the evidence, nor were there "serious credibility-related questions" with the evidence. The court acknowledged that Stroud's niece, a key witness for the state, was cross-examined about her potential bias against the defendant, but "she answered the questions about her alleged bias head-on and flatly denied having any bias against Defendant, going as far as to say she cares for him and his family. We find this testimony remedies the seriousness of any credibility-related questions." Therefore, even assuming *arguendo* that it was error to instruct the jury on acting in concert in this case, the state presented "exceedingly strong evidence of Defendant's guilt that was neither in dispute nor subject to serious credibility-related questions," so the error was not prejudicial.

(1) Trial court erred in imposing 36 months of probation in misdemeanor case without special findings. (2) Jury instructions on possession of drug paraphernalia departed from indictment but did not constitute plain error

State v. Lu, ___ N.C. App. ___, 836 S.E.2d 664 (Nov. 19, 2019)

The defendant was a passenger in a car stopped at a traffic checkpoint. An officer smelled marijuana emanating from the vehicle. The defendant told the officer that the marijuana was located in a bag behind the driver's seat. The officer found a drawstring bag there, which the defendant said was his. Inside the bag, the officer found two plastic bags containing marijuana, a hookah, a snort straw, and a beer can. The beer can was altered to be a container that could be unscrewed. Inside the beer can the officer found two white crystallized substances later identified as Methydone and a Lorazepam tablet.

The defendant was charged with felony possession of a Schedule I controlled substance (Methydone), misdemeanor possession of marijuana, and misdemeanor possession of drug paraphernalia based on his possession of the altered beer can. He was convicted and sentenced to 6 to 17 months for the felony and 120 days (to run consecutively) for each misdemeanor offense. Each sentence was suspended, and the defendant was placed on probation for 36 months. He also was ordered to serve 12 days of special probation for the felony.

The defendant argued on appeal that the trial court erred by giving jury instructions that did not identify the item that served as the basis for the defendant's drug paraphernalia charge (the altered beer can) and that referred to marijuana in addition to Methydone. The defendant was charged with possession of drug paraphernalia under G.S. 90-113.22, not possession of marijuana paraphernalia, a separate crime under G.S. 90-113.22A. The defendant argued that the reference to marijuana may have caused the jury

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to consider the items associated with the marijuana, including the drawstring bag and the plastic bags containing the marijuana. Because the defendant did not object to the jury instructions at trial, the court of appeals reviewed for plain error.

The court of appeals determined that naming marijuana in the instructions varied from the indictment and was error. However, the appellate court found that the facts presented during trial undercut any perceived probable impact on the jury. The officer gave substantially more testimony about the altered beer can and its contents than the other containers. The other bags were not discussed in detail, while the beer can was the subject of focused and specific questions, and the jury was given a demonstration of how it unscrewed. The marijuana was entered into evidence inside the plastic bags, “indicating that the bag was part and parcel of the marijuana possession.” Slip op. at 11. The beer can, in contrast, was its own exhibit, and the drawstring bag was not entered into evidence at all. In addition, the jury convicted the defendant of possessing Methylone, a drug contained exclusively in the beer can, suggesting that the jury also believed the defendant possessed the can itself, which, unlike the other items, was designed for the specific purpose of containing and concealing drugs. Thus, the court concluded that the defendant failed to show that the trial court’s error had a probable impact on the jury’s finding of guilt and, as such, was not plain error.

Mistrial

Trial judge did not abuse discretion in denying mistrial after prosecutor inadvertently showed image similar to image that trial judge had ruled was inadmissible

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

The defendant was convicted of obtaining property by false pretenses for selling boxes purportedly containing iPhones that contained only lug nuts. At trial, the prosecutor tried to use the video system to display to the jury a photo of the vehicle driven by the defendant, which the judge had admitted without objection. Instead, the prosecutor inadvertently showed an image of the defendant with several phones in his hand while wearing gold necklaces and standing in front of a mirror, an image similar to a photo the trial judge had ruled inadmissible under North Carolina Rule of Evidence 403. Once defense counsel noticed the image and objected, the prosecutor apologized and disconnected the display. The trial judge denied the defendant’s motion for a mistrial and instead gave a limiting instruction telling the jury to disregard anything that might have just flashed up on the screen. After considering the nature of the evidence and the circumstances of the defendant’s case, the Court of Appeals held that the defendant did not overcome the presumption that the jury was able to understand and comply with the trial judge’s limiting instruction and that the trial judge did not abuse his discretion in denying a mistrial.

Motions

Defendant’s motion to dismiss at the close of the evidence adequately preserved the issue of the sufficiency of the evidence for appeal.

State v. Royster, 373 N.C. 157 (Nov. 1, 2019)

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The defendant was seen handling a black box in connection with a possible drug transaction/ransom payment. The next day, officers found a black box full of cocaine in the woods nearby. The defendant was charged with and convicted of trafficking by possession. He appealed, arguing that the State's evidence was insufficient. A divided court of appeals agreed that there was insufficient evidence that there was cocaine inside the box at the time that defendant was seen handling it. On further appeal, the supreme court held that the defendant adequately preserved the sufficiency issue, as his motion to dismiss at the close of all the evidence included an argument about possession. The supreme court divided equally on the merits, with Justice Davis not participating. The opinion of the court of appeals therefore stands without precedential value.

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, 2019)

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.

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(1) Trial judge had jurisdiction to enter written order granting motion to suppress after State gave notice of appeal at the conclusion of the hearing on the motion; (2) Trial judge was free to give no weight to officer's testimony in his findings of fact, which were supported by other evidence; (3) State failed to show that the defendant was driving and that probable cause existed to arrest him for impaired driving

State v. Fields, ___ N.C. App. ___, 836 S.E.2d 886 (Dec. 3, 2019)

The defendant was charged with impaired driving, was convicted in district court, appealed to superior court, and prevailed on a motion to suppress at a pretrial hearing in superior court. The State appealed. (1) The Court of Appeals rejected the State's argument that the superior court judge lacked jurisdiction to enter a written order after the State gave oral notice of appeal at the conclusion of the hearing at which the judge granted the motion to suppress. At the hearing, the trial judge stated that the State could not establish a nexus between the person the officer saw driving and the defendant who later walked up to the officer. The Court found that the judge's written order was a chronicle of the findings and conclusions he decided at the motion hearing and was not a new order affecting the merits of the case. (2) The Court rejected the State's argument that certain findings of fact were not supported by the evidence. In regard to the green pickup truck that the defendant was allegedly driving, the trial judge found that the arresting officer testified that he did not see the truck park or anyone get in or out of the truck. The State asserted that the officer testified that he observed a video at the mini-mart where the truck was parked showing the defendant getting out of the truck. The Court found that the officer testified that the video was lost because he left the flash drive containing the video in his patrol car when he took the car to a mechanic. The Court held that the trial judge determines the credibility of witnesses, the weight to be given to testimony, and reasonable inferences. "The trial court was free to give no weight to [the officer's] testimony regarding viewing the Mini-mart video." (3) The Court rejected the State's argument that probable cause existed to arrest the defendant for impaired driving. The Court found that the trial judge's findings supported his conclusion that the State failed to show that the defendant was driving and, although the truck was registered to the defendant, failed to establish a connection between the driver of the truck and the defendant.

Pleas

The defendant did not show any fair and just reason for withdrawing his guilty plea before sentencing.

State v. Taylor, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

In 2011 the defendant was charged with first-degree murder, robbery with a dangerous weapon, and conspiracy to commit robbery with a dangerous weapon for his participation in a murder allegedly committed by Taurus Locklear and Shawn Jones. A plea agreement allowed the defendant to plead guilty to second-degree murder and other crimes in exchange for his cooperation in the pending prosecutions of Locklear and Jones. The trial court accepted the guilty plea in 2014, but deferred sentencing pending the resolution of the case against Locklear. However, in 2015 the State dismissed the charges against Locklear due to issues with the witnesses and evidence against him. At that point, the defendant moved to withdraw his guilty plea. At an evidentiary hearing in April 2016 two officers gave inconsistent accounts of the defendant's statements during their investigation of the case. At a subsequent hearing in June 2016, the defendant's lawyer testified that, in light of his own failure to examine the discrepancies between the officers' accounts, he gave ineffective assistance in the plea agreement process, and that the defendant should therefore be entitled to withdraw his plea. The trial judge denied the motion and entered judgment. The defendant appealed. The Court of Appeals

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considered whether the defendant had shown “any fair and just reason” for withdrawing the plea—the proper standard for evaluating a motion filed prior to sentencing. Applying the factors spelled out by the Supreme Court in *State v. Handy*, 326 N.C. 532 (1990), the Court of Appeals concluded over a dissent that the trial court did not err by denying the motion. The defendant appealed to the Supreme Court.

The Supreme Court affirmed the Court of Appeals, concluding that the defendant failed to show any fair and just reason for withdrawing the guilty plea. The Court examined each of the *Handy* factors in turn. As to the first factor, whether the defendant asserted his legal innocence, the Court concluded that the fact that the defendant’s guilty plea was not a no contest or *Alford* plea weighed against allowing him to withdraw it. As to the second factor, the strength of the State’s proffer of evidence, the Court noted that the factual basis for the plea presented by the State was “essentially uncontested” and therefore sufficient. As to the third factor, the length of time between entry of the guilty plea and the desire to change it, the Court concluded that the 18-month delay in this case did not favor allowing the defendant to withdraw the plea. As to the fourth factor, the competency of counsel, the Court agreed that the factor was inconclusive. Taking all of the factors into consideration, the Court ultimately agreed with the Court of Appeals’ conclusion that the defendant failed to show “any fair and just reason” to withdraw the guilty plea. The Court dismissed the defendant’s related ineffective assistance of counsel claim without prejudice to his right to file it as a motion for appropriate relief.

The State gave a sufficient factual basis for the defendant’s guilty plea.

State v. Alston, ___ N.C. App. ___, 836 S.E.2d 319 (Nov. 5, 2019)

The defendant pled guilty to felony serious injury by vehicle based on a single vehicle accident. The State presented a factual basis for the plea indicating that the defendant’s girlfriend’s infant child was injured and that an analysis of the defendant’s blood showed the presence of Alprazolam and Benzodiazepine. The court of appeals granted the defendant’s petition for writ of certiorari but rejected his argument that the factual basis for the plea was insufficient under G.S. 15A-1022(c). The court concluded that the information was sufficient despite not including information about the timing of the defendant’s impairment or the seriousness of the infant’s injuries, because those elements could reasonably be inferred from the other information the State provided. A dissenting judge would have denied the defendant’s petition for writ of certiorari and granted the State’s motion to dismiss the appeal.

Sentencing

The trial court erred in calculating the defendant’s prior record level by using a joinable offense as a prior conviction

State v. High, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2020)

The trial court erred in calculating the defendant’s prior record level, which was proved by stipulation, by using a joinable offense as a prior conviction for sentencing purposes. In 2004 the defendant was convicted of first-degree murder and armed robbery based on an incident where he killed his father and took money from his father’s bedroom. The defendant was 15 years old at the time of the offenses but was tried as an adult and sentenced to life in prison without the possibility of parole. In 2014 post-conviction proceedings based on *Miller v. Alabama*, the first-degree murder conviction was vacated and the defendant pleaded guilty to second-degree murder. As part of that plea agreement, the State and

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the defendant stipulated that the defendant had a prior record level of III, a record level that was the result of six prior record points arising from the 2004 armed robbery conviction. Noting that a defendant's stipulation regarding his or her prior record level does not preclude the court's review where calculation of the record level requires answering a legal question, the court found that use of the 2004 armed robbery conviction violated the rule from *State v. West*, 180 N.C. App. 664 (2006) that a joinable offense may not be used in calculating a defendant's prior record level.

A defendant who disagrees with the jail credit calculated by the trial court should seek relief under the procedures in G.S. 15-196.4

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

After the defendant pled guilty to multiple offenses, the trial court suspended his sentence and placed him on supervised probation. At a later probation violation hearing, the trial court revoked the defendant's probation, reactivated his sentence, and awarded him 343 days of jail credit. The defendant appealed, asking the Court of Appeals to remand the case to the trial court to determine whether he should have received an additional 107 days of credit. The Court of Appeals dismissed the defendant's appeal without prejudice to seek relief from the trial court pursuant to G.S. 15-196.4, which allows the defendant to petition the court for credit not previously allowed. Then, if necessary, the defendant could appeal the trial court's determination with a record suitable for meaningful review by the Court of Appeals.

(1) The trial court did not abuse its discretion in revoking defendant's supervised probation based on a finding that the defendant willfully absconded; (2) Judgment inaccurately stating that defendant waived a violation hearing for which he appeared contained a clerical error that may be corrected on remand

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

(1) The defendant was convicted of drug offenses in Gaston County on July 5, 2017 and was sentenced to 24 months of supervised probation. After reporting for his intake visit with a Gaston County probation officer, the defendant avoided probation officers for several months. Probation officers attempted on six separate occasions to verify defendant's residence at the address he provided. He was not present for any of these visits. On two of the visits, individuals who knew the defendant told the officers that the defendant no longer lived at the residence or that he planned to move from the residence.

Despite being on notice to maintain regular contact with probation officers, no probation officer met with the defendant in person following his initial intake visit before the first violation report alleging absconding was filed on September 14, 2017. On the few occasions that a probation officer could reach the defendant by phone, the officer notified the defendant that a home visit was scheduled. The defendant was absent from the home on those occasions and failed to apprise his probation officer of his whereabouts.

Even after the defendant was released from custody after being arrested for alleged probation violations relating to absconding, he failed to report to his probation officer within 24 hours as instructed. After defendant's case was transferred from Gaston County to Lincoln County in March 2018,

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officers continued to have difficulty contacting him. And he failed to notify officers upon getting evicted from his listed residence.

An addendum was filed to the defendant's probation violation report on May 31, 2018 alleging an additional incident of absconding. The trial court found that the defendant violated his probation by absconding and ordered his probation revoked. The defendant appealed, arguing that the trial court erred in revoking his probation based on its finding that he willfully absconded from supervision.

The Court of Appeals found the State's allegations and supporting evidence—reflecting defendant's continuous, willful pattern of avoiding supervision and making his whereabouts unknown—sufficient to support the trial court's exercise of discretion in revoking defendant's probation for absconding.

(2) The trial court checked the box on the judgment form stating that the defendant waived a violation hearing and admitted the violations. This was inaccurate, as the record reflects that the defendant was present for his probation hearing and testified as a witness. The Court of Appeals determined that the trial court committed a clerical error when it checked the box indicating otherwise and remanded the case to allow the trial court to correct the error.

(1) Trial court erred by sentencing defendant in the aggravated range where there was insufficient evidence to support the finding of an aggravating factor; (2) Trial court erred in assessing attorney fees without first affording the defendant an opportunity to be heard.

State v. Patterson, ___ N.C. App. ___, 839 S.E.2d 68 (Feb. 4, 2020)

The defendant was convicted of financial card theft and sentenced to a suspended sentence of 8 to 19 months imprisonment and 24 months supervised probation. Defendant's sentence was based on the aggravating factor in G.S. 15A-1340.16(d)(12a), which requires the State to prove that within 10 years before the instant offense, the defendant had been found by a North Carolina court to have been in willful violation of the conditions of probation. G.S. 15A-1340.16(d)(12a).

Outside of Defendant's presence, the trial court later entered a civil judgment of \$2,250.00 against him as recoupment for fees for the attorney appointed to represent him.

The Court of Appeals granted certiorari review to consider the lawfulness of the sentence and the civil judgment entered against the defendant. As to the sentence, the State admitted on appeal that the prosecutor did not present evidence that the defendant violated conditions of probation at any time before he committed the offense of conviction. The court agreed there was insufficient evidence presented at trial to support this aggravating factor, vacated the sentence, and remanded the case to the trial court for resentencing.

As to the civil judgment, the State admitted there was no evidence that the defendant was afforded an opportunity to be heard regarding the total amount of hours and fees claimed by his court-appointed attorney. It conceded that if the petition for certiorari was granted, the civil judgment for attorney fees had to be vacated, and the case had to be remanded to the trial court for further proceedings. The court agreed with the State's concession, noting that the trial court never directly asked the defendant whether he wished to be heard on the issue and that there was no other evidence that the defendant received notice, was aware of the opportunity to be heard on this issue, and chose not to be heard. The trial court's request that defendant's counsel "guesstimate [the number of hours worked] so [Defendant] will have an idea as to what the legal fees will be" was insufficient to provide the requisite

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notice and opportunity to be heard. The court vacated the civil judgment for attorney fees and remanded the case to the trial court for further proceedings.

In a per curiam opinion, the court affirmed the determination of the Court of Appeals that the defendant’s sentence of life with the possibility of parole for his conviction of felony murder when he was 16 years old was not grossly disproportionate to his crime; the defendant’s Eighth Amendment arguments that he has no meaningful opportunity for parole were not ripe for resolution

State v. Seam, ___ N.C. ___, 837 S.E.2d 870 (Feb. 28, 2020)

The court per curiam affirmed the decision of the Court of Appeals, which had held that his sentence of life in prison with the possibility of parole for his conviction of felony murder when he was 16 years old was not grossly disproportionate to his crime under the both the Eighth Amendment and the state constitution. The Court of Appeals also had rejected the defendant’s argument that because G.S. 15A-1340.19B (the post-*Miller* first-degree murder sentencing scheme for juveniles) did not exist at the time he committed his crime, his sentence under that statute violated the prohibition against ex post facto laws.

The Supreme Court further concluded that the defendant’s Eighth Amendment arguments asserting that he has no meaningful opportunity for parole were not ripe for determination because the time at which he is eligible to apply for parole has not yet arrived. The court “recognize[d] that the potential for parole constitutionally cannot be illusory for offenders sentenced to life with the possibility of parole and noted that the defendant was not precluded from raising such claims at a later date, in the event they become ripe for resolution. A summary of the Court of Appeals opinion is available in the compendium here.

The trial court applied the incorrect legal standard when sentencing a 17-year-old defendant to life without parole to the extent that it focused on the offense and the manner in which it was committed instead of the defendant’s potential for rehabilitation.

State v. Ames, ___ N.C. App. ___, 836 S.E.2d 296 (Nov. 5, 2019)

The defendant, 17 years old at the time of his crime, was charged with first-degree murder based on his role in a murder committed by one of his acquaintances during a robbery. Trial testimony indicated that the defendant orchestrated the killing. He was convicted by a jury of first-degree murder. At sentencing, the trial judge reviewed mitigating circumstances as required by G.S. 15A-1340.19B(c) to decide whether to impose a sentence of life without parole or life with the possibility of parole after 25 years. Among other findings, the trial court found no evidence of particular immaturity, no evidence of mental illness, and “no evidence . . . that the defendant would benefit from rehabilitation and confinement other than that of other . . . persons who may be incarcerated for . . . first degree murder.” The trial court concluded that any mitigating factors were “outweighed by other evidence in this case of the offense and the manner in which it was committed” and sentenced the defendant to life without parole. The court of appeals vacated the sentence, concluding that the trial court applied an incorrect legal standard by focusing on the nature of the offense and not whether the defendant was, within the meaning of *Miller v. Alabama*, 567 U.S. 460 (2012), “the rare juvenile offender who exhibits such irretrievable depravity that rehabilitation is impossible and life without parole is justified.” The trial court also erred by comparing the young defendant to the broader class of all persons who may be incarcerated for first-

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degree murder, including adults. The court of appeals remanded the case to the trial court for resentencing consistent with its opinion, emphasizing that the mitigation evidence put on by the defendant (including his youth, his violent home environment, his potential for rehabilitation) “seemingly implicated every factor *Miller* identified as counseling *against* sentencing a juvenile to life without the possibility of parole.” Slip op. at 24 (emphasis in original). A dissenting judge would have affirmed the sentence of life without parole.

The trial court erred in determining that the defendant was ineligible for an expunction of a felonious speeding to elude arrest conviction that arose from an incident where the defendant also was convicted of DWI

State v. Neira, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

In 2007 the defendant was convicted of DWI and felonious speeding to elude arrest, charges arising from a single incident. In 2018 he filed a petition for expunction of the speeding to elude charge. The trial court denied his petition, agreeing with the State’s argument that because the charge for “fleeing to elude [was filed under] the same file number as DWI” it was an offense “involving impaired driving” and was therefore ineligible for an expunction. While “[w]hether to grant an expunction is a discretionary determination” normally reviewed for abuse of discretion, the court reviewed *de novo* whether the trial court had erred as a matter of law by interpreting G.S. 15A-145.5(a)(8a) as to render the defendant ineligible for expunction due to the speeding to elude charge being an “offense involving impaired driving as defined in G.S. 20-4.01(24a).” Noting that the speeding to elude conviction involved impaired driving as a matter of fact, the court explained that “the statutory regime defines expunction eligibility in term of the *offense* in question” and that felonious speeding to elude arrest is not defined in G.S. 20-4.01(24a) as an “offense involving impaired driving.” Thus, the trial court made an error of law in determining that the defendant was categorically ineligible for expunction.

- (1) The trial court retained jurisdiction to amend a sentence until the time for notice of appeal expires;**
- (2) Amendment of a drug trafficking sentence to include the maximum term that corresponds to the mandatory minimum sentence was a clerical correction that the trial court could make outside of the defendant’s presence.**

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

(1) When the defendant was convicted of drug trafficking, the sentence initially announced by the trial judge was “a mandatory 70 months” of active imprisonment. The following Monday (five days later), without the defendant being present, the court entered an amended judgment stating both the minimum and maximum sentence: 70 to 93 months. The defendant argued on appeal that the trial court lacked jurisdiction to amend the sentence when it did because the defendant had already appealed by that point. The Court of Appeals disagreed, concluding that, under G.S. 15A-1448(a)(3), the jurisdiction of the trial court is divested when notice of appeal has been given *and* the time for giving notice of appeal has expired. For an appeal to the appellate division, that time period is 14 days. N.C. R. App. P. 4(a)(2). Because only 5 days had passed at the time of change, the time for appeal had not expired, and the trial court therefore retained jurisdiction.

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(2) The defendant argued in the alternative that amending the judgment in her absence deprived her of her right to be present at sentencing. The appellate court again disagreed, concluding that the amended judgment did not amount to a “substantive change” to the original sentence. Because the 93-month maximum that accompanies a 70-month minimum is statutorily required under G.S. 90-95(h)(4), it was not the product of judicial discretion. The record showed that the trial court understood from the outset that the sentence was statutorily mandatory, and the amendment was therefore clerical in nature and not a substantive change.

(1) Trial evidence did not support the charge of displaying an expired registration plate; (2) The propriety of a jury instruction was not properly before the Court of Appeals; (3) The defendant’s sentence to probation was improper when a fine only sentence was required.

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

The defendant was charged with driving while license revoked, operating a motor vehicle without displaying a current approved inspection certificate (G.S. 20-183.8(a)(1)), and displaying an expired registration plate (G.S. 20-111(2)) after being pulled over for driving his truck without a license plate. He was convicted of all three offenses, first in district court and then by a jury in superior court. (1) On appeal, the State conceded and the Court of Appeals agreed that the trial court erred by denying the defendant’s motion to dismiss the charge of displaying an expired registration plate. The defendant’s truck had no plate whatsoever, and so he was not displaying an expired one. (The court noted that the evidence would have supported a conviction under G.S. 20-111(1), driving without a current registration plate.) (2) As to the inspection certificate infraction, the defendant argued that there was insufficient evidence to support his conviction when the jury was instructed on a theory of guilt—here, *display* of an expired inspection certificate—that did not apply in his case when, again, he did not display any certificate. The Court of Appeals disagreed, concluding that *display* of an expired inspection is not one of multiple theories of guilt for this offense. As such, the jury instruction referencing *display* was erroneous, but the defendant did not object on that basis, and the issue was therefore not properly before the appellate court. (3) Finally, the State conceded and the Court of Appeals agreed that the defendant’s sentence was erroneous. Despite being Prior Conviction Level I with no prior convictions, the defendant received a 10-day suspended sentence with probation for this Class 3 misdemeanor. Under G.S. 15A-1340.23(d), unless otherwise provided for a specific offense, a Class 3 misdemeanor sentence for a defendant with no more than three prior convictions may consist of a fine only. The appellate court remanded for resentencing.

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

Mace v. North Carolina Department of Insurance, ___ N.C. App. ___, ___ S.E.2d ___ (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

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revoking the petitioner's license. The petitioner appealed. Reviewing several previous decisions about the treatment of PJs, the Court of Appeals recognized that a PJ 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 PJ 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 (PJ) 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 PJ was not a conviction. (3) The Court observed that although a PJ with a condition that the defendant pay costs is not a condition that converts a PJ into a final judgment, a trial judge may not impose that condition without the defendant's consent. When a defendant consents to a PJ, 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 PJ 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 PJ, presumably when a defendant has not satisfied the conditions of a PJ, 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.

Where defendant did not stipulate to her prior record level and the State presented no evidence beyond the prior record level worksheet, the State did not meet its burden of proving the defendant's record level

State v. Braswell, ___ N.C. App. ___, 837 S.E.2d 580 (Jan. 7, 2020)

The defendant pled guilty to various offenses in Wilson County and the State offered a prior record level ("PRL") worksheet alleging 12 points, making her a Level IV for felony sentencing purposes. The defendant did not expressly stipulate to the prior convictions and neither she nor her attorney signed

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the worksheet. The trial court sentenced the defendant as a record level IV without objection. The court then adjourned immediately without asking the parties if they wished to be heard. The defendant appealed, complaining that the State failed to prove her prior record level by a preponderance of the evidence. The Court of Appeals granted certiorari and reversed.

While the defendant did not object at sentencing, an error in prior record level calculation is automatically preserved under G.S. 15A-1444(a2)(1). A bare prior record level worksheet is insufficient to establish the defendant's criminal record by a preponderance of the evidence, but "an explicit stipulation is not necessary for the State to carry its burden." The court reviewed precedent regarding when and how the State meets its burden to prove prior record level. Where the defendant's counsel acknowledged the worksheet and directed the court's attention to it during sentencing, those acts were deemed a stipulation to the accuracy of the PRL worksheet. *State v. Alexander*, 359 N.C. 824 (2005). "[A] stipulation need not follow any particular form, [but] its terms must be definite and certain." Silence can be deemed a stipulation if the trial court or prosecutor states the alleged record level and the defense is clearly given an opportunity to object but fails to do so. On the other hand, where the defendant is not clearly given an opportunity to object and does not otherwise acknowledge the PRL, "[n]either defense counsel's lack of objection . . . nor the PRL worksheet, alone or in combination, is sufficient to meet the State's burden."

Here, there was no stipulation and counsel did not have an opportunity to object to the record level. That the defendant had signed a plea transcript with a notation "IV" under the "Pun. Cl." (punishment class) column on the plea transcript next to a list of the offenses to which she was pleading did not amount to a stipulation.

[I]t was the State's burden to prove by a preponderance of the evidence that these roman numerals on the plea transcript indicated that Defendant stipulated to the sentencing level, and we cannot find here that this ambiguous evidence amounts to a 'definite and certain' stipulation, as required.

Similarly, a reference by the defendant to her "criminal record" during the plea colloquy did not rise to the level of a stipulation. The State therefore failed to meet its burden and the matter was vacated and remanded for resentencing.

Judge Tyson would have denied the defendant's petition for certiorari, finding no merit to the defendant's arguments on appeal.

Georgia offense was substantially similar to a North Carolina offense for criminal history purposes

State v. Graham, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2020), temp. stay allowed, ___ 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. The state dismissed some of the charges prior to verdict, and the jury ultimately convicted the defendant of one count of sexual offense against a child under age 13.

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At sentencing, the trial court concluded that a prior sex offense conviction from Georgia was substantially similar to a North Carolina offense classified as a B1 felony, adding 9 points to defendant's criminal history. The Georgia statute was not formally introduced into evidence, but the appellate court determined the record was sufficient to review the issue and reject defendant's argument. Although there were some minor differences in the statutes regarding the age requirements for perpetrators and victims, such that some acts might qualify under one statute but not the other, overall the prohibited conduct was substantially similar and "[b]oth N.C. Gen. Stat. § 14-27.25 and Ga. Code Ann. § 16-6-3 seek to protect persons under age sixteen from those who would engage in sexual intercourse with them, and seek greater deterrence for offenders significantly older than their victims by punishing them more severely."

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.

(1) The trial court did not abuse its discretion by revoking the defendant's probation for absconding;
(2) The trial court did not err by ordering the sentences activated upon revocation of probation to run consecutively.

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

(1) The defendant, who had been on probation in six cases, argued on appeal that the trial court erred by revoking his probation for absconding. A divided Court of Appeals disagreed, concluding that the trial court did not abuse its discretion by revoking when the State presented competent evidence to support its finding that the defendant absconded. At the violation hearing, the probation officer testified that, as part of his investigation, he went to the defendant's last known residence twice, called the defendant's references, called the local hospital, and checked legal databases to see if the defendant was in custody. During the investigation the defendant also missed two additional appointments and did not contact the officer, leaving the officer unaware of the defendant's whereabouts for at least nine days. The appellate court distinguished *State v. Williams*, 243 N.C. App. 198 (2015), in which it had overturned an absconding revocation for a defendant who, despite missing meetings with his officer, remained in contact by telephone. The court also articulated a *mens rea* distinction between nonrevocable failure-to-report violations and revocable absconding violations, saying that failures to report can amount to absconding if they are willful and the State proves to the trial judge's reasonable satisfaction that the defendant was avoiding supervision or making his whereabouts unknown. Here, the court cited evidence of the defendant's failure to return a call from the officer and the thoroughness of the officer's

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investigation as sufficient evidence that the defendant was willfully making himself unavailable for supervision and making his whereabouts unknown within the meaning of the absconding condition. Moreover, the defendant admitted to the absconding, and thus failed to meet his burden of establishing that the violation was not willful. (2) The defendant also argued that the trial court erred by ordering the six activated sentences to run consecutively, to the extent that it mistakenly believed that it lacked the authority to allow them to run concurrently. The Court of Appeals disagreed, concluding that the revoking judge's remark that he was not going to modify the sentencing judge's decision indicated that the judge acted in his discretion, not under a misapprehension of the law. The court remanded the matter for correction of a clerical error. A judge dissenting in part would have concluded in light of prior appellate cases that the evidence did not support a finding of willful absconding.

Revocation of defendant's probation for absconding upheld

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

The Court of Appeals upheld the trial judge's revocation of the defendant's probation for absconding on the following facts: The defendant was released from custody on December 21, 2018, following a plea of guilty to assault with a deadly weapon on a government official. He failed to report to his probation officer by January 11, 2019, when the probation violation report was filed. The probation officer tried to contact the defendant at his sister's house, which the defendant had given to the probation officer as his address. When the probation officer called the listed phone number, his sister said she had not had contact with him in some time and didn't know he was out of custody; and when the officer went to the address provided by the defendant, the homeowner said he didn't know the defendant. On this evidence, the Court concluded that the trial judge did not abuse his discretion in finding that the defendant had absconded. The Court rejected the defendant's argument that the trial judge may have revoked his probation based on other alleged violations that could not be grounds for revocation, such as failing to attend community support meetings. The Court found that the trial judge specifically revoked the defendant's probation for absconding.

(1) Trial court erred in imposing 36 months of probation in misdemeanor case without special findings. (2) Jury instructions on possession of drug paraphernalia departed from indictment but did not constitute plain error

State v. Lu, ___ N.C. App. ___, 836 S.E.2d 664 (Nov. 19, 2019)

The defendant was a passenger in a car stopped at a traffic checkpoint. An officer smelled marijuana emanating from the vehicle. The defendant told the officer that the marijuana was located in a bag behind the driver's seat. The officer found a drawstring bag there, which the defendant said was his. Inside the bag, the officer found two plastic bags containing marijuana, a hookah, a snort straw, and a beer can. The beer can was altered to be a container that could be unscrewed. Inside the beer can the officer found two white crystallized substances later identified as Methydone and a Lorazepam tablet.

The defendant was charged with felony possession of a Schedule I controlled substance (Methydone), misdemeanor possession of marijuana, and misdemeanor possession of drug paraphernalia based on his possession of the altered beer can. He was convicted and sentenced to 6 to 17 months for the felony and 120 days (to run consecutively) for each misdemeanor offense. Each sentence was suspended, and

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the defendant was placed on probation for 36 months. He also was ordered to serve 12 days of special probation for the felony.

The defendant argued on appeal that the sentences for the misdemeanor offenses were unlawful because the trial court did not make finding that a longer period of probation was necessary. The court of appeals agreed.

G.S. 15A-1343.2(d)(2) provides that “[u]nless the court makes specific findings that longer or shorter periods of probation are necessary,” the probationary period for a misdemeanant sentenced to intermediate punishment (which includes any suspended sentence that requires supervised probation) must be not less than 12 nor more than 24 months. The record supported the defendant’s argument that the trial court made no specific findings; therefore, the court of appeals vacated the misdemeanor judgments and remanded for resentencing.

A probation condition requiring the defendant to comply with drug treatment recommended as a result of an evaluation by TASC was proper under G.S. 15A-1343(b1)(10).

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

The defendant was convicted and placed on probation for several crimes, including drug-related crimes. The trial judge ordered as a special condition of probation that the defendant “[r]eport for initial evaluation by TASC” and “participate in all further evaluation, counseling, treatment, or education programs recommended as a result of that evaluation.” The Court of Appeals upheld the condition, rejecting the defendant’s argument that it was an improper delegation of the trial court’s authority to require participation in treatment dictated by the TASC evaluation and not specifically ordered by the court. The appellate court concluded that the condition was reasonably related to his drug-related conviction and his rehabilitation, and therefore proper as a discretionary condition under G.S. 15A-1343(b1)(10).

Sex Offenders

Imposition of satellite based monitoring (SBM) for life 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

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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.

The trial court's findings supported its conclusion that the defendant was a danger to the community and should thus be required to register as a sex offender for secret peeping.

State v. Fuller, ___ N.C. App. ___, 835 S.E.2d 53 (Nov. 5, 2019), temp. stay granted, ___ 373 N.C. 259 (Nov. 22, 2019)

Using a hidden camera built into a phone charger, the defendant made secret recordings of the woman in whose house he lived. He pled guilty to secret peeping under G.S. 14-202, but challenged the trial court's finding that he was a "danger to the community" and had to register as a sex offender under G.S. 14-202(l). The trial court made its determination based on findings that the defendant: (1) made recordings over a long period of time (more than two months); (2) used sophisticated technology; (3) invaded the victim's private space (her bathroom and bedroom) on multiple occasions to move the camera between them; (4) stored his recordings; and (5) could easily repeat the crime because the recording devices were cheap and easily obtainable. A divided court of appeals affirmed, concluding that the trial court's findings supported its determination that the defendant was a person who "posed a risk of engaging in sex offenses following release from incarceration or commitment"—the standard for "danger to the community" articulated in *State v. Pell*, 211 N.C. App. 376 (2011). The court of appeals distinguished this case from *Pell*, noting that the crime here was more sophisticated and took advantage of a position of trust, and that unlike in *Pell* there was no indication here that the underlying cause of the defendant's behavior was in remission or that he was moving in the right direction. A concurring judge would have affirmed the trial court under a less demanding abuse-of-discretion standard. A dissenting judge would have reversed based on the trial court's focus on defendant's past offenses and the lack of evidence of the likelihood of recidivism.

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. ___, ___ S.E.2d ___ (Mar. 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

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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. ___, ___ S.E.2d ___ (Feb. 18, 2020), temp stay granted, ___ N.C. ___, 838 S.E.2d 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. 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

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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.

Trial court's findings were not sufficient to establish reasonableness of lifetime SBM.

State v. Dravis, ___ N.C. App. ___, 837 S.E.2d 384 (Feb. 4, 2020)

This case was before the Court of Appeals for reconsideration in light of *State v. Grady*, ___ N.C. ___, 831 S.E.2d 542 (2019). The court's prior opinion is *State v. Dravis*, ___ N.C. App. ___, 817 S.E.2d 796 (2018) (unpublished).

The Court of Appeals again concluded that the findings of the trial court were not sufficient to support a conclusion that lifetime satellite-based monitoring (SBM) was a reasonable warrantless search. The court explained that the State did not provide sufficient evidence to show how the efficacy of SBM helped solve sex offense crimes. Thus, it reversed the trial court's order imposing lifetime SBM.

(1) SBM order was supported by evidence; (2) Constitutional challenge to SBM not raised at trial was waived; (3) Ineffective assistance of counsel claims are not available for civil SBM proceedings

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

In this Catawba County case, the defendant pled guilty to five counts of indecent liberties with a minor in lieu of other related charges, including possession of child pornography and other sexual assaults on children. The State argued for the imposition of satellite-based monitoring ("SBM"), pointing to the factual bases for the pleas and a STATIC-99R assessment finding the defendant to be "Average Risk." The trial court ordered the defendant to enroll in SBM for a term of ten years following his release from prison. The defendant sought certiorari review, arguing the trial court erred by ordering SBM, that the State failed to demonstrate that SBM was reasonable under *State v. Grady*, 372 N.C. 509 (2019), and that his trial counsel was ineffective for failing to raise a constitutional challenge to the SBM order.

(1) In addition to the factual bases and the STATIC-99R, the trial court found that the defendant assaulted several children of both genders, that those children were between 6 and 14 years old, and that the defendant abused a position of trust to facilitate the assaults. These findings were supported by the evidence: "The unobjected to evidence, that Defendant admitted as part of his plea bargain, provides competent evidence to support [these] additional findings." *Blankenship* Slip op. at 7. These findings and the STATIC-99R also supported a finding that the defendant "require[d] the highest possible level of supervision," warranting imposition of SBM. *Id.* at 8. The trial court properly considered the context of the offenses, and the additional findings were related to the defendant's likely recidivism and were not duplicative of the STATIC-99R. The trial court did not therefore err in ordering the defendant to enroll in SBM.

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(2) The defendant did not object or raise any challenge to the imposition of SBM for a term at the time of the order. Any constitutional objection was therefore unpreserved: “The defendant did not raise a constitutional issue before the trial court, cannot raise it for the first time on appeal, and has waived this argument on appeal.” *Id.* at 13. The court declined to invoke Rule 2 of the Rules of Appellate Procedure to review the unpreserved issue and dismissed the claim.

(3) The court likewise rejected any alleged ineffective assistance of counsel claim in the SBM context: “Our Court has held ‘hearings on SBM eligibility are civil proceedings.’ . . . [and ineffective assistance of counsel] claims are not available in civil appeals such as that form an SBM eligibility hearing.” *Id.* at 14. This claim was also dismissed, and the trial court’s judgments were unanimously affirmed.

Order imposing lifetime SBM without an evidentiary hearing was error

State v. Graham, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 17, 2020), temp. stay allowed, ___ 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. The state dismissed some of the charges prior to verdict, and the jury ultimately convicted the defendant of one count of sexual offense against a child under age 13.

Immediately after sentencing, the state asked to proceed with an evidentiary hearing on subjecting defendant to satellite-based monitoring (SBM) after his release. Rather than conduct a hearing, the trial court took notice of the facts presented at trial, defendant’s prior conviction, and the nature of the underlying offense, and ordered defendant placed on lifetime SBM. On appeal, defendant argued it was error to enter that order without conduct a hearing; the state conceded it was error, and the Court of Appeals agreed. To support an SBM order, the state must prove at a hearing that the search imposed by monitoring is reasonable as applied to the defendant, under the totality of the circumstances, weighing the defendant’s privacy rights against the state’s legitimate interests. The trial court’s order was reversed and the matter was remanded to conduct the hearing.

The Sixth Amendment establishes a right to a unanimous jury verdict that applies to the state courts.

Ramos v. Louisiana, 590 U.S. ___, ___ S. Ct. ___ (Apr. 20, 2020)

The Supreme Court reversed a Louisiana state court and held that the Sixth Amendment gives defendants a right to a unanimous jury verdict that applies to the states. The defendant was convicted of murder in 2016 based on a 10–2 jury verdict, which was a sufficient basis for conviction under then-existing Louisiana state law. (Oregon is the only other state that allows convictions based on nonunanimous verdicts.) Justice Gorsuch wrote a majority opinion joined in full by Justices Ginsburg and Breyer and in part by Justices Sotomayor and Kavanaugh, concluding based on the historical context in which the Sixth Amendment was adopted that the entitlement to an impartial jury included the right, applicable in both the federal courts and the state courts, to a unanimous jury to be convicted. The Court disclaimed the precedential value of *Apodaca v. Oregon*, 406 U.S. 404 (1972), a case in which a

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four-Justice plurality plus a lone Justice resolving the case on other grounds upheld an Oregon conviction that was based on a nonunanimous verdict. Justice Sotomayor wrote a concurring opinion saying that *Apodaca* must be overruled, not only because of its dubious reasoning, but also because of the racially discriminatory origins of the Louisiana and Oregon laws the case upheld. Justice Kavanaugh likewise wrote separately to concur and to share more extended thoughts on the application of stare decisis in this case. Justice Thomas concurred in the judgment, noting his agreement that the requirement for a unanimous jury verdict applies to the states, but under his own view that it applies through the Fourteenth Amendment Privileges or Immunities Clause, not the Due Process Clause. Justice Alito wrote a dissent, joined by Chief Justice Roberts and joined in part by Justice Kagan, arguing that the lower court should have been affirmed under *Apodaca*.

Vindictive Prosecution

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 (Apr. 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.

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.

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(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." 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." 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." 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

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compel a determination by the trial court that the prosecutor withheld the additional indictment in order to circumvent the statute.

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.

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.

Evidence

Evidence

Authentication

Crack cocaine rock that was “smashed” into powder prior to trial was admissible in evidence. Being smashed was not a material change to the evidence that precluded its authentication, and the state established a chain of custody for the evidence.

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.

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

Evidence

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.

(1) Certain evidentiary rulings were erroneous but did not amount to plain error; (2) Single conspiracy to shoot two people supported one conspiracy conviction only

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

The defendant was convicted of first-degree murder based on felony murder, attempted first-degree murder, felonious discharge of a firearm into an occupied vehicle in operation, and two counts of conspiracy to commit first-degree murder. The defendant's brother was the shooter and was convicted in a separate case. (1) On appeal the defendant argued that the trial judge committed plain error by admitting the following evidence. (A) A witness testified that the defendant knew that the defendant's brother intended to shoot the victims. The Court found that the testimony was inadmissible because a witness may not testify to another person's mind or purpose without personal knowledge of the person's mind or purpose, a foundation not laid by the State. The Court concluded, however, that erroneous admission of the testimony did not have a probable impact on the jury's finding that the defendant counseled and knowingly aided the shooting by assisting in luring the victims to the place where the defendant's brother shot them. (B) Two witnesses who were not called as experts, one of whom was a detective, testified that the defendant concealed evidence about the planned shooting by using a smartphone texting app. Applying Rule 701 of the North Carolina Rules of Evidence, which requires that opinion testimony by lay witnesses be rationally based on a witness's perception and helpful to the jury, the Court found that the State failed to lay a foundation showing that the witnesses were familiar with how the use of such apps affects cell phone records. The Court concluded that the erroneous admission of the testimony was not plain error because other evidence showed that the defendant was communicating with her brother via cellphone, that her brother destroyed his cellphone, and there were no records of their communications, which the jury could have viewed in a manner disadvantageous to the defendant. (C) A witness testified to the good character of one of the victims—that he was kind, protective, and nonviolent, among other qualities. The Court held that this testimony was inadmissible under Rule 404(a)(2) because it was not offered to rebut any evidence by the defendant that the victim was the first aggressor in the altercation. The Court concluded that the erroneous admission of the testimony was not plain error given other evidence consistent with the defendant's guilt. (2) The defendant argued, the State conceded, and the Court found that the trial judge erred in allowing the jury to convict her of two counts of conspiracy because the evidence showed

Evidence

a single conspiracy to shoot two people. The Court therefore vacated one of the conspiracy convictions and remanded for resentencing. One judge concurred in the result only.

Crawford Issues & Confrontation Clause

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.

Trial court did not err in admitting defendant's medical records, including results of the blood alcohol test performed by the hospital, and the admission of those records did not prejudice defendant's case.

State v. Romano, ___ N.C. App. ___, 836 S.E.2d 760 (Nov. 19, 2019)

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.

Evidence

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 when it denied his motion to suppress and admitted his medical records, which contained the results of a blood alcohol test performed by the hospital. A manager from the hospital's records department testified regarding the management of hospital records, and a medical technologist testified about the hospital's methods and procedures for conducting laboratory tests. In addition, an expert witness in blood testing testified for the State that he relied upon the medical records in forming a conclusion about the defendant's blood alcohol level. The court determined that the records were properly admitted because (1) they were created for medical treatment purposes and kept in the ordinary course of business and thus were nontestimonial for purposes of the Confrontation Clause; (2) even if the records were testimonial, they were admissible as the basis of a testifying expert's independent opinion; and (3) the admission of the records was not prejudicial in light of the substantial additional evidence that the defendant was driving while impaired.

The admission of an officer's earlier testimony from a hearing on a motion to suppress did not violate the defendant's right to confront and cross-examine witnesses at a subsequent probation violation hearing.

State v. Jones, ___ N.C. App. ___, 838 S.E.2d 686 (Jan. 21, 2020)

The defendant was on felony probation. During a traffic stop, a law enforcement officer found a pistol in the defendant's car, which resulted in criminal charges for possession of firearm by a felon and carrying a concealed weapon and the filing of a probation violation report for committing new criminal offenses. In the trial for the new criminal charges, the judge denied the defendant's motion to suppress the pistol, but the case nonetheless resulted in a mistrial. At the subsequent probation violation hearing, the court found that the defendant committed the alleged criminal offenses and revoked probation. After granting the defendant's petition for writ of certiorari, the Court of Appeals rejected his argument that he was deprived of the right to confront and cross-examine the law enforcement officer at his probation violation hearing. The right to confront and cross-examine witnesses at a probation violation hearing as provided in G.S. 15A-1345(e) is grounded in a probationer's Fourteenth Amendment due process rights, which are more flexible than his or her confrontation rights at trial under the Sixth Amendment. As such, the court held that the law enforcement officer's testimony at the prior motion to suppress was competent evidence of the alleged violations, and that the trial court did not err by finding the new criminal offense violations despite the earlier mistrial. The defendant did not request findings for good cause as to why confrontation should not be allowed, and therefore no such findings were required. The Court of Appeals affirmed the revocation of probation but remanded the case for correction of a clerical error.

Cross-Examination, Impeachment, Corroboration & Related Issues > Corroboration, Statements

Evidence

Corroborating witness's testimony was sufficiently similar to victim's testimony to be permissible

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.

Testimony from one of the witnesses offered as corroboration of the victim's testimony included details about additional abuse not testified to by the victim. Distinguishing an omission or silence on a subject from direct contradiction, and noting that the "vast majority" of the witness's corroborating testimony did conform to the victim's testimony, the court held that the other witness's testimony was sufficiently similar to the victim's and the trial court did not abuse its discretion by admitting it for corroborative purposes. Assuming *arguendo* that it was error, it was not prejudicial, since other witnesses also testified to corroboration that more closely tracked the victim's trial testimony. Therefore, the defendant did not show there was a reasonable possibility the jury would have evaluated the victim's credibility differently without this particular witness's corroboration.

Prior Acts--404(b) Evidence

No error to admit evidence of prior bad acts to show defendant's identity

State v. Thomas, ___ N.C. App. ___, 834 S.E.2d 654 (Oct. 15, 2019)

The defendant was convicted of four counts of first-degree murder and other charges and appealed. He argued the trial court erred in denying his motion to suppress, his motion to dismiss, and in admitting certain evidence. The Court of Appeals unanimously affirmed.

The trial court did not err in admitting evidence of a prior similar crime to prove the defendant's identity under Rules of Evidence 401, 403, and 404. Evidence was presented at trial showing that the defendant committed crimes similar to those for which he was being tried (although he was not formally charged with these other bad acts). The defendant argued there was insufficient evidence that he committed the alleged acts and that the evidence violated the ban on propensity evidence in Rule 404(b). Rejecting this contention, the court found that the *modus operandi* of the prior crime was substantially similar to the current case and was admissible to show the defendant's identity as the perpetrator. Specifically, the incidents shared the following characteristics:

(1) [T]he perpetrator wore a Jason-style white hockey mask with holes in it, similar to the one seized from defendant in Colorado; (2) the targets were all suspected drug dealers or living with suspected drug dealers; (3) the attacks all took place at night in the victims' homes; (4) defendant had an accomplice; and (5) the incidents had both temporal and geographic proximity, most of them taking place within a month or two of each other, and within the same city.

Additionally, forensics from the incident recounted by the 404(b) witness matched the gun found on the defendant in Colorado. "All of this evidence supports a reasoned conclusion defendant was the perpetrator in this incident, and the common *modus operandi* helps establish his identity in the crimes

Evidence

he was charged with.” This was relevant evidence, and the court did not abuse its discretion in determining the evidence was more probative than prejudicial.

Fifth Amendment (Self-Incrimination) Issues

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).

Evidence

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

Hearsay

(1) Trial court did not abuse its discretion by denying defendant’s Motion for Appropriate Relief alleging juror misconduct; (2) State presented substantial circumstantial evidence to rebut defendant Molly Corbett’s exculpatory handwritten statement that she and her co-defendant father acted in lawful self-defense and defense of others in killing her husband; (3) Defendants are entitled to a new trial based on a reasonable possibility that the jury might have reached a different result, based on (a) the erroneous exclusion of hearsay statements from the victim’s children; (b) the improper admission of expert testimony regarding the untested stains on defendant Tom Martens’ boxer shorts and Molly Corbett’s pajama pants, which failed to satisfy Rule 702’s reliability requirements; and (c) the trial court’s error in sustaining the State’s motion to strike Tom’s testimony that he heard Molly scream, “Don’t hurt my dad.”; (4) Trial court committed reversible error by delivering unsupported jury instructions on the aggressor doctrine.

State v. Corbett & Martens, ___ N.C. App. ___, 839 S.E.2d 361 (Feb. 4, 2020), temp. stay granted, ___ N.C. ___, 837 S.E.2d 721 (Feb 24, 2020)

Defendants Molly Martens Corbett (“Molly”) and Thomas Michael Martens (“Tom”), daughter and father, were convicted of second degree murder in the death of Molly’s husband, Jason Corbett (“Jason”). Evidence at trial established that Tom attempted to stop Jason from choking Molly by hitting Jason with an aluminum baseball bat. Molly also hit Jason with a brick paver. Jason’s skull was fractured from multiple blows and he died at the scene. Jason’s children from a previous marriage, Jack and Sarah Corbett, ages 11 and 8, were at home and sleeping at the time of the altercation. Jack and Sarah’s mother had died unexpectedly when they were very young, and they considered Molly to be their mother.

(1) Defendants argued that the trial court abused its discretion by denying their Motion for Appropriate Relief (MAR), as well as their request for an evidentiary hearing, because competent evidence demonstrated that certain jurors “committed gross and pervasive misconduct in their private discussions of the case”; jurors engaged in “private discussions” amongst themselves prior to deliberations; and several jurors’ statements during post-trial media interviews showed that they improperly considered and formed opinions about Molly’s mental health. The court rejected this argument, characterizing the defendants’ allegations as being, at best, general, speculative, and conclusory. Furthermore, the court concluded that even if the trial court were to hold an evidentiary hearing, which it was not required to do, precedent prohibiting verdict impeachment would bar the defendants from presenting any admissible evidence to prove the truth of their allegations.

(2) Defendants asserted that the State failed to present substantial evidence to rebut or contradict Molly’s exculpatory handwritten statement, which the State introduced, establishing that Molly and Tom acted in lawful self-defense and defense of others. The Court of Appeals disagreed.

The State was required to present substantial evidence sufficient to convince a rational trier of fact that the defendants did not act in self-defense. The appellate court determined that the case was not entirely predicated on Molly’s statement that she and Tom acted in self-defense and defense of each other. Rather, the State presented substantial circumstantial evidence from which a rational juror could

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reach a contrary conclusion, including that: (1) Jason suffered at least twelve blows to the head; (2) Tom had no visible injuries and Molly had only a “light redness” on her neck; (3) Jason was unarmed when the altercation occurred; (4) Jason’s children remained asleep throughout the entire altercation; (5) EMS, paramedics, and law enforcement responders observed that some of the blood on Jason’s body had dried, and that Jason’s body felt cool; (6) Tom told a coworker that he hated Jason; and (7) Jason had a life insurance policy, of which Molly was the named beneficiary.

(3) The Court of Appeals concluded, over a dissent, that certain evidentiary errors were so prejudicial as to inhibit the defendants’ ability to present a full and meaningful defense.

(a) The Court of Appeals held that the trial court erroneously concluded that statements Jack and Sarah Corbett made to workers at a children’s advocacy center were inadmissible under the hearsay exception for medical diagnosis or treatment. At the time of trial, Jack and Sarah had been taken to Ireland to live with their aunt and uncle. The appellate court determined that their statements at the advocacy center satisfied the two-part test for admissibility established in *State v. Hinnant*, 351 N.C. 277 (2000): (1) the children made the statements to obtain medical diagnosis or treatment; and (2) the statements were reasonably pertinent to medical diagnosis or treatment. The court explained that the child-friendly atmosphere and the separation of the examination rooms did not indicate that the children’s statements during the interviews were not intended for medical purposes. The children were informed before their interviews that they would be receiving medical interviews together with physical examinations as part of their full evaluations at the facility. The interviewers asked non-leading, open-ended questions, instructed the children that they should not “guess at anything” and emphasized the overall significance of the child medical evaluations that they would be receiving. In addition, the court concluded that the children’s statements were reasonably pertinent to medical treatment or diagnosis. Following their forensic medical interviews, Sarah and Jack were examined by a pediatrician who diagnosed both children as “victim[s] of child abuse based on exposure to domestic violence” and recommended that they “receive mental health services” as treatment.

Moreover, the court concluded that even if the children’s forensic medical interview statements were inadmissible under the medical diagnosis or treatment exception to the rule against hearsay, they (along with statements the children made to DSS workers) were admissible under the residual hearsay exception.

(b) Stuart James, the State’s expert witness in bloodstain pattern analysis, testified at trial about untested blood spatter on the underside hem of Tom’s boxer shorts and the bottom of Molly’s pajama pants. The defendants argued that this testimony was not the product of reliable principles and methods applied reliably to the facts of this case. The Court of Appeals agreed.

While James was “unquestionably qualified to provide expert testimony on the subject” of blood spatter, he did not follow the reliability protocol established in a treatise he coauthored on the subject. First, these particular stains were not tested for the presence of blood. Second, though James said it was the “best practice” for an analyst to view a photograph of the person wearing the blood-spattered clothes, he never viewed a photograph of Tom “wearing just the boxer shorts.” James further testified that the State provided him with just one photograph of Molly wearing the pajama pants, and that it was not readily apparent from that photograph how the pants actually fit Molly on the night of the incident. The court found James’s failure to follow the reliability standards and protocol prescribed in his own treatise as inherently suspect. It concluded that James’s testimony was based upon insufficient facts and data, and, accordingly, could not have been the product of reliable principles and methods applied reliably to the facts of the case.

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The court determined that James's testimony "had the powerful effect of bolstering the State's claim that Jason was struck after and while he was down and defenseless." But, given the flawed methodology, the testimony could only serve to unduly influence the jury to reach a conclusion that it was fully capable of reaching on its own.

(c) The defendants argued that the trial court erred in striking Tom's testimony that, during the altercation, he "hear[d] Molly scream[,] 'Don't hurt my dad.'" The Court of Appeals agreed. The court reasoned that Molly's statement was admissible for the non-hearsay purpose of illustrating Tom's then-existing state of mind. This was "a particularly relevant issue" in light of the defendants' claims of self-defense and defense of another.

(d) Tom argued that the trial court committed reversible error by instructing the jury that he would not be entitled to the benefit of self-defense or defense of a family member if the jury found that he were the initial aggressor in the altercation with Jason. The Court of Appeals agreed.

First, the appellate court stated that the trial court could not have based its ruling on Tom's decision to arm himself with the baseball bat before joining the altercation. The mere fact that a defendant was armed is not evidence that he was the aggressor if he did not unlawfully use his weapon.

Moreover, the court deemed it significant that Jason was the first to employ deadly force. Tom testified that from the moment he opened the bedroom door, "Jason had his hands around Molly's neck," and he said he was going to kill her. Jason subsequently put Molly in a "very tight chokehold" and Tom noticed that Molly "was no longer wiggling. She was just weight, being dragged back into the hallway."

Because Tom did not aggressively and willingly enter into the fight without legal excuse or provocation, the Court of Appeals determined that the trial court erred by instructing the jury on the aggressor doctrine. The error, the court reasoned, very likely prejudiced Molly as well as Tom, since the jury was instructed that it could find her guilty under an acting-in-concert theory.

One judge concurred in part and dissented in part. The judge concurred that the trial court did not err by denying defendants' request for an evidentiary hearing on their MAR and the MAR itself or by denying defendants' motions to dismiss for insufficient evidence. The judge dissented from the remainder of the majority opinion leading to its conclusion that the defendants are entitled to a new trial.

Opinions

(1) Trial judge erred in admitting expert testimony that substance was methamphetamine without first requiring that expert explain how she applied the GCMS test to the substance; however, error was not plain error

(2) Good cause did not exist for activating the defendant's suspended sentence on other charges after his period of probation expired; State could have proceeded for violation of "commit no crime" condition before defendant was convicted of current crime

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

(1) The defendant was convicted of possession with intent to sell or deliver a Schedule II controlled substance and sale of methamphetamine. At trial, the State presented the testimony of an expert in drug chemistry from the North Carolina State Crime Lab. She testified that she performed a gas chromatography mass spectrometer (GCMS) test on the substance. She explained how the GCMS test works and how the examiner analyzes the results. Before she explained how she applied those methods

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on the sample in this case and the result she obtained, the State interrupted her testimony and asked about recognition of GCMS testing in the scientific community. The witness testified that GCMS was well-respected in the scientific community and confirmed that she had recorded the results of her testing in the lab report. The lab report was then admitted into evidence without objection, and the witness testified without objection that the substance was methamphetamine, Schedule II. The Court of Appeals held that although the witness was prepared to explain how she conducted GCMS testing in this case, she never did so. Further, the lab report stated only that the material that was examined was found to contain methamphetamine. The Court of Appeals found that this evidence failed to satisfy North Carolina Rule of Evidence 702(a)(3), which requires that the witness demonstrate that she applied the principles and methods reliably to the facts of the case. The Court ruled, however, that the defendant failed to establish plain error because the witness testified that she conducted the GCMS test, obtained positive results, and produced a lab report recording the results. (2) The trial judge revoked the defendant's probation, imposed for other charges before the offenses in this case, based on violation of the condition that the defendant commit no criminal offense. The defendant argued and the State conceded that the trial judge erred by activating his suspended sentence without making a finding that good cause existed to revoke his probation after the period of probation expired. The defendant argued further that the probation revocation should be vacated, without remand, because the record was devoid of any evidence to show good cause to revoke after the expiration of the defendant's probation. The Court of Appeals agreed. A violation report was filed May 17, 2017, and a probation hearing was scheduled for June 13, 2017, but a hearing did not take place until March 2019, fourteen months after the defendant's probation expired. The Court found nothing in the record to show why the probation hearing was not held in June 2017 or at least before expiration of his probation in January 2018. The Court noted that a criminal conviction is not required for the trial judge to revoke probation for a defendant's commission of a criminal act in violation of probation. A concurring judge would have remanded for further proceedings on whether the State made reasonable efforts to conduct a probation hearing before expiration of the defendant's probation.

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. ___, ___ S.E.2d ___ (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

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print, [the expert] failed to provide any such detail when testifying as to *how* he arrived at his conclusions *in this case*. *Koivan* 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.

Admission of firearms expert testimony was not abuse of discretion or plain error.

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State v. Griffin, ___ N.C. App. ___, 834 S.E.2d 435 (Oct. 15, 2019)

In this Pasquotank County case, the defendant was convicted of first-degree murder. Upon discovering the body of the victim, police found five shell casings at the scene and two bullets on the victim's body. At trial, an agent from the State Crime Lab was qualified as an expert in "forensics firearms examinations and analysis" without objection. She opined that the shell casings matched a gun recovered from a field next to the defendant's property, again without objection. On appeal, the defendant argued that this testimony should have been excluded under Rule of Evidence 702 and relevant case law, and that admission of the testimony was plain error. The court disagreed.

According to the defendant, the analyst's testimony failed to demonstrate that her opinion was based on sufficient data, that it was the product of reliable methods, or that the methods were reliably applied to the case. Rejecting that argument, the court observed: "Defendant severely misrepresents [the agent's] opinion testimony by briefly summarizing a few lines of testimony while omitting the bulk of the testimony, and bases his argument on the unsupported and conclusory allegation that the testimony was insufficient to satisfy *Daubert*." Reviewing the analyst's testimony in full, the court found that the expert was qualified by her education in the field, she examined the casings in accordance with her training, she analyzed the data generated from her tests, and described her source of information and conclusions in a peer-reviewed report. Concluding, the court stated:

As [the agent's] testimony shows her opinion was the product of reliable principles and methods, and that she reliably applied the principles and methods to the facts of the case, we conclude that the trial court did not abuse its discretion, much less plainly err, in admitting [the analyst's] expert opinion testimony on forensic firearms examination.

There was therefore no error in admitting the expert testimony, and conviction was unanimously affirmed.

(1) The court of appeals lacked jurisdiction to hear an appeal of a satellite-based monitoring order in the absence of a written notice of appeal, and it declined to grant review through writ of certiorari. (2) An expert pediatrician's comment about the consistency of the victim's story was not impermissible vouching. (3) Witnesses' use of the words "disclose" and "disclosure" to describe what the victim told them was not impermissible vouching. (4) The trial court did not commit plain error by admitting a therapist's testimony that she believed the victim. (5) The defendant did not receive ineffective assistance of counsel where he was not prejudiced by his lawyer's failure to object to improper testimony.

State v. Worley, ___ N.C. App. ___, 836 S.E.2d 278 (Nov. 5, 2019)

The defendant was convicted by a jury of two counts of statutory sexual offense with a child by an adult and one count of first-degree kidnapping based on his repeated sexual assaults of his seven-year-old niece. The trial court sentenced the defendant to prison and ordered him to enroll in satellite-based monitoring (SBM) for life. (1) Based on the defendant's failure to file a written notice of appeal as required by Rule 3 of the Rules of Appellate Procedure, the court of appeals concluded that it lacked jurisdiction to hear his SBM appeal. The defendant also failed to argue in the trial court that SBM was an unconstitutional search under the Fourth Amendment. The court of appeals declined grant his petition for writ of certiorari and, in the absence of evidence of a manifest injustice, to invoke Appellate Rule 2 to address his unpreserved constitutional argument. (2) A pediatrician that the State tendered as an expert testified without objection that children don't tend to make up stories about sexual abuse, and that the

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victim “gave excellent detail” and that her story was “very consistent.” The court of appeals found no error, noting that while it would be improper for an expert witness to opine based on an interview with a victim as to whether the child had been sexually abused, statements regarding the child’s consistency in recounting the alleged abuse are nevertheless admissible. (3) The court rejected the defendant’s argument that witnesses’ repeated use of the words “disclose” and “disclosure” to describe what the victim told them in private amounted to impermissible vouching. Citing *State v. Betts*, ___ N.C. App. ___, ___ S.E.2d ___ (Sept. 3, 2019), and declining to follow unpublished *State v. Jamison*, ___ N.C. App. ___, 821 S.E.2d 665 (2018) (unpublished), the court agreed that nothing about the term “disclose” conveys believability or credibility. (4) Some statements admitted by a marriage and family therapist who treated the victim were improper vouching. Her general statement about “this incident that happened” was not improper, but her statement that the victim would need therapy “because of the sexual abuse that she experienced” and “I believe [the victim]” were improper as an opinion of the victim’s veracity. However, in the absence of an objection at trial and in light of the substantial evidence against the defendant (medical evidence and testimony from corroborating witnesses), the court concluded that the admission of the improper evidence did not rise to the level of plain error warranting a new trial. (5) Finally, defense counsel’s failure to object to the improper vouching evidence was not ineffective assistance of counsel where there was no reasonable probability that the errors prejudiced the defendant.

The admission of lay witness testimony on the defendant’s mental state was not reversible error

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. The defendant argued that the trial court erred by allowing lay testimony on the defendant’s mental capacity from his second victim, a registered nurse. She answered questions from the State on how the defendant compared to “psych patients” she had dealt with, on whether the defendant was able to process his thoughts, and on whether he was in touch with reality. Though a lay witness may not offer a specific psychiatric diagnosis, the Court of Appeals—reviewing the issue for abuse of discretion—concluded in light of the evidence against the defendant that there was no reasonable possibility that the result of his trial would have been different if the trial court had excluded the testimony.

New trial based on plain error where DSS investigator testified that DSS substantiated sexual abuse by the defendant against the complainant

State v. Warden, ___ N.C. App. ___, 836 S.E.2d 880 (Dec. 3, 2019) temp. stay granted, ___ N.C. ___, 835 S.E.2d 852 (Dec 20 2019)

The defendant was convicted of sexual offense with a child by an adult, child abuse by a sexual act, and taking indecent liberties with a child. At trial, a DSS Child Protective Services Investigator testified, without objection, that DSS had substantiated the allegations of sexual abuse against the defendant. The investigator explained that when DSS believes the allegations are true, it substantiates the case and that in this case “[w]e substantiated sexual abuse naming [the defendant] as the perpetrator.” The defendant testified and denied having committed any sexual act against the complainant. Citing previous cases addressing substantiation testimony, the Court found that the testimony improperly

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bolstered and vouched for the victim's credibility and that admission of the testimony was plain error in this case. The Court stated that where, as argued by the State in its closing argument, the credibility of the complainant is the central if not the only issue to be decided by the jury, the error is prejudicial and requires a new trial. A dissenting judge agreed that it was error to allow the testimony but would have found that the error did not meet the prejudice standard for plain error review.

(1) An expert witness did not offer a conclusive diagnosis of sexual abuse based on the victim's statement alone, and therefore did not impermissibly vouch for the victim's credibility. (2) The trial court did not err by excluding testimony that was speculative and not within the witnesses' personal knowledge. (3) The trial court did not commit plain error by failing to give a limiting instruction as to a witness's statistical testimony.

State v. Peralta , ___ N.C. App. ___, 836 S.E.2d 254 (Nov. 5, 2019)

The defendant was convicted by a jury of seven sex crimes against a five-year-old victim, including statutory rape of a child by an adult, statutory sexual offense with a child by an adult, and indecent liberties with a child. At trial, the State presented a nurse practitioner who testified about the medical evaluation given to the victim. The nurse practitioner testified without objection that the victim gave "clear and concise statement[s] regarding child sexual abuse," and that her own testimony was "based off a complete medical evaluation, not only [the victim's] statements." (1) On appeal, the defendant argued that the trial court committed plain error by impermissibly allowing the nurse practitioner to testify to the truth of the victim's statements to the extent that she offered a conclusive diagnosis without physical evidence. The court rejected the argument, noting first that the witness never actually offered a conclusive diagnosis. To the contrary, she gave testimony relevant to helping the jury understand that a lack of physical evidence in a medical exam did not preclude sexual abuse. Moreover, any error related to the nurse practitioner's detailed testimony about sexual abuse, including penetration, was deliberately elicited by the defendant on cross-examination. Regardless, the defendant did not demonstrate that the jury would have reached a different result in light of all the other unchallenged evidence. (2) The defendant also argued that the trial judge erred by excluding the testimony from two defense witnesses who allegedly asked the victim's mother to stop talking about sex in front of children. The court of appeals disagreed, concluding that the proffered testimony—that the victim may have learned explicit language about sexual abuse from her mother and not from her personal experience with abuse—was too speculative and not within the witnesses' personal knowledge. (3) Finally, the trial court did not err by failing to give a limiting instruction indicating that the nurse practitioner's statistical testimony could be considered only for corroborative purposes. Reviewing the argument for plain error, the court concluded that the nurse practitioner's testimony was proper, and that any error would not be prejudicial in any event in light of the collective evidence of guilt.

Miscellaneous Cases

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.

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

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.

(1) Any hearsay error related to the admission of the defendant's jail phone conversation was harmless due to the overwhelming evidence of the defendant's guilt. (2) Statements by the woman the defendant spoke to on the jail phone were not testimonial despite automated warnings that they were being recorded. (3) Any evidentiary error related to the admission of video of the defendant's interview with the police was harmless due to the overwhelming evidence of the defendant's guilt. (4) The defendant's second-degree murder conviction was properly sentenced as a Class B1 felony when there was no evidence or instruction related to depraved-heart malice. (5) The defendant properly stipulated to the offense classification of his prior public disturbance conviction for prior record level purposes.

State v. Roberts, ___ N.C. App. ___, 836 S.E.2d 287 (Nov. 5, 2019)

The defendant fired a gun from his car toward a park where over a dozen people were playing basketball and hanging out. He was later found asleep in his car in a ditch by a Highway Patrol officer, who arrested him for driving while impaired. He was convicted by a jury of second-degree murder and assault with a deadly weapon. The defendant argued that the trial court erred by admitting three phone

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calls the defendant made from the jail because they contained hearsay and violated the defendant's confrontation rights. (1) As to the hearsay argument, the court of appeals concluded that any error was harmless in light of the overwhelming evidence of the defendant's guilt. (2) As to the alleged violation of the Confrontation Clause, the court adopted the reasoning of a case from the Fourth Circuit, *United States v. Jones*, 716 F.3d 851 (4th Cir. 2013), and concluded that, despite automated warnings indicating that the calls were being recorded and monitored, the statements made by the woman the defendant was talking to on the jail phone were not intended to bear witness against him, and were therefore not testimonial. Because the statements were not testimonial, their admission did not violate the Confrontation Clause. (3) Next, the court declined to consider whether the trial court committed plain error by admitting, without objection, video interviews in which the defendant discussed prior assault and rape charges with the police. Again, in light of the overwhelming evidence of the defendant's guilt, the defendant failed to show how the admission of the evidence resulted in a miscarriage of justice or an unfair trial. (4) At sentencing, the trial court did not err by sentencing the defendant as a Class B1 felon upon jury's general verdict of guilty of second-degree murder when no evidence or jury instruction supported the depraved-heart malice that makes the crime a Class B2 felony. As in *State v. Lail*, 251 N.C. App. 463 (2017), it was readily apparent from the evidence here that the jury found the defendant guilty of a Class B1 second-degree murder. (5) Finally, the court of appeals rejected the defendant's argument that his stipulation to a prior conviction identified as "M-PUBLIC DISTURBANCE" as a Class 1 misdemeanor was ambiguous in light of the multiple potential classifications of disorderly conduct. To the contrary, under *State v. Arrington*, 371 N.C. 518 (2018), when a defendant stipulates to a prior conviction of a particular offense classification, he or she also stipulates to the facts underlying that conviction. The trial court has no duty to enquire further in the absence of clear record evidence suggesting the defendant stipulated to an incorrect classification, and there was no such evidence here.

Arrest, Search, and Investigation

Arrest, Search, and Investigation

Arrests & Investigatory Stops

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

State v. Ellis, ___ N.C. ___, ___ S.E.2d ___ (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.

Defendant was not seized when he was approached by an officer outside a gas station and asked to leave; defendant’s consent to the search and his subsequent nervous behavior justified a *Terry* frisk of his clothing for weapons; and counterfeit drugs discovered during that search were admissible under the plain feel doctrine.

State v. Johnson , ___ N.C. App. ___, 837 S.E.2d 179 (Dec. 17, 2019)

A police officer stopped at a gas station for a cup of coffee, and on his way inside he noticed the defendant standing outside the gas station, talking loudly and using abusive language on his cell phone. The clerk inside told the officer she thought the defendant was bothering other customers. The officer called for backup, approached the defendant, and asked him to end his conversation. The defendant complied “after some delay,” but then began shifting from foot to foot and looking from side to side. His nervous behavior made the officer concerned that he might have a weapon, so he asked the defendant if he could pat him down. The defendant hesitated, but then consented. While conducting the pat-down, the officer felt a soft, rubbery wad in the defendant’s pocket that the officer immediately believed to be narcotics packaged in plastic baggies. After completing the pat-down, the officer

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manipulated the rubbery wad again, ensuring it was what he believed it to be, and then reached into the defendant's pocket and withdrew the object. The wad was made up of plastic baggie corners containing a white powdery substance that looked like cocaine and a tube of Orajel. The defendant stated that the substance was baking soda, which he mixed with Orajel to fool buyers into thinking it was cocaine. Field and lab testing confirmed the defendant's statements. The defendant was charged with possession with intent to sell and deliver a counterfeit controlled substance. The trial court denied the defendant's motion to suppress the fruits of the search on the grounds that he was illegally detained, he did not consent to the search, and the search exceeded the scope of a permissible pat-down. The defendant pled guilty and appealed.

The appellate court affirmed the trial court's ruling denying the motion. The defendant was not seized by the officers, who initially told him he should "finish his conversation elsewhere." It was only when the defendant hesitated and began acting nervous that the officer became concerned that the defendant might be armed, and the defendant then consented to be searched for weapons. The counterfeit drugs discovered during that weapons search were admissible under the "plain feel" doctrine. Even before he manipulated the object a second time or removed it from the defendant's pocket, the officer testified that based on his years of experience in narcotics investigations, it was "immediately apparent" to him that the object would be drugs in plastic packaging. After reviewing several cases on the plain feel doctrine, the court explained that the standard to be applied is analogous to the probable cause standard. In this case, the officer's training and experience in narcotics investigations, the circumstances surrounding the defendant's nervous behavior, and the readily apparent nature of the item in the defendant's pocket established "that [the officer's] subsequent manipulation of the objects and search of defendant's pocket for confirmation was therefore supported by probable cause."

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. ___, ___ S.E.2d ___ (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

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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.

Given the commonsense inference that vehicles likely are being driven by their owners, an officer’s knowledge that the registered owner of a vehicle has a revoked driver’s license provides reasonable suspicion for a traffic stop in the absence of information negating the inference that the owner is the driver.

Kansas v. Glover, 589 U.S. ___, ___ S. Ct. ___ (Apr. 6, 2020)

In this Kansas driving with a revoked license case, the Court held that when a police officer knows that the registered owner of a vehicle has a revoked driver’s license and lacks information negating an inference that the owner is the driver of the vehicle, a traffic stop is supported by reasonable suspicion and does not violate the Fourth Amendment. Recognizing that persons other than the registered owner sometimes may be lawfully driving, the Court said that knowledge of a registered owner’s revoked license “provided more than reasonable suspicion to initiate [a] stop” based on the “commonsense inference” that, in the absence of negating information, vehicles likely are being driven by their registered owners. The Court emphasized the narrow scope of its holding, saying that the presence of additional facts may dispel reasonable suspicion and offering the example of a situation where an officer observes that a driver does not appear to be the registered owner.

Justice Kagan, joined by Justice Ginsburg, wrote a concurring opinion expressing the view that the stop in this case was reasonable given the particular nature of Kansas motor vehicle law, where a license revocation usually is the consequence of serious or repeated offenses, and in light of the fact that the “barebones [evidentiary] stipulation” before the court demonstrated a total absence of “additional facts” that might “dispel reasonable suspicion.”

Justice Sotomayor dissented, criticizing the majority’s approach for “absolving officers from any responsibility to investigate the identity of a driver” when feasible and arguing that inferences contributing to reasonable suspicion must be based on specialized law enforcement training and experience rather than layperson “common sense.”

In a per curiam opinion, the court affirmed the decision of the Court of Appeals holding that no reasonable suspicion supported a warrantless traffic stop based on an anonymous tip.

State v. Carver, ___ N.C. ___, 837 S.E.2d 872 (Feb. 28, 2020)

The court per curiam affirmed the decision of the Court of Appeals, ___ N.C. App. ___, 828 S.E.2.d 195 (2019), which had held over a dissent that no reasonable suspicion supported a warrantless traffic stop based on an anonymous tip.

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A sheriff's deputy received a dispatch call, originating from an anonymous tipster, just before 11 PM. The deputy was advised of a vehicle in a ditch on a specified road, possibly with a "drunk driver, someone intoxicated" and that "a truck was attempting—getting ready to pull them out." The tip provided no description of the car, truck or driver, nor was there information regarding the caller or when the call was received. When the deputy arrived at the scene about 10 minutes later, he noticed a white Cadillac at an angle partially in someone's driveway. The vehicle had mud on the driver's side and the deputy opined from gouges in the road that it was the vehicle that had run off the road. However he continued driving and saw a truck traveling away from his location. He estimated that the truck was travelling approximately 15 to 20 miles below the posted 55 mph speed limit. He testified that the truck was the only one on the highway and that it was big enough to pull the car out. He did not see any chains, straps, or other devices that would indicate it had just pulled the vehicle out of the ditch. He initiated a traffic stop. His sole reason for doing so was "due to what was called out from communications." The truck was driven by Griekspoor; the defendant was in the passenger seat. When the deputy explained to the driver that there was a report of a truck attempting to pull a vehicle out of the ditch, the driver reported that he had pulled the defendant's car out of the ditch and was giving him a ride home. The deputy's supervisor arrived and went to talk with the defendant. The defendant was eventually charged with impaired driving. At trial he unsuccessfully moved to suppress, was convicted and appealed. The court found that the stop was improper. As the State conceded, the anonymous tip likely fails to provide sufficient reliability to support the stop. It provided no description of either the car or the truck or how many people were involved and there is no indication when the call came in or when the anonymous tipster saw the car in the ditch with the truck attempting to pull it out. The State argued however that because nearly every aspect of the tip was corroborated by the officer there was reasonable suspicion for the stop. The court disagreed. When the deputy passed the Cadillac and came up behind the truck, he saw no equipment to indicate the truck had pulled, or was able to pull, a car out of the ditch and could not see how many people were in the truck. He testified that it was not operating in violation of the law. "He believed it was a suspicious vehicle merely because of the fact it was on the highway." The details in the anonymous tip were insufficient to establish identifying characteristics, let alone allow the deputy to corroborate the details. The tipster merely indicated a car was in a ditch, someone was present who may be intoxicated, and a truck was preparing to pull the vehicle out of the ditch. There was no description of the car, the truck, or any individuals who may have been involved. After the deputy passed the scene and the Cadillac he noticed a truck driving under the posted speed limit. He provided no testimony to show that the truck was engaging in unsafe, reckless, or illegal driving. He was unable to ascertain if it contained a passenger. The court concluded: "At best all we have is a tip with no indicia of reliability, no corroboration, and conduct falling within the broad range of what can be described as normal driving behavior." (quotation omitted). Under the totality of the circumstances the deputy lacked reasonable suspicion to conduct a warrantless stop of the truck.

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

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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

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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.

Officers had reasonable suspicion to believe that defendant might be armed and dangerous, which justified a "frisk" of the vehicle that led to discovery of cocaine within a reachable area, even after defendant had been removed from the vehicle.

State v. Johnson, ___ N.C. App. ___, 837 S.E.2d 169 (Dec. 17, 2019) temp. stay granted, ___ N.C. ___, 836 S.E.2d 655 (Jan. 7, 2020)

Two officers on patrol together in a high-crime area after midnight checked the tag on a vehicle and discovered that it was registered to another car, so the officers initiated a traffic stop. The driver stopped fairly quickly and raised his hands, holding them outside the vehicle window. Based on past experience with drug crimes, the officers took notice of that gesture because "sometimes it can mean the person has a gun." Upon approaching the car and talking to the defendant in the driver's seat, the officer noticed that the defendant was turning or "blading" his body as if to conceal something to his right. The driver was cooperative and answered "no" when asked if he had any weapons in the car, but he also seemed very nervous. The defendant explained that he had just purchased the car that day, and he provided the officer with his license and a bill of sale from the center console. While checking the defendant's information back in their patrol car, the officers learned that the defendant had several prior charges and at least two convictions for violent offenses. Believing that the defendant might be armed and dangerous, the officers asked him to step out of the vehicle, where he consented to a frisk of his person. The officers then searched the "lungeable" areas inside the vehicle, over defendant's objection, and discovered cocaine in the center console. The defendant was indicted for felony possession of cocaine, and filed a motion to suppress the search of his vehicle.

The defendant moved to suppress the evidence found during the search of his car on the grounds that the officers had no authority to search the vehicle and unlawfully extended the traffic stop. The trial court denied the defendant's motion to suppress, and that ruling was affirmed on appeal. Under the totality of the circumstances, and showing deference to the trial court's factual findings, there were specific and articulable facts to support the officers' reasonable suspicion that the defendant might be armed (late at night in a high crime area, and the defendant's unusual raised hand gesture, nervous demeanor, "blading" his body to hide something, and violent criminal history). In the case of vehicle

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stops, an officer's authority to check the defendant for weapons includes a brief and limited search of areas inside the vehicle that would be within the suspect's reach, even after the person has been removed from the vehicle. "In other words, we review the frisking of a vehicle the same way we would analyze an officer's frisk of a person." Because the officers had authority to conduct a frisk search of the defendant and his vehicle, any extension of the original traffic stop was likewise not unlawful.

Exclusionary Rule

Motion to suppress properly denied when the evidence was sufficiently attenuated from any illegality

State v. Thomas, ___ N.C. App. ___, 834 S.E.2d 654 (Oct. 15, 2019)

The defendant was convicted of four counts of first-degree murder and other charges and appealed. He argued the trial court erred in denying his motion to suppress, his motion to dismiss, and in admitting certain evidence. The Court of Appeals unanimously affirmed.

The offenses occurred in 2005, although the defendant was not tried until 2017. As a part of the investigation into the homicides and other crimes, law enforcement obtained an order authorizing the use of a pen register to obtain 60 days of cell-site location information ("CSLI") on a phone connected to the defendant in 2005. Law enforcement acted under G.S. 15A-262, requiring a showing only of "relevance" to an investigation, and did not obtain a search warrant. The defendant alleged this violated *U.S. v. Carpenter*, ___ U.S. ___, 201 L. Ed. 2d 507 (2018). Rejecting this argument, the court first noted *Carpenter's* scope: "*Carpenter* only established the government must obtain a warrant before it can access a phone company's *historical* CSLI; it did not extend its holding to the issue of government acquisition of real-time or prospective CSLI." Here, the State sought both types of data, and it was unclear which category of information was used to actually locate the defendant. *Carpenter* would only control as to the historical data (but did indeed apply to that category of data, despite having been decided 13 years after the events in question, since *Carpenter* was decided while this matter was on direct appeal).

Here, it was unnecessary to decide the extent of protections for real-time or prospective CSLI, given that the evidence was sufficiently attenuated from any illegality (an alternative ground found by the trial court to justify the search). "Evidence is admissible when the connection between unconstitutional police conduct and the evidence is remote or has been interrupted by some intervening circumstance, so that 'the interest protected by the constitutional guarantee that has been violated would not be served by suppression of the evidence obtained.'"

The Supreme Court has identified three factors to aid in determining whether there was a sufficient intervening event to break the casual link between the government's unlawful act and the discovery of evidence: (1) the 'temporal proximity' of the unconstitutional conduct and the discovery of evidence, (2) the 'presence of intervening circumstances', and (3) 'particularly, the purpose and flagrancy of the official misconduct.'

Here, three days had passed between the court order authorizing the CSLI and law enforcement locating the defendant. That amount of time was not substantial and weighed in favor of suppression. However, the intervening circumstances here weighed heavily in favor of attenuation—the defendant was found with guns and ammo, threatened to shoot at officers when they attempted to apprehend him, and actually fired a gun at officers during the course of his arrest. "[T]his constituted an intervening circumstance sufficient to attenuate the connection between any unconstitutional police conduct and

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the discovery of evidence.” Finally, the purpose of the exclusionary rule would not be served by suppression here because the misconduct was “neither purposeful nor flagrant.” Officers acted according to the law and common understanding of pen registers in 2005 and no reasons existed at the time to believe those procedures were unconstitutional. The trial court did not therefore err in denying the motion to suppress.

Identification of Defendant

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.

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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.

(1) Trial court did not err in denying the defendant’s motion to suppress evidence of a show-up identification as the show-up was carried out in accordance with the North Carolina Eyewitness Identification Reform Act and was not impermissibly suggestive; (2) Because officers complied with the show-up procedures in G.S. 15A-284.52(c1), defendant was not entitled to a jury instruction on noncompliance with the Act

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

Two men attempted to rob the victim in a McDonald’s parking lot. One of the suspects fired a gun, and both suspects fled. The victim ran to a nearby parking lot, where he found a law enforcement officer. The victim told the officer what had occurred and described the suspects. Two suspects matching the description were located nearby a few minutes later. When officers approached, the defendant ran. He was apprehended a few minutes later. The victim was taken to the location where the defendant was apprehended, and the victim identified the defendant as the person with a gun who had tried to rob him earlier. The identification was recorded on one of the officer’s body cameras.

The defendant was indicted for attempted robbery with a dangerous weapon. He moved to suppress the victim’s show-up identification. The trial court denied the motion, and the defendant was convicted at trial. The defendant appealed, arguing that the trial court erred when it denied his motion to suppress evidence of the show-up identification and when it failed to instruct the jury about purported noncompliance with the North Carolina Eyewitness Identification Reform Act (“the Act”).

(1) G.S. 15A-284.52(c1) of the Act provides that

- A show-up may only be conducted when a suspect matching the description of the perpetrator is located in close proximity in time and place to the crime, or there is reasonable belief that the perpetrator has changed his or her appearance in close time to the crime, and only if there are circumstances that require the immediate display of a suspect to an eyewitness;
- A show-up may only be performed using a live suspect; and
- Investigators must photograph a suspect at the time and place of the show-up to preserve a record of the suspect’s appearance at the time of the show-up.

The Court of Appeals determined that the trial court made findings that supported each of these requirements. The defendant, who matched the victim’s description, was detained less than a half-mile from the site of the attempted robbery. He was suspected of a violent crime that involved the discharge of a firearm and he fled when officers first attempted to detain him. These circumstances required an immediate display of the defendant. An armed suspect who is not detained poses an imminent threat to the public. And had the victim determined that the defendant was not the perpetrator, officers could have released the defendant and continued their search. Finally, the show-up involved a live suspect and was recorded on camera.

The Court of Appeals rejected the defendant’s argument that the Act requires law enforcement officers to obtain a confidence statement and information related to the victim’s vision. G.S. 15A-284.52(c2) requires the North Carolina Criminal Justice Education and Training Standards Commission to develop a policy regarding standard procedures for show-ups. The policy must address “[c]onfidence statements by the eyewitness, including information related to the eyewitness’ vision, the circumstances of the events witnessed, and communications with other eyewitnesses, if any.” The court reasoned that

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because G.S. 15A-284.52 does not place additional statutory requirements on law enforcement, but instead requires the North Carolina Criminal Justice Education and Training Standards Commission to develop nonbinding guidelines, only G.S. 15A-284.52(c1) sets forth the requirements for show-up identification compliance.

The court further determined that the show-up did not violate the defendant's due process rights as it was not impermissibly suggestive and did not create a substantial likelihood of misidentification.

(2) G.S. 15A-284.52(d)(3) provides that when evidence of compliance or noncompliance with "this section" of the Act is presented at trial, the jury must be instructed that it may consider credible evidence of compliance or noncompliance to determine the reliability of eyewitness identifications. The defendant argued on appeal that he was entitled to a jury instruction on noncompliance with the Act because the officer did not obtain an eyewitness confidence level under G.S. 15A-284.52(c2)(2). The Court of Appeals rejected that argument on the basis that G.S. 15A-284.52(c2) concerns policies and guidelines established by the North Carolina Criminal Justice Education and Training Standards Commission, not the requirements for show-up identifications. Because the officers complied with the show-up procedures in G.S. 15A-284.52(c1), the defendant was not entitled to a jury instruction on noncompliance with the Act.

Interrogation and Confession

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

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conclude beyond a reasonable doubt that all twelve jurors would have voted to convict without the confession.

Search Warrants

State v. Bailey, ___ N.C. ___, ___ S.E.2d ___ (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.

Searches

Trial court did not err in denying defendant's motion to suppress evidence obtained from a search of the defendant's purse when officer testified that the defendant voluntarily consented to the search, notwithstanding contradictory testimony from the defendant.

Arrest, Search, and Investigation

State v. Hall, ___ N.C. App. ___, 836 S.E.2d 670 (Nov. 19, 2019)

An officer patrolling the parking area of a park just before closing discovered the defendant asleep in her car. Based on the defendant's positioning, he was concerned there might be a medical emergency, so he knocked on the window of her car. After he knocked several times, the defendant sat up, looked at him, and opened the driver's side door. She said she was camping in the park with her son and decided to take a nap in her car. Her speech was slurred, her eyes were bloodshot, and she was unsteady on her feet when she got out of her car. The officer also saw track marks on her arms that were consistent with heroin use. The officer asked for the defendant's license, and, while holding it, asked for consent to search the defendant's car and her purse, which was sitting in the front seat of the car.

The State and defendant presented conflicting evidence about what happened next. The officer said that defendant responded, "Sure." The defendant said the officer asked three times for permission to search her car and each time she said, "I would really rather you not." She said she only consented to the search after the officer threatened to arrest her.

The officer searched the defendant's purse and found several syringes in its top section. He then asked the defendant whether she was carrying anything illegal. The defendant asked whether she was going to jail. The officer told her that he would not take her to jail if she cooperated. The defendant told him she had a syringe containing heroin in the side compartment of her purse. The officer found the syringe there, along with a burnt spoon and two grams of heroin.

The defendant was not arrested that evening, but subsequently was indicted for possession of heroin and possession of drug paraphernalia. She filed a motion to suppress the evidence obtained from the search, which the trial court denied. She pled guilty, preserving her right to appeal. On appeal, she argued that she did not voluntarily consent to the search of her purse, and that the trial court's findings on that issue were insufficient. The court of appeals disagreed. Rejecting the defendant's argument to the contrary, the court explained that the question of whether consent to search was voluntary is one of fact, not law.

The trial court determined that the defendant freely gave consent to the officer to search her vehicle and her purse. This finding was supported by the officer's testimony at the suppression hearing that he asked defendant for consent to search her car and purse, and she said, "Sure." The court of appeals concluded, therefore, that the trial court's finding that the defendant's consent was "freely given" was supported by competent evidence and was binding on appeal. Though the trial court failed to make a specific finding that the search did not violate the defendant's Fourth Amendment rights, the appellate court reached that conclusion based on the finding of fact that the defendant voluntarily consented to the search. Thus, the court of appeals concluded that the trial court did not err in denying the defendant's motion to suppress.

(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

Arrest, Search, and Investigation

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.

Criminal Offenses

Criminal Offenses

General Crimes

(1) A mother's failure to report that her husband sexually abused her daughter did not make the mother an accessory after the fact to the husband's abuse. (2) The mother's persistent refusal to allow her daughter to talk candidly with law enforcement or DSS about the abuse was obstruction of justice.

State v. Ditenhafer, 373 N.C. 116 (Nov. 1, 2019)

The defendant's husband sexually abused the defendant's daughter. (The husband was not the daughter's biological father, but he had adopted her after he married her mother.) The daughter told an aunt about the abuse. This led to law enforcement and DSS investigations. However, the defendant initially did not believe her daughter and instead pressured her to recant her allegations. Even after walking in on the abuse in progress, the defendant sought to prevent her daughter from cooperating with authorities. The defendant was charged with (a) being an accessory after the fact to sexual activity by a substitute parent, based on her failure to report the abuse that she personally observed; (b) felony obstruction of justice for pressuring her daughter to recant; and (c) felony obstruction of justice for denying law enforcement and DSS access to her daughter during the investigation. She was convicted on all counts and appealed, arguing that the evidence was insufficient to support each conviction. The case eventually reached the state supreme court, which ruled: (1) There was insufficient evidence to support the accessory after the fact conviction. "[T]he indictment alleged that [the defendant] did not report [her husband's] sexual abuse of [her daughter, and] a mere failure to report is not sufficient to make someone an accessory after the fact under North Carolina law." The court distinguished failure to report a crime from affirmative concealment of a crime. The court also "decline[d] to consider any of defendant's other acts not alleged in this indictment" that might have supported the accessory after the fact charge. (2) There was sufficient evidence to support the defendant's conviction of obstruction of justice for denying the authorities access to the daughter during the investigation. The court noted that the defendant interrupted one interview of the daughter by investigators, was present and "talked over" the daughter in several others, and generally "successfully induced [the daughter] to refuse to speak with investigating officers and social workers." The court remanded the matter to the court of appeals for further consideration of whether there was sufficient evidence that the obstruction was felonious by virtue of an intent to deceive or defraud. (The other count of obstruction of justice, for pressuring the daughter to recant, had been affirmed by the court of appeals and was not before the supreme court.) Two dissenting Justices would have found sufficient evidence of accessory after the fact.

(1) Conspiracy to commit attempted first-degree murder is a cognizable offense in North Carolina; (2) The evidence was sufficient to go to the jury on the attempt and conspiracy charges

State v. Lyons, ___ N.C. App. ___, 836 S.E.2d 917 (Dec. 3, 2019)

The defendant was convicted of attempted first-degree murder and conspiracy to commit attempted first-degree murder. (1) The defendant argued that the latter charge is invalid because it alleges a non-existent crime. The defendant argued that an attempt requires that the act fail; therefore, it is an illogical impossibility and a legal absurdity to criminalize an agreement to commit a failed act, which in

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this case would be an agreement not to commit murder. The Court of Appeals rejected the argument, holding that under North Carolina law “failure” is not an element of attempted first-degree murder and that conspiracy to commit that offense is a cognizable charge. (2) The defendant argued that the evidence was insufficient to support attempted first-degree murder or conspiracy because the evidence showed only that he fired a pellet gun to try scare away the officer who was in pursuit. The Court found that the evidence was sufficient for the jury to find that the defendant fired a gun at the officer, not merely a pellet gun, with the intent to kill.

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

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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.

Homicide

Motion to dismiss for insufficient evidence was properly denied where the state presented sufficient evidence to support defendant's voluntary manslaughter conviction based on the use of excessive force in self-defense, and the trial court's jury instruction on the substantive offenses and affirmative defenses, taken as a whole, did not constitute plain error.

State v. Hairston, ___ N.C. App. ___, 837 S.E.2d 157 (Dec. 17, 2019)

On March 13, 2016, the defendant was out at a bar in Greensboro with his nephews and several other people to celebrate a friend's birthday. As they were leaving the bar around 2:00 a.m., another group of men approached and one of them asked a woman in the defendant's group if she would perform sexual acts for money. The defendant's group rebuked the other man, and the defendant's group left the parking lot in two vehicles. When they were stopped at a red light, a vehicle occupied by the second group of men pulled up next to the vehicle in which the defendant was riding. One of the men in the second group smashed a bottle against the defendant's vehicle, and the second group pursued the defendant's group at high speed as they drove away. The vehicles all pulled into a nearby parking lot, where two off-duty police officers were parked in a patrol vehicle. As the occupants exited their vehicles, a large fight broke out involving different clusters of people, and one person ("Jones") was killed. Additional officers responded to the scene and attempted to break up the multiple altercations. None of the officers saw a weapon being used, but Jones and several other individuals had suffered deep lacerations, and their statements to the officers on scene indicated the defendant was the one who cut them with a knife. As the fights were being broken up, an officer saw the defendant walking back towards a vehicle, ignoring commands to stop, and making a furtive movement to throw something into the car. Officers checked the car and found a bloody knife on the driver's seat. The defendant was searched and also found to have "bath salts" in his pocket. The medical examiner concluded that stab wounds consistent with the knife found in the car caused Jones' death. Additional evidence indicating that the defendant was the person who mortally wounded Jones included blood found on the defendant's shoes and clothing, the defendant's close proximity to the wounded individuals, the defendant's DNA on the knife, and the defendant's statements to a private investigator

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that others were stomping and hitting him so he pulled a knife out of his pocket and “came out swinging.”

The defendant was charged with first-degree murder, possession of 4-chloromethcathinone, and attaining habitual felon status. At the conclusion of a jury trial on the substantive charges, the jury was instructed on first-degree murder, second-degree murder, voluntary manslaughter, and the controlled substance offense. The jury convicted the defendant of voluntary manslaughter and drug possession. On appeal, the defendant argued that the trial court should have granted his motion to dismiss for insufficient evidence based on self-defense (or that he received ineffective assistance of counsel if that argument was deemed not adequately preserved), and that the trial court erred in its jury instruction regarding voluntary manslaughter.

Because the jury only convicted the defendant of manslaughter, rather than first- or second-degree murder, and because the state did not advance the theories that the defendant had either killed in the heat of passion or was the initial aggressor, the appellate court concluded that the only issue it needed to determine was whether the state’s evidence was sufficient to withstand a motion to dismiss a charge of voluntary manslaughter premised on a killing that would be second-degree murder (committed with malice) but for the fact that the defendant had an imperfect claim of self-defense (based on his use of excessive force). To survive such a motion, the state’s evidence would have to show that the defendant: (1) intentionally wounded Jones; (2) proximately causing his death; (3) under a reasonable belief that use of force was necessary to avoid death or great bodily harm; but (4) the force used was greater than necessary to prevent such harm. Viewed in the light most favorable to the state, there was sufficient evidence in this case from which a reasonable juror could find each of those four factors, and the motion to dismiss was properly denied.

The defendant also argued on appeal that the parties had agreed to use pattern jury instruction 206.10, but the trial court’s actual instructions to the jury did not directly follow the pattern instruction language. If true, a challenge to that instruction would be preserved for appellate review even though the defense did not object. But based on its review of the record, the appellate court held that there was not an agreement to use a specific instruction, so its review of the jury instructions was limited to plain error. After reviewing the instructions as a whole, the appellate court found that the trial court had adequately instructed the jury as to each element and lesser-included offense. “Because the jury was informed of the essential elements it would have to find beyond a reasonable doubt in order to convict defendant of voluntary manslaughter, the trial court did not err in its jury instructions.”

The trial court’s instruction on the malice element of attempted first-degree murder was not reversible error in light of the defendant’s use of a deadly weapon and the related circumstances

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. In light of the facts of the case, the Court of Appeals rejected the defendant’s argument that the trial court erred by denying his motion to dismiss the attempted first-degree murder charge for insufficiency of the evidence that he acted with premeditation and deliberation. The State proved, among other things, that the defendant said he would kill her and that he shot the door near the doorknob four to six times before kicking the door and yelling, which the court deemed sufficient evidence for the jury to reasonably conclude that the

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defendant attempted to kill the victim with premeditation and deliberation.

The appellate court also concluded that the defendant could not demonstrate prejudicial error resulting from the trial court's deadly weapon malice instruction. The defendant argued that the instruction could have been misleading to the extent that it allowed an inference of malice on the attempted murder charge for shooting at the victim based on the injury resulting from a different crime, the pistol-whipping. Based on the defendant's use of a weapon and the related circumstances, the court was unpersuaded that the jury would have reached a different result without the instruction.

Assaults

- (1) The defendant could not be separately convicted and punished for both habitual misdemeanor assault and felony assault inflicting serious bodily injury based on the same act;**
(2) the court must arrest judgment on one of the convictions.

State v. Fields, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

The defendant was convicted after a jury trial of habitual misdemeanor assault and felony assault inflicting serious bodily injury for the same assaultive act. The trial court imposed consecutive sentences. The defendant appealed, arguing that the trial court erred by sentencing him for both habitual misdemeanor assault and the felony assault. The Court of Appeals vacated the habitual misdemeanor assault conviction, holding over a dissent that the defendant could not be sentenced for both crimes when the offenses arose from the same act. *State v. Fields*, ___ N.C. App. ___, 827 S.E.2d 120 (2019). The State appealed to the Supreme Court of North Carolina based on the dissent, and also sought discretionary review on the issue of whether, even if it was impermissible for the trial judge to sentence the defendant for both convictions, the Court of Appeals erred by *vacating* one of the convictions instead of *arresting judgment* on it. (1) On the first issue, the Supreme Court affirmed the Court of Appeals, concluding that the defendant could not be sentenced for both convictions that arose out of the same assaultive act. The misdemeanor assault statute, G.S. 14-33, includes prefatory language saying the law applies “[u]nless the conduct is covered under some other provision of law providing greater punishment”—language the appellate courts have generally interpreted to bar simultaneous punishments for the same act. Though the habitual misdemeanor assault statute, G.S. 14-33.2, does not include that language, the Supreme Court concluded that the principle still applies, as the misdemeanor assault is necessarily a part of the “upgraded” habitual misdemeanor assault conviction. The felony assault conviction based on the same assaultive act was a “provision of law providing greater punishment” that invoked the prefatory language of the misdemeanor assault statute, which in turn meant that the defendant could not be punished for habitual misdemeanor assault. (2) On the second issue, the Court concluded that the proper remedy when such prefatory language bars double punishment for the same act is to arrest judgment on one of the judgments, not to vacate it.

Evidence supported multiple convictions for assault; defendant's hands and feet could be deadly weapons; defendant was not materially prejudiced by lack of charge conference where record established that a conference did take place.

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

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The defendant and the victim were in a relationship and took a vacation trip to the beach. While at the vacation house, the defendant became enraged after consuming drugs and alcohol and committed a series of violent assaults against the victim that included punching her in the nose, biting her ears, head-butting her, and strangling her to the point of vomiting. The assaults began at the vacation house and continued throughout a forced drive back from the beach and after returning to the victim's home. The victim eventually spoke with her family by phone, who came to her house and contacted emergency services. The victim suffered a broken nose, ruptured eardrum, concussion, and other serious injuries. The defendant was subsequently tried and convicted for kidnapping, three different assault offenses, and communicating threats.

On appeal, the defendant first argued that his motion to dismiss for insufficiency of the evidence should have been granted because the evidence only established a single, continuous assault rather than multiple separate offenses. The appellate court held that this argument was not made at trial and therefore it was not preserved for appeal; but even if it had been raised at trial, there was evidence to support multiple assault convictions. To support multiple convictions, there must be "separate and distinct" assaults. To decide whether the assaults are sufficiently distinct, the court considers whether each act: (i) requires a separate thought process; (ii) is distinct in time; and (iii) results in a different outcome. In this case, the court held that the defendant employed a separate thought process in his decision to inflict each distinct punch, slap, kick, bite and head butt, and each assault occurred at a different point in time and resulted in different injuries. Therefore, even if the argument had been made and preserved, the trial court did not err by denying the motion to dismiss.

The defendant next argued that the trial court should have granted his motion to dismiss the assault charge alleging use of a deadly weapon because there was insufficient evidence that his hands and feet were deadly weapons. Hands and feet can be a deadly weapon based on the manner in which they are used and the relative size and condition of the parties. In this case, based on defendant's height and size relative to the victim, the violent nature of the attacks, and the victim's severe injuries, the appellate court held that it was not error to deny the motion to dismiss and let the jury decide whether his hands and feet were deadly weapons.

Defendant's final argument, asserting that he was materially prejudiced by the trial court's failure to conduct a charge conference as required by G.S. 15A-1231(b), was denied because the record established that a conference did take place, and the defense indicated they were satisfied with the proposed instructions and made no objection after the instructions were given.

Trial court erred in sentencing defendant for assault by strangulation (Class H felony) when defendant also was convicted of and sentenced for assault with a deadly weapon with intent to kill inflicting serious injury (Class C felony) based on the same conduct

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

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

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

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

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

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

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

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

Abuse Offenses

In a neglect of an elder adult case there was sufficient evidence that the defendant was her elderly mother’s “caretaker”; the admission of video of a police interview with the mother containing alleged hearsay was not prejudicial

State v. Stubbs, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2020)

In this neglect of an elder adult case, the trial court did not err by denying the defendant’s motion to dismiss for insufficient evidence that she was her elderly mother’s “caretaker” as that word is defined by G.S. 14-32.3(d)(1), and the trial court did not commit plain error by allowing a video of the defendant’s mother to be played for the jury. Despite the defendant’s argument that she and her mother, who lived at the defendant’s house, did not have a “close relationship” and were “more like roommates” and testimony describing the mother as a “very private person [who] liked to keep to herself,” the court found the State’s evidence sufficient to send the question of the defendant’s caretaker status to the jury. This evidence included that in her mother’s final weeks of life the defendant helped her bathe; purchased food and supplies for her; assisted her in paying her bills; helped with “general normal care, daily things;” and purchased life insurance on her behalf and at her request.

The court went on to determine that the trial court did not commit plain error by admitting a video of a police interview with the defendant’s mother to be played for the jury. The defendant argued that her mother’s statements in that video, which went to the issue of whether the defendant was her caretaker, were inadmissible hearsay. The court found that admission of the video, even if error, was not prejudicial because the State’s other evidence was adequate to prove that the defendant was her mother’s caretaker.

Criminal Offenses

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.

Threats & Related Offenses

(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

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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

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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

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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.

Sexual Assaults & Related Offenses

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 people. 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.

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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.

Kidnapping & Related Offenses

Motion to dismiss kidnapping properly denied where evidence showed restraint and danger to the victim beyond the acts inherent to the contemporaneous robbery

State v. Thomas, ___ N.C. App. ___, 834 S.E.2d 654 (Oct. 15, 2019)

The defendant was convicted of four counts of first-degree murder and other charges and appealed. He argued the trial court erred in denying his motion to suppress, his motion to dismiss, and in admitting certain evidence. The Court of Appeals unanimously affirmed.

The defendant objected that a charge of kidnapping should have been dismissed for failure to show confinement or restraint beyond that necessary for the accompanying robbery. "Whether a restraint was more than that which is an inherent or inevitable part of another felony depends on 'whether the victim is exposed to greater danger than is inherent in the armed robbery itself.'" Here, the defendant assaulted, robbed, and murdered the victim's boyfriend before walking her through the house at gunpoint and attempting to twice shoot her in the head before leaving (the gun malfunctioned). This was sufficient removal beyond what was necessary to accomplish the robbery. Those acts were not "inherent" to the robbery, and "increased [the victim's] vulnerability and helplessness beyond what was necessary to enable the defendant to rob her." The motion to dismiss was therefore properly denied.

Larceny, Embezzlement & Related 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

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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.”

Robbery

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

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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.]

In an attempted armed robbery trial, it was error not to instruct the jury on the lesser-included offense of attempted common law robbery when there was evidence presented that the alleged weapon was actually a BB gun.

State v. Wise, ___ N.C. App. ___, 837 S.E.2d 193 (Dec. 17, 2019)

The defendant and another person committed an attempted robbery of a convenience store in which they pointed what appeared to be a gun at the clerk and demanded money. When the clerk explained that he had already put the money in the store's safe, the two men fled. The defendant was eventually charged with attempted armed robbery, but the weapon used was never found. At trial, a detective testified for the state that the defendant had admitted to committing the attempted robbery, but claimed that it was only a BB gun and not a real gun. The jury convicted the defendant of attempted armed robbery, and the defendant appealed. The defendant argued that the trial court erred by refusing to instruct the jury on the lesser-included offense of common law robbery. The appellate court agreed and vacated the conviction. The trial court is required to instruct the jury on the lesser-included offense of common law robbery "if there is *any evidence* – whether offered by the State or by the defendant – that the implement used was *not* a deadly weapon." In this case, since the state presented some evidence (the defendant's statement, as testified to by the detective) that the purported firearm was only a BB gun, the trial court was required to instruct the jury on the lesser offense.

Frauds

A Kansas identity theft statute which criminalizes the "using" of any "personal identifying information" belonging to another person with the intent to "[d]efraud that person, or anyone else, in order to receive any benefit" was not preempted by the federal Immigration Reform and Control Act of 1986 (IRCA).

Kansas v. Garcia, 589 U.S. ___, 140 S. Ct. 791 (Mar. 3, 2020)

A Kansas identity theft statute which criminalizes the "using" of any "personal identifying information" belonging to another person with the intent to "[d]efraud that person, or anyone else, in order to receive any benefit" was not preempted by the federal Immigration Reform and Control Act of 1986 (IRCA). The IRCA makes it unlawful to hire and alien knowing that he or she is unauthorized to work in the United States. To enforce this prohibition, the IRCA requires employers to use a federal work-authorization form (I-9) to comply with a federal employment verification system. The IRCA also requires that employees complete an I-9 no later than their first day of work and it is a federal crime to provide false information on an I-9 or use fraudulent documents to show authorization to work. In addition, the IRCA limits the use of information "contained in" I-9 forms "for law enforcement purposes" apart from the enforcement of certain federal statutes and the Immigration and Nationality Act, and also contains a provision that expressly "preempt[s] any State or local law imposing civil or criminal sanctions (other than through licensing or similar laws) upon those who employ, or recruit or refer for a fee for employment, unauthorized aliens." The preemption provision makes no mention of state or local laws that impose criminal or civil sanctions on employees or applicants for employment.

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The alien defendants in this case were not authorized to work in the United States and secured employment by using identities of other persons, including those persons' social security numbers, on I-9 forms. Each of them used these same false identities when they completed federal W-4 tax withholding forms and similar state K-4 tax withholding forms. Each defendant was convicted of a Kansas identity theft offense related to their use of another person's social security number on the tax forms, the same numbers they had used on the I-9 forms. The Court reversed the decision of the divided Kansas Supreme Court which had determined that since the social security numbers had been used in the I-9 forms, the convictions were preempted by the IRCA based on the fact that the social security numbers were "contained in" the I-9 forms. The Court held that the Kansas identity theft laws were neither expressly nor impliedly preempted by federal law. With respect to express preemption, the court explained that (1) the express preemption contained in the IRCA applied only to State and local laws imposing sanctions on employers and recruiters; (2) the Kansas Supreme Court's interpretation of the IRCA limitation on the use of information "contained in" an I-9 form to preempt a state prosecution based on the use of a false social security number in a tax form when that number also had been used in an I-9 form was "flatly contrary to standard English usage" of the term "contained in;" and (3) the defendants' argument that a provision of the IRCA generally prohibiting the use of the federal employment verification system for "law enforcement purposes" rested on a misunderstanding of that system and its relationship to the circumstances of this case. The court went on to find that the Kansas laws, as applied, were not preempted by implication, finding neither field preemption nor conflict preemption.

Justice Thomas joined by Justice Gorsuch, each of whom also joined the majority opinion in full, filed a concurring opinion to separately reiterate the view that the court should abandon its "purposes and objective" preemption jurisprudence.

Justice Breyer, joined by Justices Ginsburg, Sotomayor, and Kagan, concurred in part and dissented in part, agreeing with the majority opinion that the IRCA did not expressly preempt the Kansas criminal law at issue but disagreeing with the majority opinion's implied preemption analysis on the basis that "Congress has occupied at least the narrow field of policing fraud committed to demonstrate federal work authorization."

Bombing, Terrorism, and Related Offenses

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

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simply referred to the “straightforward list of [prohibited] weapons,” which includes any “explosive or incendiary” grenade.

Weapons Offenses

In narrow 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

State v. Mercer, ___ N.C. ___, 838 S.E.2d 359 (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.

1) Circumstantial evidence was sufficient to establish that the defendant unlawfully possessed a firearm after having been convicted of a felony; (2) Prosecutor’s improper statements mischaracterizing evidence in closing argument were not so grossly improper as require the trial court to intervene without an objection from the defendant.

State v. Parker, ___ N.C. App. ___, 839 S.E.2d 83 (Feb. 4, 2020)

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Defendant was indicted for first-degree murder, possession of a firearm by a felon, two counts of assault with a deadly weapon with intent to kill, robbery with a deadly weapon, two counts of attempted robbery with a deadly weapon, and attaining habitual felon status. At trial, he was convicted solely of possession of firearm by a felon. The charges arose from a murder that occurred during a drug transaction. Three men, Michael Harbin, Carlos James, and Derrick Copeland approached a house in Garland, NC to purchase marijuana. There were three men at the house, Jafa McKoy, a man the three would-be drug purchasers did not know, identified only as "P," and a third man they likewise did not know. "P" approached the car in which James was sitting holding a revolver. McKoy, accompanied by the other unknown man, shot at Harbin and Copeland who had gotten out of the car. They ran. James's body was subsequently discovered in the driveway. He had been shot in the back of the head and was dead.

Four days later, Copeland identified defendant's photograph as a suspect for "P" with 85 to 90 percent confidence. An SBI agent interviewed the defendant two weeks after the murder. He admitted that the men may have seen him at the house, but denied killing anyone or being present when someone was killed. Records from the defendant's cell phone showed that it was being used in the area of the murder in the hours before James was killed, but defendant's phone was not in use and no location could be identified during the time of the encounter with Hardin, Copeland, and James. Cell phone records showed defendant as being in the nearby area, but headed toward Clinton, shortly after Hardin and Copeland ran from the house.

At the close of the State's evidence, the trial court found the State had presented insufficient evidence that defendant possessed the specific intent to kill under a theory of acting in concert and dismissed the counts of assault with a deadly weapon with intent to kill. The trial court denied Defendant's motion to dismiss the remaining charges. Defendant did not testify or present any evidence at trial. The jury found Defendant guilty of possession of a firearm by a felon and found the defendant not guilty of the remaining charges. Defendant stipulated and pled guilty to attaining habitual felon status. The trial court sentenced the Defendant as a habitual felon, and the defendant appealed. On appeal, the defendant argued that (1) the trial court erred by denying his motion to dismiss the charge of possession of a firearm by a felon; and (2) the State misrepresented evidence before the trial court and made false and misleading statements to the jury during closing arguments, which deprived him of a fair trial. The Court of Appeals rejected those arguments.

(1) Even assuming that the State offered no direct evidence that the defendant possessed a firearm on the occasion in question, the court held that the State submitted sufficient circumstantial evidence to support a reasonable inference of the defendant's guilt. The defendant admitted that he was present at house the morning of the incident and that Copeland, Harbin, and James may have seen him there. Defendant's cell phone was located near the scene close to the time of the incident. Copeland identified the defendant from a photo array as the armed suspect present at the scene with "85 to 90 percent" confidence. Copeland testified "P" had a "beard, brown skin, [and a] tattoo on the upper cheek," and estimated he was about 6'2" tall and weighed about 240 pounds. Harbin testified "P" was wearing a hat, had a beard, and "was like a burley dude, like a kind of bigger dude." The State also presented testimony from Jane Peterson, defendant's girlfriend at the time of the incident. She described the defendant at the time as having a close-cut beard and a tattoo on his arm and on his face. The court explained that "[a]lthough this evidence may not rule out every hypothesis of Defendant's innocence, that is not the State's burden on Defendant's motion to dismiss."

(2) The State argued to the jury on three occasions during closing arguments that eyewitness testimony described "P" as having a chest tattoo, when the only testimony at trial about a chest tattoo had been testimony from the defendant's former girlfriend that the defendant had such a tattoo. Because the

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State's case was based solely on Copeland's and Harbin's identifications of Defendant as "P," the defendant argued that these misstatements rose to the level of prejudicial error to award a new trial. The court held, however, that the defendant did not establish that the prosecutor's repeated, mistaken invocation of supposed eyewitness testimony that "P" had a chest tattoo was so grossly improper as to be likely to influence the verdict of the jury. The chest tattoo was not the sole characteristic the State relied on to identify the defendant as "P." The eyewitness testimony describing "P" also was consistent with defendant's height, frame, skin color, beard, and other tattoos. The court reasoned that while the State's misstatements may have given the jury greater confidence in identifying Defendant as "P," the defendant failed to show that the jury would have reached a different verdict without the three misstatements. While the remarks were improper, they were not so grossly or extremely improper that the trial judge was required to intervene on its own absent an objection from the defendant.

Denial of carry concealed permit violated petitioner's procedural due process rights

In re: Duvall, ___ N.C. App. ___, 834 S.E.2d 177 (Oct. 15, 2019)

The petitioner appealed the district court's denial of his concealed weapon permit. The Mecklenburg County Sheriff's Department denied his application, citing information received from the Veteran's Affairs ("V.A.") that indicated the petitioner was disqualified due to substance abuse issues. The petitioner had been diagnosed with post-traumatic stress disorder in 2016 and had experienced some suicidal ideation following the death of his young son (although he never attempted suicide). He also had some history of alcohol abuse and "concern over his drinking behavior," but had not been treated for substance abuse specifically. The V.A. provided documentation to the petitioner indicating they did not agree with the Sheriff's justification, and the petitioner provided that communication to the district court in his appeal. At hearing, the district court determined that the petitioner was disqualified under the substance abuse subsection and that he suffered a mental infirmity that prevented him from safely handling a firearm. He appealed, alleging due process violations.

G.S. 14-415.15 requires that the Sheriff notify an application of the reasons for denial of a concealed carry permit and explain the reason for the denial. A "bare bones" denial does not meet the requirement of the statute. Here, the Sheriff's denial failed to contain sufficient information about the alleged substance abuse to afford the petitioner an opportunity to challenge that conclusion. The petitioner further had no notice whatsoever that his mental health beyond potential substance abuse issues would be considered at the hearing, or that his ability to safely handle a firearm would be at issue. The court rejected the argument that the Sheriff's denial letter referencing the V.A. records provided notice that any matter within his V.A. records were potentially at issue. Because the denial letter referenced a specific subsection of the statute, the petitioner could not have known that other issues were in play. "Petitioner had no meaningful notice his mental health history would be either at issue or a basis for denial for inability to safely handle a firearm before the trial court."

The petitioner also argued that the district court's finding of substance abuse was unsupported by the record. Because no transcript of the hearing was contained in the record on appeal, the court was unable to review the oral evidence at the hearing. Normally it is the burden of the appealing party to establish the record on appeal, but here "the burden shifted to [the Sheriff] to show the alleged violation had no impact on the remainder of the proceedings, because [the Sheriff] violated Duvall's due process rights. Without a transcript or narrative of what occurred at the hearing, [the Sheriff] cannot meet that burden." However, the district court was ordered to apply the definition of "addict" from 21 U.S.C. 802 when determining whether the petitioner was disqualified for the permit under the

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substance abuse subsection. The case was therefore unanimously reversed and remanded for a new hearing. One judge wrote separately to concur in judgment.

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.”

Obstruction of Justice and Related Offenses

There was sufficient evidence that the defendant acted with “deceit and intent to defraud” in this common law obstruction of justice case such that the offense was punishable as a felony rather than a misdemeanor

State v. Ditenhafer, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

Criminal Offenses

Over a dissent, the court held that there was sufficient evidence in this common law obstruction of justice case that the defendant's obstructive acts were done "with deceit and intent to defraud" such that under G.S. 14-3(b) the offense was punishable as a felony rather than as a misdemeanor. The defendant was told by another family member that the defendant's daughter was the victim of sexual abuse by the defendant's husband, who was the daughter's adoptive stepfather. The State's evidence showed that despite believing that abuse had occurred, the defendant engaged in a course of conduct whereby she denied child protective services and sheriff's department investigators access to her daughter and otherwise frustrated their investigation. The defendant intervened in the investigation by remaining within hearing distance or being present during "almost every interview" investigators conducted with her daughter, not permitting her daughter to answer certain questions and answering for her during one interview, sending text messages to her daughter and physically interrupting another interview, "constantly" influencing her daughter's statements in interviews by verbally abusing and punishing her, instructing her daughter not to speak with investigators, and directing investigators not to speak with her daughter in private. The defendant also directed her daughter to lie to investigators. The court stated that this conduct regarding investigative interviews which occurred while the defendant believed her daughter had been the victim of abuse was sufficient to allow a reasonable juror to infer that the defendant's denial of access to her daughter was committed with deceit and intent to defraud. The court went on to hold that subsequent similar obstructive actions occurring after the defendant had actually witnessed her daughter being raped by the defendant's husband was sufficient circumstantial evidence that the defendant had acted with deceit and intent to defraud when she denied investigators access to her daughter while merely under the belief that she had been sexually abused.

Judge Tyson dissented, expressing the view that evidence showing that the defendant "presented her daughter and allowed access every time upon request" by investigators negated the "deceit and intent to defraud" element of the felony version of the offense. Judge Tyson noted that all of the interactions between investigators and the defendant's daughter were "voluntary," in that none of them were supported by a warrant or other court order.

Gambling

Plaintiff's gaming machines were an "entertaining display" in violation of G.S. 14-306.4; permanent injunction against the State prohibiting enforcement of gambling and sweepstakes law reversed

Gift Surplus, LLC v. State of North Carolina, ___ N.C. App. ___, 833 S.E.2d 703 (Oct. 15, 2019), review granted, ___ N.C. ___, 837 S.E.2d 883 (Feb. 26, 2020)

The trial court entered a permanent injunction prohibiting the State from enforcing the sweepstakes and gambling bans against the plaintiff, having determined the plaintiff's machines did not violate the applicable statute, G.S. 14-306.4. On appeal, the court determined that the machines qualified as an "entertaining display" in violation of G.S. 14-306.4(a)(3) and reversed the injunction. Two judges wrote separately to concur in judgment.

Drug Offenses

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In a drug trafficking case, there was insufficient evidence that the defendant knowingly possessed methamphetamine where the defendant mistakenly believed that the drugs provided to him at a controlled sale were fake and handled them only for the purpose of inspection

State v. Campbell, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2020)

In this trafficking of methamphetamine case, substantial evidence showed that the defendant believed the white substance handed to him during a controlled drug sale was fake, rather than an impure mixture containing methamphetamine, and therefore there was insufficient evidence that the defendant knowingly possessed the methamphetamine. At a controlled drug sale arranged by law enforcement with the help of an informant, the defendant stated his belief that the substance presented to him as methamphetamine was, contrary to his expectations, “re-rock,” a term that was defined by the State’s witnesses to describe “fake” drugs. In fact, the substance was a mixture of 1 gram of methamphetamine and at least 28 grams of a cutting agent. As the defendant and an associate inspected the substance, law enforcement officers entered the room and arrested them. Finding the case to be controlled by *State v. Wheeler*, 138 N.C. App. 163 (2000), the court explained that when there is no evidence that a person intends to continue a drug transaction because he or she believes the drugs are fake, handling the drugs for the sole purpose of inspection does not constitute possession.

Judge Berger dissented and expressed his view that there was sufficient evidence that the defendant knowingly possessed the methamphetamine because of his previous dealings in methamphetamine with the informant and because the defendant’s use of the term “re-rock” may have been a reference to impure, rather than fake, methamphetamine. Judge Berger also distinguished *Wheeler* on the grounds that the defendant in this case did not affirmatively reject the methamphetamine mixture.

Where the defendant was convicted of sale of cocaine and delivery of cocaine based on a single transfer, the trial court did not commit plain error by arresting judgment on the delivery conviction and sentencing the defendant on the sale conviction

State v. Canady, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2020)

In this case involving convictions for, among other offenses, sale of cocaine and delivery of cocaine, the trial court did not commit plain error in its application of G.S. 90-95 and in sentencing the defendant. At sentencing, the trial judge arrested judgment on the conviction of delivering cocaine, a Class H felony, and consolidated other convictions into the single count of selling cocaine, a Class G felony. On appeal the defendant argued that G.S. 90-95, which generally punishes the sale of cocaine more severely than the delivery of cocaine, is ambiguous as to the appropriate punishment for a judgment based on the “sale or delivery” of cocaine and that the rule of lenity requires that the lesser punishment be imposed. Taking note of the North Carolina Supreme Court’s decision in *State v. Moore*, 327 N.C. 378 (1990) establishing that a defendant may not be convicted of both the sale and the delivery of a controlled substance when both offenses arise from a single transfer, the court held that the purpose of *Moore* was accomplished here by the trial judge arresting judgment on the delivery of cocaine conviction and that the defendant did not show that plain error occurred.

In a keeping or maintaining a vehicle drug case, there was insufficient evidence that the defendant kept or maintained a vehicle; assuming evidence of keeping or maintaining the vehicle was sufficient, there was insufficient evidence that the defendant’s purpose for doing so was keeping or selling controlled substances

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State v. Weldy, ___ N.C. App. ___, ___ S.E.2d ___ (June 2, 2020)

In this keeping or maintaining a vehicle for the keeping or sale of controlled substances case, there was insufficient evidence that the defendant kept or maintained a vehicle or did so for the keeping or selling of controlled substances. Officers had received information from another agency indicating that the defendant was selling drugs. During a traffic stop and weapons frisk following 20-25 minutes of surveillance of the defendant driving, approximately 56 grams of methamphetamine and 7 grams of heroin were discovered on the defendant's person, and an officer later testified that neither amount was consistent with personal use. The defendant was driving a vehicle registered to his wife and mother-in-law.

Noting that North Carolina courts have defined the words "keep" and "maintain" separately, the court explained that they are similar terms, "often used interchangeably, to establish a singular element of the offense" and that whether a vehicle is "kept or maintained" for the keeping or selling of controlled substances depends on the totality of the circumstances. Finding that the State presented no evidence that the defendant "maintained" the vehicle because there was no evidence that the defendant had title to or owned the vehicle, had a property interest in it, or paid for its purchase or upkeep, the court turned to whether there was sufficient evidence that the defendant "kept" the car within the meaning of G.S. 90-108(a)(7). Reviewing relevant caselaw, which establishes that the "keep or maintain" language of the statute "refers to possessing something at least for a short period of time—or intending to retain possession of something in the future—for a certain use," the court determined that evidence of the defendant's possession of the vehicle for approximately 20-25 minutes, standing alone, was insufficient to prove that the defendant "kept" the vehicle.

The court then turned to whether, assuming there had been sufficient evidence of the defendant's keeping or maintaining the vehicle, the State presented sufficient evidence that the defendant's purpose in doing so was the "keeping or selling" of controlled substances. Again reviewing relevant caselaw, the court determined that the discovery on the defendant's person of single bags containing approximately 56 grams of methamphetamine and 7 grams of heroin was insufficient to prove the purpose of keeping or maintaining the vehicle was the keeping or selling of controlled substances. The court noted that the State presented no evidence that cell phones, cash, scales, baggies or other paraphernalia had been discovered in the vehicle. There also was no evidence that the vehicle had been modified to conceal drugs or that drugs had been discovered in the vehicle itself, hidden or otherwise.

Judge Berger dissented and expressed his view that there was sufficient evidence of the offense and that the majority erroneously conflated "keeping" and "maintaining" in its analysis of whether the defendant kept or maintained the vehicle. In Judge Berger's view there was sufficient evidence that the defendant "kept" the vehicle based on his possession of the vehicle while engaging in drug activity. He also would have found sufficient evidence that the defendant's purpose in doing so was the keeping or selling of controlled substances based on the defendant's use of the vehicle to transport drugs, the discovery of a purported drug ledger in the vehicle, and other evidence that the defendant was involved in the sale of drugs.

Sufficient evidence supported for maintaining a vehicle for keeping controlled substances

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

The defendant's conviction for maintaining a vehicle for keeping or selling drugs was supported by sufficient evidence.

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The determination of whether a vehicle . . . is use for keeping or selling controlled substances will depend on the totality of the circumstances. . . While no factor is dispositive, '[t]he focus of the inquiry is on the use, not the contents, of the vehicle. *Slip op.* at 11 (citations omitted).

Here, the defendant hid a trafficking amount of methamphetamine in a tire-sealant can in his car and possessed paraphernalia. In the light most favorable to the State, this was sufficient evidence from which a jury could infer that the car was kept for purposes of keeping drugs. The defendant's motion to dismiss this charge for insufficiency of the evidence was therefore properly denied and the convictions unanimously affirmed.

State's evidence was sufficient to show that defendant intended to sell or deliver cocaine where defendant possessed a corner bag containing .34 grams of cocaine and another package containing 11.19 grams of cocaine.

State v. Wilson, ___ N.C. App. ___, 899 S.E.2d 438 (Feb. 4, 2020)

The defendant was convicted of possession with intent to sell or deliver cocaine (PWISD-Cocaine), felony possession of cocaine and attaining habitual felon status. He argued on appeal that State failed to offer sufficient evidence of an intent to sell or deliver cocaine. The Court of Appeals rejected that argument, determining that there was sufficient evidence to support submission of the PWISD-Cocaine charge to the jury.

The State's evidence showed that the defendant possessed cocaine contained in two packages: a corner bag containing .34 grams and a package containing 11.19 grams. Though this amount is less than half the amount that would support a trafficking charge and less than what courts have previously recognized as a substantial amount, the Court of Appeals reasoned that the amount was not insubstantial and that it well exceeded amounts previously deemed to support a PWISD-Cocaine conviction. Thus, the court deemed evidence that the defendant possessed more than 11 grams of cocaine an important circumstance. Moreover, the court stated that evidence of the packaging (one small corner bag indicative of personal use and a larger package containing the bulk of the cocaine) supported an inference of intent to sell or deliver. The defendant's actions at the time he possessed the cocaine further supported an inference of an intent to sell and distribute. The defendant was driving (and thus transporting the cocaine) to his brother's apartment complex when a law enforcement officer signaled for him to stop. The defendant did not immediately stop. Instead, he accelerated away from the officer, only stopping once he reached the apartment complex. Once there, the defendant got out of his car, refused to comply with the officer's directions, and ducked behind a parked car where the larger bag of cocaine was later found. The court stated that this supported an inference that the defendant attempted to hide the larger amount of cocaine while leaving the smaller corner bag—associated with only personal use—in plain view.

The court acknowledged that there was no evidence of cash, paraphernalia or other tools of the drug trade. Nevertheless, it viewed the amount of cocaine, the packaging, and the defendant's evasive behavior to be enough to establish, "at a minimum, a borderline case to support submission of the PWISD-Cocaine charge to the jury."

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

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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.

Motor Vehicle Offenses

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; There was sufficient evidence of malice to submit a second-degree murder charge to the jury

State v. Nazzal , ___ N.C. App. ___, ___ S.E.2d ___ (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.

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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.

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Accident

Trial court erred by not instructing jury on the defense of accident when there was substantial evidence to support the defense presented at trial.

State v. Bediz, ___ N.C. App. ___, 837 S.E.2d 188 (Dec. 17, 2019)

A code enforcement officer (“Wayman”), accompanied by police officers, was at a property owned by the defendant to execute an administrative warrant for the removal of nuisance building materials. While they were standing on the street in front of the property, the defendant drove up in his car and the passenger side mirror struck Wayman in the hip. The police officers shouted at the defendant to stop his car and get out. The defendant stopped his car, but as Wayman walked by in front of the vehicle, the car moved forward again and struck Wayman in the knee. The officers repeatedly demanded that the defendant exit his car, and after he complied the defendant stated that Wayman “wanted to be hit.” The defendant was arrested and charged with assault with a deadly weapon. After being convicted in district court, the defendant appealed for trial de novo in superior court, and the jury found him guilty of the lesser charge of simple assault.

On appeal, the defendant argued that the trial court erred by denying his motion to dismiss for insufficient evidence regarding the defendants’ intent. The appellate court disagreed, and found there was circumstantial evidence of intent based on the witness testimony and officers’ body-cam video. The defendant swerved towards Wayman with his car, and when he exited the car he was visibly upset with Wayman, which would allow a reasonable person to believe that the defendant intended to hit Wayman or at least to put him in fear of immediate bodily harm. But the trial court erred by not instructing the jury on the defense of accident. The defendant testified that it was a chaotic scene, he was only trying to “squeeze by” Wayman and park his car, and he did not hit anyone on purpose. That constituted sufficient evidence from which the jury could have concluded the defendant’s action was unintentional, lawful, and not done with reckless disregard for the safety of others, so it was reversible error to deny the defendant’s request for an instruction on the defense of accident.

Entrapment and Entrapment by Estoppel

The trial court erred by failing to instruct the jury on entrapment.

State v. Keller, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

The defendant was charged with solicitation of a child by computer under G.S. 14-202.3 after he responded to a Craigslist personal advertisement posted by a police detective posing as a 15-year-old. At trial the defendant requested a jury instruction on the defense of entrapment, which the trial court denied. The defendant was convicted and appealed. A divided Court of Appeals affirmed, with the majority concluding that the defendant’s request for an entrapment instruction was properly denied when the evidence showed that he was willing to engage in criminal activity and defendant failed to show that he was not predisposed to commit the act. *State v. Keller*, ___ N.C. App. ___, 828 S.E.2d 578 (2019). The dissenting judge would have concluded that the defendant was entitled to the instruction.

The Supreme Court reversed the Court of Appeals and remanded for a new trial. A defendant is entitled to jury instructions on entrapment if he presents “some credible evidence” tending to show that he was

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a victim of entrapment. Here, viewing the evidence in the light most favorable to the defendant, the Court concluded that he made the requisite showing. The defendant testified that he initially believed the undercover detective to be 18 years old because Craigslist requires age verification to post a personal ad. And once the detective said via email that he was 15, the defendant repeatedly said they would have to wait to have sex until the detective was of age, at which point the detective steered the conversation back toward sex. Taking those facts as true, the Court concluded that a reasonable juror could have found that the defendant did not have a willingness or predisposition to commit the charged crime, and that he was thus entitled to an instruction on entrapment. The Court also concluded that the trial court erred by finding that the defendant's request for a jury instruction on entrapment was inconsistent with his testimony that he traveled to meet the detective to help him, not to commit a sexual act with him. In general, a defendant cannot simultaneously deny committing an act and also say that he was entrapped into committing it. Here, however, the defendant did not deny the act, but rather only disputed his criminal intentions for the meeting. The entrapment defense therefore remained available. Finally, the Court held that the error was prejudicial and remanded for a new trial.

Justice Newby dissented, joined by Justice Morgan, stating his view that the entrapment defense is not available to a defendant who does not admit to all the elements of the charged offense, and that the defendant's continued pursuit of the undercover detective even after learning that he was underage showed a predisposition to commit criminal acts that barred an entrapment defense.

(1) Because the defendant was predisposed to commit criminal offenses which a confidential informant persuaded him to commit, he was not entitled to a jury instruction on the affirmative defense of entrapment; (2) The trial court erred by entering a civil judgment against the defendant for attorney's fees without giving the defendant an opportunity to be heard on that issue

State v. Pratt, ___ N.C. App. ___, ___ S.E.2d ___ (Mar. 3, 2020)

In this drug trafficking case, the trial court did not err by refusing the defendant's request to instruct the jury on the affirmative defense of entrapment. The trial court did err, however, by entering a civil judgment against the defendant for attorney's fees without first giving the defendant an opportunity to be heard on that issue.

Viewed in the light most favorable to the defendant, the evidence showed that the defendant was persuaded by Jason Ford, a confidential informant working with the Onslow County Sheriff's Office, to commit the crimes for which he was convicted. As to the jury instruction on entrapment, the court explained that under precedent from the North Carolina Supreme Court,

The defense of entrapment is available when there are acts of persuasion, trickery or fraud carried out by law enforcement officers or their agents to induce a defendant to commit a crime and when the origin of the criminal intent lies with the law enforcement agencies. We note that this is a two step test and a showing of trickery, fraud or deception by law enforcement officers alone will not support a claim of entrapment. The defendant must show that the trickery, fraud or deception was practiced upon one who entertained no prior criminal intent.

(quoting and adding emphasis to *State v. Hageman*, 307 N.C. 1, 28 (1982)). The court found that the defendant's evidence showed the first element of entrapment but did not show the second, noting that the defendant's testimony established that (1) the criminal opportunity at issue originated with a third party who was not working for or affiliated with the State; (2) the defendant told Ford about the

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opportunity; and (3) Ford thereafter encouraged the defendant to take advantage of the criminal opportunity and offered to help facilitate. Reviewing the record, the court found that it demonstrated that Ford “merely afford[ed] the defendant an opportunity to commit the crime[s]” which he was predisposed to commit and, therefore, the defendant was not entitled to an instruction on entrapment.

The State conceded that the indigent defendant was not given an opportunity to be heard before the trial court entered the civil judgment against him for attorney’s fees and that this was error. The court set aside the civil judgment and remanded for a new hearing on attorney’s fees.

Insanity

Kansas’ repeal of insanity defense and adoption of mens rea defense does not violate due process.

Kahler v. Kansas, 589 U.S. ___, 140 S. Ct. 1021 (Mar. 23, 2020)

The defendant was convicted of and sentenced to death for killing his wife, who had filed for divorce, his two teenage daughters, and his wife’s grandmother, with whom the victims were staying. Before trial, the defendant filed a motion arguing that Kansas’ law on insanity violated the Due Process Clause of the Fourteenth Amendment. Before statutory changes enacted in 1995, Kansas followed the M’Naghten test for insanity. Under that test, a defendant is not guilty by reason of insanity if either (1) he did not know the nature and quality of the act he was doing or (2) if he did know, he did not know his act was wrong. In 1995, Kansas legislatively abolished the M’Naghten insanity defense and adopted a mens rea defense. The pertinent statute provides that it is a defense to prosecution that the defendant, as a result of mental disease or defect, lacked the culpable mental state required as an element of the offense charged. The statute provides further that a mental disease or defect is not otherwise a defense. The Kansas courts rejected the defendant’s due process challenge. The U.S. Supreme Court affirmed.

The six-member majority began by observing that the M’Naghten insanity formulation consists of two tests: a cognitive incapacity test (the defendant did not know the nature and quality of his act); and a moral incapacity test (the defendant did not know his act was wrong). The Kansas’ mens rea defense, according to the Court, retains the cognitive incapacity test for insanity and jettisons the moral incapacity test. For a state rule on criminal liability to violate the Due Process Clause, it must offend “some principle of justice so rooted in the traditions and conscience of our people as to be ranked as fundamental.” Slip Op. at 14. The Court held that the moral capacity test is not such a principle and that the Due Process Clause does not compel states to adopt an insanity defense that turns on a defendant’s ability to know his act was wrong. The Court also noted that Kansas law allows a defendant to present mental health evidence at sentencing and that a judge may replace a defendant’s prison term with commitment to a mental health facility.

The three dissenting justices argued that Kansas had eliminated the core of the insanity defense by disallowing the defense for a defendant, who by reason of mental illness, “lacked the mental capacity necessary for his conduct to be considered morally blameworthy.” Dissenting Op. at 1. The dissent gave two examples to illustrate its view.

In Prosecution One, the accused person has shot and killed another person. The evidence at trial proves that, as a result of severe mental illness, he thought the victim was a dog. Prosecution Two is similar but for one thing: The evidence at trial proves that, as a result of severe mental illness, the defendant thought that a dog ordered him

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to kill the victim. Under the insanity defense as traditionally understood, the government cannot convict either defendant. *Id.* at 1–2.

Under Kansas’ law, the defendant in Prosecution One could defend against the charge by showing that his mental illness prevented him from forming the mens rea for murder (intentional killing of a human being). The defendant in Prosecution Two has no defense under Kansas law because he acted with the necessary level of intent. The dissent observed that mental illness typically does not deprive individuals of the ability to form intent; rather, it affects their motivations for acting. As a result, Kansas’ approach requires conviction of a broad swath of defendants who would be adjudged not guilty under any traditional formulation of the insanity defense. In the dissent’s view, this result “offends deeply entrenched and widely recognized moral principles underpinning our criminal laws.” *Id.* at 21. The dissent rejected the idea that consideration of mental capacity at sentencing satisfies due process, finding that an insane defendant should not be found guilty in the first place.

Self-Defense

The defendant was not entitled to a self-defense instruction

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. The court rejected the defendant’s argument that the trial court erred by failing to give a self-defense instruction despite the defendant’s request for instructions on both perfect and imperfect self-defense. The defendant’s testimony that he did not recall shooting the first victim and his expert’s testimony that he acted involuntarily defeated his self-defense argument.

Jury instructions on self-defense and voluntary manslaughter properly denied where evidence showed no objectively reasonable threat of deadly force

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

The defendant shot and killed a police officer while the officer was approaching the defendant’s car to serve arrest warrants on him in Robeson County. The defendant claimed that he had been the victim of several recent attempted murders and was “on edge,” so that when he saw the plainclothes officer approaching with a gun on his waist, he fired on the officer from his car. The defendant testified that he thought the victim-officer was going to kill him when he saw the officer’s gun but acknowledged that the gun was not raised or pointed at him. The trial court refused to instruct the jury on self-defense or voluntary manslaughter, finding that the defendant was not under the threat of deadly force. The defendant was convicted of second-degree murder.

The trial court must instruct on all “substantial features” supported by the evidence in a case. If the defendant presents competent evidence in support of self-defense, viewed in the light most favorable to the defendant, the jury should be instructed on self-defense. “Competent evidence of self-defense is evidence that it ‘was necessary or reasonably appeared to be necessary’ for the defendant ‘to kill his adversary in order to protect himself from death or great bodily harm.’” *Id.* at 8. The reasonableness of a defendant’s belief of threat is judged by an objective standard. Here, even in the light most favorable to

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the defendant, the evidence did not establish an objective reasonable belief of death or serious harm as a matter of law. The defendant's testimony showed that the defendant saw a gun as the officer left his vehicle, that the officer looked at the defendant "real mean," and that the gun was not pointed at the defendant. "In the mind of a person of ordinary firmness, this evidence would not permit the use of deadly force on a complete stranger getting out of a nearby car. Accordingly, the trial court properly declined to give the requested instruction on self-defense." *Id.* at 11. For the same reason—insufficient evidence supporting self-defense (perfect or imperfect)—the defendant was also not entitled to an instruction on voluntary manslaughter. The trial court was therefore unanimously affirmed.

Voluntary Intoxication

Where the defendant was not so intoxicated as to be incapable of forming intent, the trial court did not err in denying the defendant's request for jury instructions on voluntary intoxication or diminished capacity.

State v. Meader, ___ N.C. App. ___, 838 S.E.2d 643 (Jan. 21, 2020), temp. stay granted, ___ N.C. ___, 837 S.E.2d 386 (Feb. 7, 2020)

The defendant was charged with felony breaking or entering a motor vehicle, misdemeanor larceny, and misdemeanor possession of stolen goods for taking items from a car. The trial judge denied her pretrial request to instruct the jury on voluntary intoxication or diminished capacity and she was convicted. On appeal, the defendant argued that the trial court erred by denying her request. Over a dissent, the Court of Appeals disagreed, noting that evidence of "mere intoxication" is not sufficient to establish voluntary intoxication as a defense to the formation of intent. Though there was evidence that the defendant seemed intoxicated, there was also evidence that she was fairly cooperative and aware of her circumstances. The court noted that there was no evidence of how much the defendant consumed, or over what period, or whether she was incapable of comprehending her surroundings. Even taking the evidence in the light most favorable to the defendant, the Court of Appeals deemed it insufficient to show that she was intoxicated to such a profound degree that it was impossible for her to form the requisite intent to commit the charged crimes. The court thus held that the trial court did not err by denying her request. A dissenting judge would have concluded that substantial trial evidence supported the conclusion that the defendant was intoxicated enough to be incapable of forming the requisite specific intent for the crime, and that the trial court thus erred by failing to give the requested instruction.

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Racial Justice Act

(1) Repeal of the Racial Justice Act violated the state and federal constitutional prohibitions on ex post facto laws; (2) the 2013 amendments to the RJA changing the evidentiary standards applicable to RJA claims violated the constitutional prohibition on ex post facto laws; (3) the trial court erred by dismissing the defendant’s RJA motions without an evidentiary hearing and discovery.

State v. Ramseur, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

The defendant was convicted of two counts of first-degree murder based on offenses committed in 2007. He was sentenced to death in 2010. That same year he filed a motion for appropriate relief under the North Carolina Racial Justice Act (RJA), but the trial court did not rule on it until after the General Assembly amended the RJA in 2012 and then repealed it in 2013. The repeal was made retroactively applicable to all pending MARs filed before the effective date of the repeal. The trial court therefore determined that the repeal rendered the defendant’s MAR void and dismissed it. The trial court also ruled in the alternative that the defendant’s RJA claims were without merit and that no evidentiary hearing was necessary to resolve them.

The Supreme Court granted the defendant’s petition for writ of certiorari. (1) The Court agreed with the defendant that retroactive application of the RJA repeal violated the prohibitions against ex post facto laws in the state and federal constitutions. The Court reasoned that this was the type of ex post facto law that inflicts a greater punishment for an offense than the law applicable when it was committed. Though the RJA did not exist when the defendant committed his crimes, the effective date coverage of the *original* RJA—which did include the defendant’s offense date—made the RJA applicable to crimes committed at that time. The Court concluded that the legislature’s repeal of a prior, retroactively-applicable ameliorative law like the RJA violated ex post facto principles. The Court rejected the State’s argument that the RJA was a mere procedural overlay that did not substantively change the law governing the death penalty. Through the RJA, the 2009 General Assembly affirmatively sought to allow the review of statistical evidence that the Supreme Court had not allowed in *McCleskey v. Kemp*, 481 U.S. 279 (1987), and to create a new claim for relief not otherwise available. The Court also acknowledged that the RJA repeal happened shortly after four defendants had obtained relief under the original Act, making relevant one of the policy purposes of the Ex Post Facto Clause: to restrain “arbitrary and potentially vindictive legislation.” Slip op. at 29.

(2) The Court next considered whether retroactive application of the 2012 RJA amendments to the defendant also violated the prohibition against ex post facto laws. The 2012 amendments made three significant changes to the law. And because the 2012 legislation included a severability clause, the Court analyzed each of them separately. The first change was to eliminate the mandatory requirement for an evidentiary hearing upon the filing of an RJA claim. The Court concluded that this was a procedural change that—despite working to the disadvantage of some defendants, including Mr. Ramseur—did not implicate the prohibition on ex post facto laws. The second change altered the evidentiary requirements for establishing racial discrimination in an RJA claim in several ways, including shrinking the relevant geographic region from the entire state to the specific county or prosecutorial district, limiting the relevant time for consideration, and mandating that statistical evidence alone is insufficient to establish a meritorious claim. The Court concluded that this second set of changes implemented a more stringent standard of proof for establishing discrimination that cannot permissibly apply retroactively. The third change added a waiver provision, saying that a defendant must waive any objection to imposition of a sentence of life without parole as a prerequisite for asserting an RJA claim. The Court declined to

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address the constitutionality of that change because it was not at issue in Mr. Ramseur's case. In summary, the 2012 amendment eliminating the mandatory hearing requirement could permissibly apply to an RJA claim asserted before the amendments became law, but the other evidentiary changes could not. Therefore, the evidentiary rules of the original RJA must apply to pre-amendment filings like Mr. Ramseur's.

Finally, the Court concluded that the trial court erred by concluding without an evidentiary hearing that the defendant's RJA MARs were without merit. The defendant's motions included extensive evidence, stated with particularity, tending to show race was a significant factor in imposition of death sentences within the meaning of the RJA. The Court said the motions also established that the defendant was entitled to discovery of State files under G.S. 15A-1415(f). The Court remanded the case for proceedings not inconsistent with its opinion.

Justice Newby dissented, concluding primarily that the RJA amendments and repeal did not violate ex post facto principles because they left the defendant no worse off than he was when he committed his offense in 2007, before the RJA was enacted.

(1) Repeal of the Racial Justice Act was unconstitutional as applied to the defendant; (2) the defendant's motion for appropriate relief was not procedurally barred; and (3) the trial court erred by denying the defendant's motion for appropriate relief without an evidentiary hearing in light of the evidence in his motion.

State v. Burke, ___ N.C. ___, ___ S.E.2d ___ (June 5, 2020)

The defendant was sentenced to death for first-degree murder in 1993. He filed a first motion for appropriate relief in 1997, which was denied in 2011. He filed a new MAR under the North Carolina Racial Justice Act (the RJA MAR) in 2010, amending it twice after the General Assembly amended the RJA in 2012 and then repealed it in 2013. In 2014, the trial court dismissed the defendant's amended RJA MAR as procedurally barred and, in the alternative, as being without merit. On appeal, the Supreme Court vacated the trial court's orders and remanded for proceedings not inconsistent with the Court's opinion in *State v. Ramseur*, ___ N.C. ___ (2020), summarized above. (1) The General Assembly's 2013 repeal of the RJA was unconstitutional as applied to the defendant under the state and federal constitutions, and the 2012 amendment can only be applied insofar as it affects procedural aspects of his claim. (2) The Court held that the trial court erred by concluding that the defendant's RJA MAR was procedurally barred, as the original version of the RJA included language, then codified in G.S. 15A-2012(b), allowing defendants to seek relief "[n]otwithstanding any other provision or time limitation" in the MAR article. (3) The Court also concluded that the trial court abused its discretion by dismissing the defendant's claims without an evidentiary hearing in light of the evidence presented in his motion, including evidence that race was a factor in jury selection, sentencing, and capital charging decisions in the relevant jurisdictions; statistical evidence from Michigan State University College of Law; expert testimony and evidence from another RJA case; and evidence of race-based juror strikes in his own case. The Court remanded for proceedings not inconsistent with its opinion. Justice Newby dissented for the reasons stated in his dissent in *Ramseur*.

Penalty Phase—Generally

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Appellate reweighing of aggravating and mitigating factors was permissible; death sentence affirmed by divided Supreme Court

McKinney v. Arizona, 589 U.S. ___, 140 S. Ct. 702 (Feb. 25, 2020)

In this habeas appeal, the petitioner was convicted of two murders in 1992 in Arizona state court. At that time, no requirement existed that the jury determine facts supporting an aggravating factor. At least one aggravating factor must be found to support a sentence of death under the Court's precedents. In the petitioner's case, the trial court found factors in aggravation for both murders and imposed death. In federal habeas proceedings 20 years later, the Ninth Circuit found that the trial court improperly ignored mitigation evidence in violation of *Eddings v. Oklahoma*, 455 U.S. 104 (1982) (reversible error for trial court to ignore relevant mitigation evidence at capital sentencing). The case returned to the Arizona Supreme Court, where the petitioner argued for a new sentencing hearing before a jury. The Arizona Supreme Court rejected this argument, pointing to *Clemons v. Mississippi*, 494 U.S. 738 (1990). *Clemons* allows a state appellate court to reweigh aggravating and mitigating factors in a death case following reversal for use of an improper aggravating factor (instead of a jury weighing those factors). The Arizona Supreme Court reweighed the sentencing factors in the case and again imposed death. The petitioner appealed to the U.S. Supreme Court, arguing that a jury should have made that determination. A majority of the court disagreed and affirmed the death sentence.

The court first rejected the argument that *Clemons* did not apply because that case involved an improper aggravating factor, whereas the petitioner's case involved a failure to consider a mitigation factor.

. . . [T]he Court's decision in *Clemons* ruled that appellate tribunals may perform a 'reweighing of the aggravating and mitigating evidence.' In short, a *Clemons* reweighing is a permissible remedy for an *Eddings* error.

The court also rejected the argument that *Clemons* was overruled by *Ring v. Arizona*, 536 U. S. 584 (2002), and *Hurst v. Florida*, 136 S. Ct. 616 (2016), which require a jury to determine facts supporting an aggravating factor. The petitioner argued that an appellate court could no longer reweigh aggravating factors under those cases and that a jury determination was required. This too was rejected. A jury need only find the *facts* in support of the aggravated factor; states are free to allow the trial court to make the ultimate decision on whether to impose a death sentence, so long as any facts necessary to support the aggravating factor were found by a jury. The court noted:

. . . [I]n a capital proceeding just as in an ordinary sentencing proceeding, a jury (as opposed to a judge) is not constitutionally required to weigh the aggravating and mitigating circumstances or to make the ultimate sentencing decision within the relevant sentencing range. . . In short, *Ring* and *Hurst* did not require jury weighing of aggravating and mitigating circumstances, and *Ring* and *Hurst* did not overrule *Clemons* so as to prohibit appellate reweighing of aggravating and mitigating circumstances.

The petitioner also pointed to the fact that no jury determined the facts of the factors in aggravation supporting his death sentence as *Ring* and *Hurst* require. This claim was foreclosed by the fact that *Ring* and *Hurst* were decided after the petitioner's direct appeal became final. Those cases therefore do not apply retroactively to cases (like the petitioner's) on collateral review under *Schiro v. Summerlin*, 542 U.S. 348. The court rejected the argument that the Arizona Supreme Court's reweighing of aggravating and mitigating factors re-opened direct review. The Arizona Supreme Court categorized its decision as collateral review, and the U.S. Supreme Court declined to disturb that interpretation of

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state law. “As a matter of *state* law, the reweighing proceeding in McKinney’s case occurred on collateral review.” *Id.* at 8 (emphasis in original). The Arizona Supreme Court’s judgment was consequently affirmed by a 5-4 majority. Chief Justice Roberts, and Justices Alito, Gorsuch, and Thomas joined the majority opinion.

Justice Ginsberg dissented, joined by Justices Breyer, Sotomayor, and Kagan. The dissenting justices disagreed with the majority that the Arizona Supreme Court’s action in reweighing sentencing factors was a collateral proceeding. In their view, that proceeding was a re-opening of direct appeal proceedings, and *Ring* applied. The dissenting justices would have found the death sentence unconstitutional and reversed the judgment of the Arizona Supreme Court.

Post-Conviction Proceedings

Post-Conviction Proceedings

DNA Testing & Related Matters

Though a defendant who pled guilty may seek post-conviction DNA testing under G.S. 15A-269, the defendant failed to establish that the testing results would be material to his defense.

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

In 1992, the defendant pled guilty to second-degree murder for the killing of a gas station attendant during a robbery. In 2016, after learning that an informant implicated another person in the crime, the defendant filed a motion to test the DNA and fingerprints on evidence found at the scene. The trial court denied the motion and the defendant appealed. The Court of Appeals affirmed. As a threshold matter the court said that the defendant was not barred from seeking testing under G.S. 15A-269 because he pled guilty. It rejected the State's argument that the statute's reference to the defendant's "defense" and the requirement for a "verdict" meant that the law only applied to defendants found guilty after a trial. On the merits, though, the court concluded that the defendant failed to meet his burden of showing that the results of the requested testing would be material to his defense. With the "high bar" required to establish materiality after a guilty plea, even the presence of another's DNA on the evidence would not necessarily exclude the defendant's involvement in the crime in light of the substantial evidence of his guilt. A judge concurring in the result would have concluded that the Supreme Court's decision in *State v. Sayre*, 255 N.C. App. 215 (2017), *aff'd per curiam*, 371 N.C. 468 (2018), bars a defendant who pled guilty from post-conviction DNA testing under G.S. 15A-269.

Motions for Appropriate Relief

MAR order made insufficient findings of fact

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. The state dismissed some of the charges prior to verdict, and the jury ultimately convicted the defendant of one count of sexual offense against a child under age 13.

Defendant filed an MAR seeking a new trial, based on the victim recanting her testimony. At a hearing on the MAR, the victim testified that she lied about the abuse at trial due to bribes and threats from another person. The trial judge denied the MAR, but failed to make sufficient findings of fact resolving the conflicts in the victim's testimony between the trial and the MAR hearing. The trial court "abused its discretion by failing to expressly find which version of events it believed to be true," so the matter was remanded with instructions to enter a new order making clear findings. Dissenting as to this part of the decision, J. Bryant would have found that the judge's order was sufficient, since the defendant had the burden of proof at the hearing and the trial judge made a finding that the defense had not met that

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burden by stating she was “not satisfied that the testimony given by [A.M.D.] at the trial on this matter in December 2016 was false.”

Clerical Errors/Error Correction

Case was remanded to trial judge to correct clerical error in written judgment (community punishment) to be consistent with actual sentence (intermediate punishment)

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

The defendant was convicted of obtaining property by false pretenses for selling boxes purportedly containing iPhones that contained only lug nuts. The defendant argued that the sentence of 36 months supervised probation was erroneous because the trial judge imposed a community punishment, which has a limit of 30 months probation. The Court of Appeals found that the trial judge imposed an intermediate punishment; the only indication to the contrary was a checkmark in the box for community punishment at the top of the judgment. Considering the sentencing hearing, the conditions imposed by the trial judge in the defendant’s presence, and the written judgment, the Court concluded that the mark in the community punishment box was a clerical error and remanded the case for correction.

Miscellaneous Cases

No *Bivens* remedy against U.S. Border Patrol agent for cross-border shooting

Hernandez v. Mesa, 589 U.S. ___, 140 S. Ct. 735 (Feb. 25, 2020)

This case arose from the cross-border shooting of a 15-year-old Mexican child by a U.S. border patrol agent. The parents of the child sued the agent in federal court for Fourth and Fifth Amendment violations pursuant to *Bivens v. Six Unknown Fed. Narcotics Agents*, 403 U.S. 388 (1971). *Bivens* found an implied cause of action for constitutional violations by federal officers where no statutory authorization for damages exists. The scope of a *Bivens* claim has been limited by the Supreme Court over time, and separation of powers concerns caution against extending *Bivens* to new context, a “disfavored judicial activity.” See *Ziglar v. Abbasi*, 137 S. Ct. 1843 (2017). In determining whether a *Bivens* remedy is available, the court first determines whether the claim involves new context. New context is defined broadly. “We regard a context as ‘new’ if it is different in a meaningful way from previous *Bivens* cases decided by this Court.” Slip op. at 10. If the claim presents new context, the court then determines whether there is a “reason to pause before applying *Bivens* to new context or to a new class of defendant . . .” *Id.*

Bivens has been applied to Fourth and Fifth Amendment claims before in the context of illegal search and arrest in New York City, and to sex discrimination by a congressman in Washington, D.C. A cross-border shooting, however, was new context according to the majority. “There is a world of difference between those claims and petitioners’ cross-border shooting claims, where ‘the risk of disruptive intrusion by the Judiciary into the functioning of other branches’ is significant.” *Id.* at 11. Here, the court found that the foreign policy implications of extending *Bivens* to a cross-border shooting was factor against extending the remedy. “The political branches, not the Judiciary, have the responsibility and institutional capacity to weigh foreign-policy concerns.” *Id.* at 12 (citation omitted). National security concerns were another factor against extension of *Bivens* to this context. “Since regulating the conduct of agents at the border unquestionably has national security implications, the risk of undermining

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border security provides reason to hesitate . . .” *Id.* at 17. Further, that Congress has limited the ability to recover damages from the actions of U.S. agents while abroad also indicates the need for caution. It is the role of Congress, not the courts, to fashion damages remedies, and Congress has indicated its intention to limit judicial remedies for acts of federal officers abroad by repeatedly refusing to authorize such causes of action. Concluding, the majority observed:

In sum, this case features multiple factors that counsel hesitation about extending *Bivens*, but they can all be condensed to one concern—respect for the separation of powers. . . Congress’s decision not to provide a judicial remedy does not compel us to step into its shoes. . . When evaluating whether to extend *Bivens*, the most important question ‘is who should decide’ whether to provide for a damages remedy, Congress or the courts? The correct ‘answer most often will be Congress.’ That is undoubtedly the answer here. *Id.* at 22-23.

The Fifth Circuit’s judgment dismissing the suit was therefore affirmed by 5-4 vote. Chief Justice Roberts, and Justices Thomas, Gorsuch, and Kavanaugh joined the majority opinion. Justice Thomas, joined by Justice Gorsuch, wrote separately to advocate that *Bivens* be overruled altogether.

Justice Ginsberg authored a dissent, joined by Justices Breyer, Sotomayor, and Kagan. According to the dissent, this was not new context and there were no justifications sufficient to deny a *Bivens* remedy. “Rogue U.S. officer conduct falls within a familiar, not ‘new,’ *Bivens* setting.” *Id.* at 30. The plaintiffs have no other possible recourse, and this case was “not an isolated incident.” The dissenting justices would have reversed and allowed the claim to proceed. Justice Ginsberg concluded:

In short, it is all too apparent that to redress injuries like the one suffered here, it is *Bivens* or nothing. I resist the conclusion that ‘nothing’ is the answer required in this case. *Id.* at 42 (Ginsberg, J., dissenting).

Fourth Circuit Cases

Judicial Administration

Contempt

Trial judge erred by finding the defendant in direct contempt for an unintelligible remark he made after sentencing without giving the defendant notice and an opportunity to be heard

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

The defendant entered into a plea agreement with the State in superior court, after he appealed for a trial de novo, under which he would plead guilty to misdemeanor larceny and first-degree trespassing and receive a suspended sentence of 180 days, with a split sentence of 30 days. The arrangement also stated that “[u]ltimate sentencing shall be in the discretion of the court[.]” The defendant pled guilty, and the superior court judge imposed an active sentence of imprisonment of 120 days for the larceny and 60 days for the trespass, to run consecutively. The defendant made an unintelligible remark after sentencing, and the judge held him in direct criminal contempt and imposed an additional 30 days in jail. Thereafter, the superior court entered a consent order allowing the defendant to withdraw his plea, vacating the judgment for misdemeanor larceny and first-degree trespass, and allowing the State to proceed on the original plea offer. The appeal concerned the contempt judgment only. The Court of Appeals reversed the contempt judgment, holding that the trial judge failed to give the defendant summary notice and an opportunity to be heard before entering judgment in accordance with G.S. 5A-14(b). Although the findings and order signed by the trial judge contain a preprinted finding that “the contemnor was given summary notice of the charges and summary opportunity to respond,” the Court found that the record directly contradicted the form language and that no notice or opportunity to be heard was given. The Court rejected the State’s argument that because the defendant had already served the contempt sentence, the defendant’s appeal was moot. That argument, if accepted, would allow a defendant to be criminally confined without judicial review so long as the sentence was completed.

Criminal contempt upheld for recording court proceedings in violation of courtroom policy and warnings not to do so; the judge was not required to recuse himself in hearing the contempt proceeding and had the authority to sentence the defendant to probation

In re Eldridge, ___ N.C. App. ___, 836 S.E.2d 859 (Dec. 3, 2019)

The trial judge in this case issued a show cause order for defendant to appear and show cause why he should not be held in criminal contempt for recording the proceedings before the trial judge and posting them on Facebook, contrary to courtroom policy and warnings. (1) The Court of Appeals affirmed the trial judge’s denial of the defendant’s motion to recuse, finding no evidence to suggest that the trial judge could not preside over the contempt hearing in an objective, impartial manner. (2) The evidence supported the trial judge’s finding of criminal contempt; it showed that the defendant understood the courtroom policy and warnings not to record inside the courtroom and willfully disregarded them. (3) The Court of Appeals held that the trial judge was authorized to impose a suspended sentence of imprisonment with conditions of probation, including the condition that the defendant write an essay about respect for the courtroom and publish it on his social media and internet accounts. The dissent found that although this condition had a reasonable relationship to the defendant’s criminal contempt and was permissible, it was impermissible—because not reasonably related to the contempt and potentially a violation of the First Amendment—to require the defendant to monitor comments by third parties on his accounts and delete negative ones.

Fourth Circuit Cases

Out of Session, Out of Term, etc.

(1) Judge had the authority to call a weekend recess and extend the session for a felony trial that was not completed by the last Friday of the session; (2) The defendant failed to show prejudice from the trial judge's procedure of communicating with the jury by written message, conveyed by a bailiff to the jury, rather than in open court

State v. Evans , ___ N.C. App. ___, 837 S.E.2d 1 (Dec. 3, 2019)

The defendant was tried for armed robbery, conspiracy to commit armed robbery, and possession of a firearm by a person previously convicted of a felony. The trial was not over by Friday, and the trial judge called a weekend recess. The trial resumed on the following Monday, the jury convicted the defendant of all charges, and the trial judge sentenced the defendant. (1) The defendant argued that the trial judge failed to extend the session of court in which the trial began, violating the rule against judgments entered out of session. The Court of Appeals rejected this argument in reliance on G.S. 15-167, which allows a trial judge to extend a session if a felony trial is in progress on the last Friday of the session. The Court held that such an extension is valid when the trial judge announces a weekend recess without objection by the parties, as here. Although the trial judge was asked and declined to make written findings to support the extension, her decision not to make findings did not constitute a refusal to extend the session. (2) In response to written questions asked by the jury during deliberations, the trial judge sought clarification by writing out a short message and having the bailiff go to the jury room and read the message. The judge directed the bailiff not to communicate any other information, respond to questions by the jury, or remain for any discussion by the jury. The defendant argued that this procedure violated the requirements of G.S. 15A-1234 and G.S. 15A-1236, which require that responses to jury questions and additional instructions be in open court and which prohibit speaking to the jury. The Court held that assuming the trial judge committed statutory error, the defendant failed to show prejudice. The Court found that the trial judge's message was clear and unambiguous, did not relate to guilt or innocence, and did not amount to an instruction to the jury. Absent evidence to the contrary, the Court stated that it would presume that both the bailiff and jurors understood and followed the judge's directive to the bailiff to deliver the message and not to be present for or engage in any colloquy with the jury